No. 15-187

In the Supreme Court of the United States

LOUIS CASTRO PEREZ, PETITIONER

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Failure to file a timely notice of appeal creates a jurisdictional defect, and federal courts have no authority to create equitable exceptions to jurisdictional requirements. The district court nevertheless attempted, twice, to facilitate petitioner's admittedly untimely appeal. First, it vacated and reentered its judgment under Federal Rule of Civil Procedure 60(b)(6) to restart the thirty-day notice-of-appeal deadline. Second, after the Fifth Circuit dismissed the first appeal for lack of jurisdiction and this Court denied certiorari, the district court reopened the time to appeal under Federal Rule of Appellate Procedure 4(a)(6) even though the rule's requirements were not satisfied. After a *sua sponte* request for jurisdictional briefing, the Fifth Circuit again dismissed for lack of jurisdiction. The questions presented are:

1. Did the court of appeals have the authority to examine its own jurisdiction *sua sponte*, as all of the circuits have held?

2. Did Federal Rule of Civil Procedure 60(b)(6) give the district court authority to relieve petitioner from jurisdictional limits on the time to file a notice of appeal?

3. Did Federal Rule of Appellate Procedure 4(a)(6) give the district court authority to reopen the time for appeal when the motion to reopen was not filed within the time limits specified by the rule?

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BRIEF IN OPPOSITION

The district court has twice attempted to facilitate petitioner's untimely appeal, based on the false premise that he was abandoned by his attorney. The Fifth Circuit has twice dismissed the resulting appeals for lack of jurisdiction. This is petitioner's second attempt to obtain a writ of certiorari. The Court should again deny the petition.

The first question presented does not merit review because all circuits agree that a federal court of appeals may examine its own jurisdiction on appeal even if the appellee does not raise the jurisdictional defect by cross-appeal. This Court has already denied certiorari on the second question presented, and it should do so again because the circuits recognize

that parties cannot use Rule 60(b)(6) to circumvent jurisdictional appellate deadlines. The third question presented does not merit review because petitioner's attempt to reopen the time to appeal was untimely for reasons independent of his attorney's alleged abandonment.

This case is a poor vehicle to consider the effect of attorney abandonment, in any event, because petitioner's attorney did not abandon him. No timely appeal was filed because petitioner's attorney determined that petitioner had no meritorious claims. Petitioner's attorney later changed course only because a different attorney advised her that appeals should always be filed in capital cases, regardless of merit, to delay the setting of an execution date. Delay was the only reason for petitioner's appeal, and it is the only reason for his petition for certiorari. The petition should be denied.

JURISDICTION

The Fifth Circuit lacked jurisdiction because petitioner's notice of appeal was not timely under 28 U.S.C. § 2107. This Court has jurisdiction to review the Fifth Circuit's jurisdictional ruling under 28 U.S.C. § 1254(1).

STATEMENT

1. When petitioner filed his federal habeas petition, he was represented by Sadaf Khan, with the assistance of Richard Burr, "a national expert in death

penalty cases." R.503.[1] A magistrate judge recommended denial of the habeas petition on December 29, 2011. R.510–72. Petitioner, represented by Khan, filed objections to the magistrate's report on March 5, 2012. R.588–97. The district court adopted the magistrate's report and recommendation, denied petitioner's application, and denied a certificate of appealability. R.597–601.

The district court entered judgment denying habeas relief on March 27, 2012. R.602. Petitioner's attorney, Khan, received notice of the judgment on the day it was entered. *Perez v. Stephens*, 745 F.3d 174, 176 (5th Cir. 2014) (*"Perez I"*). The deadline for filing a notice of appeal therefore fell on April 26, 2012. *See* Fed. R. App. P. 4(a)(1)(A).

2. After researching applicable law, Khan "chose not to pursue an appeal" because she concluded that it "was not viable" and would divert resources from an actual-innocence claim. R.753; *Perez I*, 745 F.3d at 176 (noting that Khan "affirmatively decided not to file an appeal"). Richard Burr contacted Khan on June 11, 2012, after he became aware that the district court had entered judgment against petitioner Perez and that Khan had not filed a notice of appeal. R.677. In an e-mail to Khan, Burr stated that "even though there are no decent issues for appeal, in a death case an appeal must be taken to stave off the setting of an execution date." R.754.

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[1] Citations in the form "R.___" refer to the record on appeal in the Fifth Circuit.

On June 25, 2012, Khan moved to reopen the time to file a notice of appeal under Appellate Rule 4(a)(6).[2] R.603–08. The district court denied the motion because Khan received notice of the judgment when it was entered. R.617. It also noted that Perez had missed the deadline to move for an extension under Appellate Rule 4(a)(5), which fell on May 29, 2012. R.617; *Perez I*, 745 F.3d at 176. Khan moved to withdraw as Perez's counsel on July 30, 2012. R.618–19.

3. The district court appointed substitute counsel on August 14, 2012. R.637–39. Perez then filed motions under Civil Rule 60(b)(6) and Appellate Rules 4(a)(5) and 4(a)(6), arguing that he failed to file a timely notice of appeal because Khan abandoned him from March 2012 to June 2012. R.644–70.

The district court granted the Rule 60(b)(6) motion and "directed [the clerk] to reenter the March 27, 2012 judgment to allow [Perez] the opportunity to file a notice of appeal." R.774–79. The district court noted that it would otherwise have granted his Rule 4(a)(6) motion. R.779 n.3. On December 17, 2012, the district court vacated and reentered the March 27, 2012, judgment. R.779–80.

Perez filed a notice of appeal 29 days later, on January 16, 2013. R.781–82. The respondent filed his own notice of appeal the next day, R.783, and later

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[2] This brief refers to the Federal Rules of Appellate Procedure as "Appellate Rules" and the Federal Rules of Civil Procedure as "Civil Rules."

moved to dismiss Perez's appeal for lack of jurisdiction. Pet. App. 34a.

4. On February 26, 2014, the Fifth Circuit granted the respondent Director's motion to dismiss, vacated the district court's Rule 60(b)(6) order (but not any other part of the judgment), and dismissed petitioner Perez's appeal for lack of jurisdiction. Pet. App. 44a–45a. The court recognized that before 1991, it had "allowed the use of Civil Rule 60(b)(6) to circumvent Appellate Rule 4(a) in cases where the clerk failed to send the required notice to the parties that a judgment had been entered." Pet. App. 36a–37a (citing *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970) (per curiam)). But after Rule 4(a) and 28 U.S.C. § 2107 were amended in 1991 to allow an extension of the time to appeal when a party did not receive notice of the judgment, the Fifth Circuit held that Rule 60(b)(6) could no longer provide such relief. Pet. App. 37a (citing *In re Jones*, 970 F.2d 36, 37–39 (5th Cir. 1992)). The court cited *Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir. 2002) (per curiam), which "makes it particularly clear that where the sole purpose of a Civil Rule 60(b) motion is 'to achieve an extension of the time in which to file a notice of appeal, it must fail.'" Pet. App. 39a (quoting *Dunn*, 302 F.3d at 493). It recognized similar holdings in *Vencor Hospitals v. Standard Life & Accident Insurance Co.*, 279 F.3d 1306, 1312 (11th Cir. 2002), and *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994). Pet. App. 37a–38a.

The court also relied on *Bowles v. Russell*, 551 U.S. 205, 214 (2007), which held that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and rejected the "unique circumstances" doctrine as an equitable exception that the court had "no authority to create." Pet. App. 39a (quoting *Bowles*, 551 U.S. at 214). It held that "using Civil Rule 60(b)(6) to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*'s clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based." Pet. App. 40a. The court distinguished *Maples v. Thomas*, 132 S. Ct. 912 (2012), *Holland v. Florida*, 560 U.S. 631 (2010), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), on the ground that they "do not involve exceptions to statutory limits on appellate jurisdiction; they address equitable exceptions to judge-created procedural bars or non-jurisdictional statutes." Pet. App. 41a.

The Fifth Circuit rejected the district court's suggestion that it "would have granted the Appellate Rule 4(a)(6) motion." Pet. App. 36a n.4. It explained that Rule 4(a)(6) could not provide relief to Perez because it "does not cover an attorney's decisions that lead to an untimely appeal." *Id.* (citing *Resendiz v. Dretke*, 452 F.3d 356 (5th Cir. 2006)). It also noted that Appellate Rule 4(a)(6) could not provide relief even if it did apply because "it permits only a fourteen-day reopening of the time for appeal," and Perez filed his appeal "twenty-eight days after the district court's Civil Rule 60(b)(6) order." *Id.*

Because Civil Rule 60(b)(6) did not permit the district court "to circumvent the rules for timely appeals," the Fifth Circuit vacated "the order granting Civil Rule 60(b)(6) relief and reentering judgment," Pet. App. 44a, and dismissed Perez's appeal for want of jurisdiction. Pet. App. 45a ("Civil Rule 60(b)(6) order VACATED (Case No. 13-70006); Perez's appeal DISMISSED (Case No. 13-70002)."). It explained that the ruling "le[ft] the March 2012 judgment as the 'live' judgment as to which Perez's appeal is, admittedly, untimely." Pet. App. 44a–45a. The court did not remand Perez's case to the district court, nor did it vacate the district court's order denying relief under Appellate Rules 4(a)(5) and 4(a)(6).

Judge Dennis dissented. He argued that *Maples*, *Holland*, and *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012), supported the district court's order. He distinguished *Bowles* on the grounds that "there was no assertion of attorney abandonment . . . nor is there an express analog in Rule 4 to Rule 60(b)(6)'s allowance for equitable relief under extraordinary circumstances." Pet. App. 62a. According to the dissent, "no case from the Supreme Court, this circuit, or any other court provides that attorney abandonment does not constitute the kind of extraordinary circumstances envisioned by Rule 60(b)(6), permitting the reentry of judgment and a new appeal therefrom." Pet. App. 65a. Because "Khan abandoned Perez right when he needed her most," Pet. App. 50a, the dissent would have affirmed.

5. This Court denied Perez's petition for a writ of certiorari. *Perez v. Stephens*, 135 S. Ct. 401 (2014).

6. On October 30, 2014, Perez filed a document in the district court titled "Louis Castro Perez's Re-urging of Pending Motions to Reopen or Extend the Time to File Notice of Appeal." R.826. In this motion, Perez maintained that "[b]ecause the Fifth Circuit vacated the December 18 order, this Court's dismissal of Mr. Perez's alternative Rule 4(a) motions no longer stands; the motions remain pending." R.827. He "re-urge[d] the Court to rule on the alternative Rule 4(a) motions, which remain pending due to the Fifth Circuit's vacatur." R.827.

The district court granted Perez's motion on December 11, 2014. It accepted Perez's argument that the Fifth Circuit's order vacating the grant of relief under Civil Rule 60(b)(6) also revived his motions under Appellate Rules 4(a)(5) and 4(a)(6), filed on August 29, 2012. Pet. App. 25a ("[T]he court agrees with Perez that his previously filed alternative motions remain pending due to the vacating of this court's order by the Fifth Circuit."). And it concluded that Perez was entitled to reopen the time to appeal under Appellate Rule 4(a)(6). The district court reasoned that Perez did not receive notice of the March 2012 judgment within 21 days because Khan had "abandoned" him, that Perez filed his motion to reopen within 180 days of that judgment,[3] and that reo-

[3] Notably, however, the district court did not find that Perez filed his motion to reopen within 14 days of the date he received notice of the judgment. *Cf.* Fed. R. App. P. 4(a)(6) (providing

pening the time to appeal would not prejudice any party. Pet. App. 30a. Perez filed his notice of appeal on December 12, 2014. R.889–90.

7. The Fifth Circuit ordered the parties to submit letter briefs addressing two questions: (1) whether the district court's order of December 11, 2014, violated the mandate rule; and (2) whether the district court had authority to reopen the time to file an appeal of the 2012 judgment under Rule 4(a)(6). Pet. App. 6a.

After receiving the parties' briefs, the Fifth Circuit again dismissed Perez's appeal for lack of jurisdiction. The Fifth Circuit first rejected Perez's argument that the Director's failure to file a separate appeal of the district court's Rule 4(a)(6) order precluded appellate review. The court explained that jurisdiction cannot be waived or created by consent, and an improperly granted motion under Appellate Rule 4(a)(6) does not provide appellate jurisdiction. Pet. App. 7a (citing *Wilkens v. Johnson*, 238 F.3d 328, 329–30 (5th Cir. 2001)). The Fifth Circuit therefore found it "necessary to review the propriety of the underlying order to ascertain whether we have jurisdiction." Pet. App. 7a.

The Fifth Circuit then held that the district court's order under Rule 4(a)(6) was improper for

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that a motion to reopen must be "filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier").

several reasons. First, the grant of relief under Appellate Rule 4(a)(6) contradicted the opinion in *Perez I*, which "unambiguously rejected the December 2012 Order's alternate holding that FRAP 4(a)(6) was a permissible method of attaining jurisdiction." Pet. App. 9a. The district court lacked authority to reach the opposite conclusion in December 2014. *Id.*

Second, the district court exceeded the scope of the mandate in *Perez I* by acting inconsistently with the disposition of the case on appeal. In the first appeal, the Fifth Circuit explained, it "vacated the district court's December 2012 Order, reinstated the March 27 Judgment from which a FRAP 4(a)(6) motion would have been untimely, [and] dismissed Perez's appeal as untimely." Pet. App. 10a. But it "did not remand to the district court," and it "did not purport to vacate either the district court's December 2012 Order or July 2012 Order denying FRAP 4(a)(6) relief." *Id.* The opinion in *Perez I* "clearly manifested an intent to dispense with the case," and "there was nothing left for the district court to do." *Id.*

Third, the Fifth Circuit held that Perez forfeited his claim for relief under Appellate Rule 4(a)(6) because he failed to raise it in his previous appeal. Although the district court denied relief under Rule 4(a)(6) in July 2012 and December 2012, Perez did not seek appellate review of either order. Pet. App. 11a. Nor did he argue that Rule 4(a)(6) provided an alternative basis of jurisdiction when the Director moved to dismiss the appeal in *Perez I*, even though

the Director's motion addressed the issue directly. Pet. App. 11a–12a.

Finally, the Fifth Circuit held that Perez could not obtain relief under Appellate Rule 4(a)(6) because "[i]t is undisputed that the clerk complied with Civil Rule 77(d) and that Khan, Perez's attorney, received notice." Pet. App. 14a. The court expressly rejected Perez's argument that he had been "abandoned" by Khan. First, it explained that an attorney's negligence, including failure "to tell her client of a civil judgment in time to file an appeal" does not constitute "abandonment." *Id.* (quoting *Resendiz*, 452 F.3d at 362). Second, the court held that Perez's argument conflicted with this Court's holding in *Bowles*, 551 U.S. at 214, that courts may not create equitable exceptions to the jurisdictional requirements of Appellate Rule 4(a)(6). Pet. App. 15a–16a.

Judge Dennis again dissented. In his view, *Perez I*'s discussion of Appellate Rule 4(a)(6) was dictum and therefore did not constitute law of the case. Pet. App. 17a. He also disagreed with the majority's conclusion that Perez forfeited his argument under Rule 4(a)(6) by failing to raise it in *Perez I*. Pet. App. 20a. Finally, he argued that the district court had authority to reopen the deadline to appeal under Rule 4(a)(6) because Khan's "constructive abandonment" of Perez deprived him of notice of the judgment against him. Pet. App. 21a. Because of Khan's "abandonment," he believed the district court's order was consistent with the agency principles discussed in *Maples v. Thomas*, and did not implicate the bar

on equitable exceptions addressed in *Bowles v. Russell*. Pet. App. 21a–22a.

The Fifth Circuit denied Perez's petition for rehearing en banc on May 19, 2015. Pet. App. 76a–77a.

ARGUMENT

I. THE CIRCUITS ARE NOT IN CONFLICT ON THE AUTHORITY OF A COURT TO CONSIDER *SUA SPONTE* ITS JURISDICTION.

The Fifth Circuit appropriately examined its own jurisdiction in *Perez II*, and it correctly determined that Perez's notice of appeal, filed on December 12, 2014, was not timely with respect to the district court's judgment of March 27, 2012. The argument that *Perez II* "deepens a circuit split," Pet. 13–18, ignores the jurisdictional nature of appellate deadlines in civil cases, *see Bowles*, 551 U.S. at 213. Failure to file a timely appeal in a civil case creates a jurisdictional defect, which cannot be waived or forfeited. *Id.*; *see also Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."). The circuits are not split on this question.

Perez attempts to demonstrate a conflict among the circuits based on cases addressing criminal appeals under Appellate Rule 4(b). He cites *United States v. Madrid*, 633 F.3d 1222, 1224 (10th Cir. 2011), which held that the government may file a motion to dismiss, rather than a cross-appeal, to challenge an order granting a motion for extension of time under Rule 4(b)(4). He contrasts that case with

United States v. Burch, 781 F.3d 342, 344–45 (6th Cir. 2015), which held that the government must cross-appeal to challenge an extension of time under Rule 4(b)(4). But the Sixth Circuit, like every other circuit, has recognized that Rule 4(b), "unlike Rule 4(a), is not established by statute, and . . . is not jurisdictional." *United States v. Gaytan-Garza*, 652 F.3d 680, 681 (6th Cir. 2011) (per curiam) (noting, nevertheless, that "this holding does not preclude sua sponte dismissal of late-filed criminal appeals").[4] To the extent Perez has identified a potential conflict regarding direct appeals in criminal cases under Rule 4(b), that conflict has no bearing on this habeas case involving collateral review.

The Third Circuit's decision in *Amatangelo v. Borough of Donora*, 212 F.3d 776 (3d Cir. 2000), similarly fails to establish a conflict on the question whether a cross-appeal is necessary to challenge the timeliness of a civil appeal. In *Amatangelo*, the district court extended the time to file an appeal beyond

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[4] *See, e.g.*, *United States v. Reyes-Santiago*, ___ F.3d ___, 2015 WL 5598869, *2 (1st Cir. Sept. 23, 2015); *United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008); *Virgin Islands v. Martinez*, 620 F.3d 321, 327 (3d Cir. 2010); *United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir. 2009); *United States v. Hernandez-Gomez*, 795 F.3d 510, 511 (5th Cir. 2015) (per curiam); *United States v. Neff*, 598 F.3d 320, 323 (7th Cir. 2010); *United States v. Watson*, 623 F.3d 542, 545–46 (8th Cir. 2010); *United States v. Sadler*, 480 F.3d 932, 934 (9th Cir. 2007); *United States v. Garduno*, 506 F.3d 1287, 1288 (10th Cir. 2007); *United States v. Lopez*, 562 F.3d 1309, 1311–13 (11th Cir. 2009); *Youkelsone v. F.D.I.C.*, 660 F.3d 473, 475 (D.C. Cir. 2011) (per curiam).

the limit set by Appellate Rule 4(a)(5). *Id.* at 779. But the appellants "nevertheless filed their notice of appeal . . . within a period that the court could have authorized under Rule 4(a)(5)." *Id*. Although the district court's order contained a "technical defect," the appeal itself had no jurisdictional defect because it was filed within the time permitted by Rule 4(a)(5). *Id.* at 780 ("Thus we are constrained to deny the appellees' motions to quash the appeal as we do have jurisdiction."). The Third Circuit refused to dismiss the appeal because the district court's error did not deprive it of jurisdiction, not because it granted an extension beyond the limits provided in Appellate Rule 4(a).

Perez cannot identify a circuit split because none exists. Consistent with this Court's decisions, the circuits have uniformly recognized that in a civil case, the lack of a timely notice of appeal creates a jurisdictional defect,[5] which the court of appeals must address sua sponte if necessary. *See Gonzalez*, 132 S.

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[5] *See, e.g.*, *Vaqueria Tres Monjitas, Inc. v. Comas-Pagan*, 772 F.3d 956, 958 (1st Cir. 2014); *Napoli v. Town of New Windsor*, 600 F.3d 168, 170 (2d Cir. 2010); *Baker v. United States*, 670 F.3d 448, 456 (3d Cir. 2012); *Hudson v. Pittsylvania Cnty.*, 774 F.3d 231, 236 (4th Cir. 2014); *Bowles v. Russell*, 432 F.3d 668, 671 (6th Cir. 2005), *aff'd*, 551 U.S. 205 (2007); *Nocula v. UGS Corp.*, 520 F.3d 719, 724 (7th Cir. 2008); *Nyffeler Constr. Inc. v. Sec'y of Labor*, 760 F.3d 837, 841 (8th Cir. 2014); *Washington v. Ryan*, 789 F.3d 1041, 1042 (9th Cir. 2015); *United States v. McGaughy*, 670 F.3d 1149, 1155 (10th Cir. 2012); *Green v. Drug Enforcement Admin.*, 606 F.3d 1296, 1301 (11th Cir. 2010); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010).

Ct. at 648 ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."). As the Sixth Circuit explained in *Burch*, when the court of appeals lacks subject-matter jurisdiction, "we do not even need a motion to dismiss, much less a cross-appeal, to notice the error; a mere whisper at oral argument will do the trick, as will a court's identification of the problem on its own." *Burch*, 781 F.3d at 344–45 (citing "a missed notice-of-appeal deadline" as an example of a jurisdictional defect). There is no circuit split on that issue, nor could there be unless a court of appeals decided to flout this Court's holding in *Bowles*.

Perez did not file a timely notice of appeal. The Fifth Circuit therefore lacked jurisdiction over his appeal, *Bowles*, 551 U.S. at 206–07, and it properly addressed the jurisdictional defect *sua sponte*, *see Gonzalez*, 132 S. Ct. at 648.

II. DISMISSAL OF PEREZ'S FIRST APPEAL DID NOT CREATE A CIRCUIT SPLIT OR A CONFLICT WITH THIS COURT'S DECISION IN *MAPLES*.

A. *Perez I* Did Not Create A Circuit Split On The Use Of Rule 60(b)(6) To Create Exceptions To Jurisdictional Appellate Deadlines.

1. The Fifth Circuit's order dismissing Perez's initial appeal for lack of jurisdiction reflects a consensus among the circuits that Rule 60(b) cannot extend the time to file a notice of appeal beyond the limits

imposed by 28 U.S.C. § 2107 and Appellate Rule 4(a). The Fifth Circuit's initial decision in this case broke no new ground, and it did not create a circuit split.

Every circuit to address the question has reached the same conclusion: Rule 60(b) cannot be used to circumvent the jurisdictional appellate deadlines established by 28 U.S.C. § 2107 and reflected in Appellate Rules 4(a)(5) and 4(a)(6). *See Dunn v. Cockrell*, 302 F.3d at 492–93 (holding that Appellate Rule 4(a)(5) forbids the use of Rule 60(b) to extend the notice-of-appeal deadline); *see also Baker v. United States*, 670 F.3d 448, 456 (3d Cir. 2012); *In re Sealed Case*, 624 F.3d 482, 487 (D.C. Cir. 2010); *Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008) ("Rule 60(b) was not an appropriate vehicle . . . . If Big Top wanted to extend the time to file an appeal, it should have filed a motion under Fed. R. App. P. 4(a)(6)."); *Bowles v. Russell*, 432 F.3d 668, 672 (6th Cir.2005), *aff'd*, 551 U.S. 205 (2007) (noting "the exclusivity of the 4(a)(6) remedy"), *cited in Hall v. Scutt*, 482 F. App'x 990, 991 (6th Cir. 2012) (per curiam) ("Rule 60(b) cannot be used to circumvent Rule 4(a)(6)'s requirements."); *Vencor Hospitals, Inc. v. Standard Life and Acc. Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002) ("Federal Rule of Civil Procedure 60(b) cannot be used to circumvent the 180-day limitation set forth in Rule 4(a)(6). In so holding, we join all of the other circuits examining this issue."); *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000) (finding "no latitude on the clear and restrictive language of Rule 4(a)(6)"); *In*

re Stein, 197 F.3d 421, 426 (9th Cir. 1999) ("Rule 4(a) and Rule 77(d) now form a tessellated scheme; they leave no gaps for Rule 60(b) to fill."); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 361 (8th Cir. 1994) ("[T]he plain language of both Fed. R. App. P. 4(a)(6) and Fed. R. Civ. P. 77(d) addresses specifically the problem of lack of notice of a final judgment. That specificity, in our view, precludes the use of Fed. R. Civ. P. 60(b)(6) to cure problems of lack of notice."); *see also* 16A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3950.6 at 228 (3d ed. 1999) ("Rule 4(a)(6) provides the exclusive means for extending appeal time for failure to learn that judgment has been entered. Once the 180-day period has expired, a district court cannot rely on the one-time practice of vacating the judgment and reentering the same judgment in order to create a new appeal period.").

2. The Fifth Circuit's opinion in *Perez I* did not create a split with the Ninth Circuit. *Cf.* Pet. 19. Both courts had already joined other circuits in holding that Rule 60(b) cannot be used to extend the time to file a notice of appeal beyond the limits imposed by Rule 4(a). In *Dunn*, 302 F.3d at 492, the Fifth Circuit recognized that Appellate Rule 4(a)(5) "provide[s] a party specific limited relief from the requirement to timely file a notice of appeal" by permitting the district court to extend the deadline, and using Rule 60(b) to provide further extensions would "circumvent" those specific limitations and render Rule 4(a)(5) a nullity. *Id.* at 492–93. The Fifth Cir-

cuit had also held that Rule 60(b)(6) does not permit the vacation and reinstatement of judgments to extend appellate deadlines based on lack of notice unless the requirements of Rule 4(a)(6) are satisfied. *See In re Jones*, 970 F.2d at 37–39.

The Ninth Circuit reached the same conclusion, rejecting a party's attempted use of Rule 60(b) to vacate and reenter a judgment to permit an appeal from the reentered decision. *See In re Stein*, 197 F.3d at 426. In *Stein*, the 30-day period to file a notice of appeal began on October 1, 1997, when the district court denied various post-trial motions. *Id.* at 423. The appellants' attorneys did not receive notice of the orders until April 9 and 10, 1998. *Id.* Within 14 days of receiving notice, the appellants moved to vacate and reenter the judgment under Rule 60(b)(1) through 60(b)(6). One appellant also moved to extend the time to appeal under Appellate Rules 4(a)(5) and (6). *Id.* The district court denied the Rule 60(b) motions on the ground that Rule 4(a) provides the exclusive remedies for failure to file a timely notice of appeal due to lack of notice of the judgment, and the appellants had not satisfied its requirements. *Id.* at 424. The Ninth Circuit agreed and affirmed.

Comparing the text of the rules and the Advisory Committee's note to the 1991 amendment of Rule 4(a), the Ninth Circuit commented, "Rule 77(d) and the changes to Rule 4(a) set *an outer* limit on the time a party can wait, but is it *the outer* limit? The answer is yes." *Id.* at 425. The court expressly endorsed the Eighth Circuit's analysis in *Zimmer*, con-

cluding that "[u]se of Rule 60(b)(1), no less than use of Rule 60(b)(6), would derogate from the purpose and effect of Rule 4(a)." *Id.* Finding no contrary authority, the Ninth Circuit concluded that "Rule 4(a) and Rule 77(d) now form a tessellated scheme; they leave no gaps for Rule 60(b) to fill." *Id.* at 426.[6] As a result, "[o]nce the 180-day period has expired, a district court cannot rely on the one-time practice of vacating the judgment and reentering the same judgment in order to create a new appeal period." *Id.* at 425 (quoting 16A Wright, Miller & Cooper, Federal Practice and Procedure § 3590.6 at 228 (3d ed. 1999)).

At most, Perez has identified an intra-circuit conflict within the Ninth Circuit based on *Mackey v. Hoffman*, 682 F.3d at 1251–53, in which a panel of the Ninth Circuit attempted to avoid circuit precedent by borrowing the concept of attorney abandonment from a variety of inapposite sources. The court relied on *Maples v. Thomas* for the proposition that attorney abandonment is an "extraordinary circumstance," which provides cause to excuse a state prisoner's procedural default of state post-conviction remedies. *See id.* at 1252–53. It also relied on *Lal v. California*, 610 F.3d 518 (9th Cir. 2010), which held

[6] The court distinguished prior Ninth Circuit authority, explaining that "insofar as our decision in *Rodgers v. Watt*, 722 F.2d 456, 459–60 (9th Cir. 1983), reflects the old one-time practice regarding notice, it has been rendered obsolete and inapplicable to this type of case by the 1991 addition of Rule 4(a)(6)." *Stein*, 197 F.3d at 426.

that an attorney's gross negligence resulting in dismissal with prejudice for failure to prosecute constitutes an "extraordinary circumstance" that warrants relief from the judgment of dismissal under Rule 60(b)(6). *See Mackey*, 682 F.3d at 1251. Finally, the *Mackey* panel relied on *Community Dental Services v. Tani*, 282 F.3d 1164 (9th Cir. 2002), in which an attorney deliberately deceived his client and failed to pursue his client's defense despite court orders to do so, ultimately resulting in a default judgment. *See Mackey*, 682 F.3d at 1251. The lawyer's virtual abandonment constituted gross negligence, which vitiated the agency relationship and provided "extraordinary circumstances" justifying relief from the default judgment under Rule 60(b)(6). *See Tani*, 282 F.3d at 1171. Not one of these cases recognized an equitable exception to the jurisdictional limit on the time to file a notice of appeal.

Its dubious merit aside, the decision in *Mackey* did not create (or set the stage for) a circuit split. The Ninth Circuit had already joined the Fifth Circuit in holding that Rule 60(b) does not permit district courts to vacate and re-enter a judgment solely for the purpose of extending the deadline to file a notice of appeal. *See In re Stein*, 197 F.3d at 426. Any intra-circuit split created by *Mackey* can and should be resolved by the Ninth Circuit; it does not warrant certiorari review by this Court. *See, e.g.*, *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. The Sixth Circuit's decision in *Tanner v. Yukins*, 776 F.3d 434 (6th Cir. 2015), does not create a conflict with *Perez I* because it arose out of different circumstances and raised distinct legal issues. In *Tanner*, the Sixth Circuit relied on Civil Rule 60(b)(6) to preserve the appeal of a pro se inmate who would have filed a timely notice of appeal but for the unconstitutional interference of prison officials. Tanner, unlike Perez, did not seek to expand the appellate deadlines based on lack of notice. Tanner asserted that her timely appeal was frustrated by a constitutional violation—a claim that she proved in court. Perez's case does not raise the same issues, and he asserts no comparable injury.

Tanner did not allege that she lacked notice of the district court's judgment under Civil Rule 77. Had she done so, Appellate Rule 4(a) would have provided her exclusive remedy. *See* 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(6). But the Sixth Circuit emphasized that efforts to extend or reopen the time to appeal under Rule 4(a)(5) and 4(a)(6) involved "circumstances that did not pertain to Tanner's procedural position." 776 F.3d at 437. And it specifically distinguished *Bowles* on the ground that "the case before us does not involve a Rule 4(a)(6) notice problem." *Id.* at 440; *see also id.* at 442 (criticizing the district court for "failing to acknowledge the distinction between notice and non-notice cases under Rule 60(b)(6)").

Instead, Tanner alleged that she had notice of the judgment and would have timely appealed, but pris-

on guards wrongfully prevented her from filing her notice of appeal. *Id.* at 436 ("Tanner's effort to file a timely notice of appeal was thwarted by guards at the prison where she was incarcerated, and the notice was filed one day late."). The Sixth Circuit initially dismissed her appeal as untimely. *Id.* But Tanner then filed suit against the prison guards under § 1983 and secured a judgment that the guards violated her "fundamental constitutional right of access to the courts." *Id.* at 438–39. The Sixth Circuit distinguished *Perez I* on this ground, noting that "*Perez* did not involve the type of unconstitutional conduct by a state actor that is at issue in this case." *Id.* at 442.

The Sixth Circuit did not blithely invoke Rule 60(b)(6) to "restart the appellate time clock." Pet. 22. It cited Rule 60(b)(6) as a procedural basis to enforce a constitutional right that neither § 2107 nor Appellate Rule 4(a)(6) purported to abridge in the first place.

Whereas the pro se appellant in *Tanner* did not file a timely notice of appeal because of unconstitutional state interference, Perez did not file a notice of appeal because his lawyer exercised her professional judgment and decided that he had no valid basis to appeal. Even if the circumstances in *Tanner* could support an exception to the jurisdictional time limits of 28 U.S.C. § 2107, the circumstances of this case cannot. This case falls directly under the provisions of § 2107 and Appellate Rule 4(a)(6), which foreclose

petitioner's attempt to avoid the limits on the court of appeals' jurisdiction.

B. *Perez I* Did Not Conflict With *Maples v. Thomas*; It Followed *Bowles v. Russell*.

1. In *Maples v. Thomas*, the Court considered whether a state prisoner's abandonment by his state habeas counsel provided cause to excuse the procedural default of his federal constitutional claims in state court. As a general rule, "[w]hen a procedural default bars litigation of a constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice.'" *Reed v. Ross*, 468 U.S. 1, 11 (1984) (quoting *Engle v. Isaac*, 456 U.S. 107, 129 (1982)); *see also Maples*, 132 S. Ct. at 922. Recognizing that mere negligence does not qualify as "cause," this Court held that abandonment could constitute "extraordinary circumstances" sufficient to excuse a procedural default under the cause-and-prejudice standard. *Id.* at 924.

Unlike 28 U.S.C. § 2107, the procedural-default doctrine does not reflect a jurisdictional limitation; it is a non-jurisdictional body of judge-made rules designed to guide federal courts' discretionary exercise of habeas power when state prisoners fail to properly present their federal constitutional claims in state court. *See generally Reed*, 468 U.S. at 9–11. There is no question that the federal courts have the authority to consider such claims. *See id.* at 9 ("Our decisions have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look

beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated."). The procedural-default doctrine merely reflects the Court's forbearance to exercise its authority in appropriate circumstances. *See, e.g.*, *Francis v. Henderson*, 425 U.S. 536, 539 (1976) ("This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power.").

By recognizing attorney abandonment as sufficient cause to excuse a state prisoner's procedural default, *Maples* did not extend judicial authority beyond any congressionally imposed limit, nor did it invest the phrase "extraordinary circumstances" (or litigants who invoke it) with the power to nullify jurisdictional rules. *Maples* interpreted a prudential, court-created doctrine and determined that the circumstances justified the exercise of the Court's existing authority.

2. In *Bowles v. Russell*, the Court expressly held that the time limits established by Appellate Rule 4(a) and 28 U.S.C. § 2107 are jurisdictional; therefore, the courts have no power to create equitable exceptions to these time limits. 551 U.S. at 214. The Court accordingly rejected the use of the "unique circumstances" doctrine to extend appellate deadlines beyond the terms of Rule 4(a). *See id.*

The Fifth Circuit's dismissal of Perez's untimely appeal follows from this Court's holding in *Bowles*.

Section 2107 establishes jurisdictional limits on the time to file a notice of appeal. Courts lack authority to alter those limits by creating equitable exceptions. *See id.* at 213–15. It follows that courts cannot "create exceptions to circumvent the appellate deadlines as set forth in Appellate Rule 4(a) and § 2107." Pet. App. 39a–40a. Dismissing the appeal for lack of jurisdiction, the Fifth Circuit recognized that "using Civil Rule 60(b)(6) to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*'s clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based." Pet. App. 40a.

Like *Bowles*, the Fifth Circuit's decision in this case does not conflict with *Maples* because it addresses a different question. *Maples* stands for the proposition that judge-made doctrines and non-jurisdictional rules are subject to equitable exceptions. *Cf. Holland*, 560 U.S. at 653–54 (holding that attorney abandonment may constitute "extraordinary circumstances" sufficient to justify equitable tolling of the non-jurisdictional limitations period under 28 U.S.C. § 2244(d)). The question whether Rule 60(b), or any source of equitable power, can be used to extend appellate deadlines beyond the limits provided by § 2107 and Rule 4(a) was not before the Court in *Maples*. But that proposition was presented, and squarely rejected, in *Bowles*.

That *Bowles* did not address Rule 60(b) specifically does not change the impact of its holding on Perez's claim. *Bowles* expressly rejected the "unique

circumstances doctrine," explaining that the jurisdictional time limits do not allow for equitable exceptions. *See Bowles*, 551 U.S. at 214. Perez does not explain how Rule 4(a) could permit an equitable exception based on "extraordinary circumstances" when the Court has already rejected an equitable exception based on "unique circumstances." Rule 4(a) permits no such exception.

Bowles forecloses any equitable exception to the appellate deadlines, including an "extraordinary circumstances" exception based in Civil Rule 60(b)(6). "No authority to create equitable exceptions to jurisdictional requirements," *Bowles*, 551 U.S. at 214, means no authority to create an equitable exception, regardless of its source. Whatever equitable power inheres in Rule 60(b), it cannot overcome the jurisdictional limits of § 2107 and Rule 4(a). *Bowles*, 551 U.S. at 213–15.

Perez cannot mask the district court's attempt to create an exception to the notice-of-appeal deadline by arguing that he "timely appealed within 30 days of the newly reentered judgment." Pet. 28. This only raises the question whether courts can go beyond the exceptions provided by Rule 4(a) and § 2107 to relieve litigants of jurisdictional deadlines. *Bowles* holds that they cannot.

Similarly, Perez argues that the district court did not extend the time to appeal; it merely "restart[ed] the appellate clock." Pet. 26. But he cannot dispute that the district court's order to vacate and reenter the judgment had the purpose and effect of relieving

Perez from the appellate deadlines that followed the district court's denial of habeas relief on March 27, 2012. The only reason for Perez's Rule 60(b) motion was to avoid the mandatory, jurisdictional deadlines that barred his appeal. The court granted that motion for the express purpose of permitting Perez to file a notice of appeal where the governing statute and rules did not allow it.

C. Perez's Failure To File A Timely Notice Of Appeal Did Not Result From Abandonment By Counsel.

In all events, this case presents a poor vehicle to consider the effect of attorney abandonment because Perez was not abandoned by his attorney. An attorney does not abandon her client unless she stops "operating as [her client's] agent in any meaningful sense of that word,'" thus "sever[ing] the principal-agent relationship." *Maples*, 132 S. Ct. at 922–23 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)). No such circumstances exist in this case.

In *Maples*, the Court found that "the extraordinary facts" demonstrated abandonment by state habeas counsel. At the time he filed his state habeas petition, Maples was represented by two associates at a large New York law firm. While his state habeas petition was pending, both lawyers left the firm for jobs that disqualified them from continuing the representation, but they did not notify Maples or seek leave to withdraw from the case. *Id.* at 916–17. When the state court denied his petition, it sent notice to his New York attorneys at their former firm, but the

notices were returned unopened, and the deadline to appeal passed without any lawyer reviewing the judgment. *Id.* at 917. Maples then filed a federal habeas petition, which was denied as procedurally defaulted based on his failure to appeal the denial of his state-court petition. *Id.*

The Court determined that Maples had been abandoned "long before the default occurred" because his lawyers left the firm "at least nine months before" the state court denied relief, and "their commencement of employment that prevented them from representing Maples ended their agency relationship with him." *Id.* at 924. As a result, "Maples lacked the assistance of any authorized attorney" during the time to appeal the denial of his state habeas petition. *Id.* at 927.

Similarly, the facts that led the Court to recognize the possible existence of "extraordinary circumstances" in *Holland* demonstrate repeated, egregious failures by counsel over an extended period. In that case, petitioner's counsel "failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so"; he "apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules"; he "failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information"; and he "failed to communicate with his client over a period

of years, despite various pleas from Holland that Collins respond to his letters." 560 U.S. at 652. The petitioner's allegations described "near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years." *Id.* at 659 (Alito, J., concurring). This protracted lack of assistance led the petitioner to undertake "efforts to terminate counsel due to his inadequate representation and to proceed *pro se*, [which] were successfully opposed by the State on the perverse ground that petitioner failed to act through appointed counsel." *Id.*

Perez comes nowhere close to satisfying the standard of abandonment set in *Maples* and *Holland*. In this case, Khan functioned as Perez's counsel before, during, and after the time for filing a notice of appeal. When the magistrate judge recommended denial of his habeas application, Khan secured extra time to prepare objections. R.574–86. She filed timely objections on March 5, 2012. R.587–96. After receiving the district court's order and judgment on March 27, 2012, R.597–602, Khan conducted legal research and affirmatively "chose not to pursue an appeal" because the appeal "was not viable" and would consume scarce resources, R.752–53. After consulting with Burr, Khan belatedly reconsidered her strategic decision, R.753–55, and on June 25, 2012, filed a motion to reopen the time to file a notice of appeal under Rule 4(a)(6). R.603–08.

Unlike the long-departed (and conflicted) lawyers in *Maples*, Perez's lawyer made a deliberate decision

not to appeal because she determined that there were no meritorious issues to raise. This was an exercise of her professional judgment as Perez's counsel, not an act of abandonment. This indisputable fact suffices to break the chain of causation between Khan's alleged abandonment and her failure to file a notice of appeal. Even if Khan had discussed the judgment with Perez and learned that he wished to appeal, she would have been bound by her "ethical duty as an officer of the court . . . not to present frivolous arguments." *Smith v. Robbins*, 528 U.S. 259, 281 (2000). In any event, the record demonstrates that Perez did not file a timely notice of appeal because his lawyer evaluated the merits of his appeal and found none. That was an exercise of professional judgment by Perez's lawyer, not abandonment.

III. *PEREZ II* WAS PROPERLY DISMISSED BECAUSE PEREZ FAILED TO FILE A TIMELY MOTION TO REOPEN AFTER HE RECEIVED NOTICE OF THE JUDGMENT.

Even if Perez's lawyer did abandon him (and she did not), the district court lacked authority to reopen the time to file an appeal because Perez failed to file a timely motion under Appellate Rule 4(a)(6). A district court may reopen the time to file an appeal only if all the conditions of Rule 4(a)(6) are satisfied. Those conditions include the following:

> the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Feder-

> al Rule of Civil Procedure 77(d) of the entry, whichever is earlier.

Fed. R. App. P. 4(a)(6)(B). Perez concedes that he received notice of the judgment more than 14 days before he moved to reopen on August 29, 2012, and more than 180 days before he again moved to reopen on October 30, 2014. The district court had no authority to reopen the time to file an appeal in either instance because Perez failed to meet all the conditions of Rule 4(a)(6).

Perez's most recent motion to reopen, filed on October 30, 2014, was untimely because it was filed more than 180 days after the district court's judgment of March 27, 2012. Perez cannot avoid the 180-day limit by characterizing his 2014 motion as a reurging of his 2012 motion. In *Perez II*, the same Fifth Circuit panel that decided *Perez I* explained that "*Perez I* did not purport to vacate either the district court's December 2012 Order or July 2012 Order denying FRAP 4(a)(6) relief." Pet. App. 10a. The district court dismissed Perez's 2012 Rule 4(a)(6) motion in 2012. Pet. App. 75a. *Perez I* did not disturb that ruling. Pet. App. 10a. The 2012 motion was therefore not before the district court in 2014. The only motion before the district court in 2014 was the Rule 4(a)(6) motion that Perez filed on October 30, 2014. That motion was untimely, and the district court lacked authority to grant relief under Rule 4(a)(6).

Even if *Perez I* did somehow revive Perez's August 2012 motion, Perez was still not entitled to relief because that motion was also untimely. Assum-

ing, contrary to the facts, that Perez was "abandoned" by his lawyer at some point in 2012, that purported abandonment ended no later than June 25, 2012, when Khan sent him a copy of the judgment and appeared in court to file a motion on his behalf. Pet. App. 5. Knowledge of the judgment was imputed to Perez on that date, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), meaning that the deadline for a Rule 4(a)(6) motion fell no later than July 9, 2012, *see* Fed. R. App. P. 4(a)(6)(B) (setting the deadline at "180 days after the judgment or order is entered or within 14 days after the moving party receives notice . . . of the entry, whichever is earlier"). But the Rule 4(a)(6) motion that the district court purported to grant in 2014 was not filed until August 29, 2012—more than 50 days after he admittedly received notice of the district court's judgment. Pet. App. 31a.

The district court failed to account for the fact that Perez received notice more than 14 days before he filed the Rule 4(a)(6) motion in August 2012. It noted only that the motion was filed "within 180 days after entry of the judgment." Pet. App. 30a. But because Perez's motion to reopen was not filed within 14 days of June 25, 2012, when he had notice of the judgment, he failed to satisfy the conditions of Rule 4(a)(6), and the district court had no power to grant relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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