No. 15-1530

IN THE

# Supreme Court of the United States

ALFREDO ROSILLO,

*Petitioner,*

v.

MATT HOLTEN AND JEFF ELLIS,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit**

## REPLY BRIEF OF PETITIONER

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September 13, 2016

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## REPLY BRIEF OF PETITIONER

Respondent's brief highlights the point that the circuits are divided against themselves over the questions presented, but this only amplifies the importance of granting *certiorari*. Current law is unpredictable, not only across the circuits but also within them. Many cases recite the term "functional equivalent," but still they diverge on substance, reaching conflicting answers to the questions presented here. This case presents a sound opportunity to resolve those questions, and Respondent's attempt to paint the circumstances of this case as narrow and fact-bound are unavailing.

### I. PETITIONER HAS NOT WAIVED THE ARGUMENTS PRESENTED IN THE PETITION.

Rosillo twice argued before the Eighth Circuit that the appeal should not be dismissed for lack of jurisdiction because he provided sufficient notice to Holten that he was appealing the district court's dismissal of Holten from the case. Appellant's Resp. to Mot. to Dismiss Appeal 1-2; Appellant's Reply Brief at 1-2. Thus, Rosillo preserved the argument that he provided sufficient notice to Holten.

Holten contends that Rosillo did not make the argument about notice in the exact same way below that he does now, but a petitioner must preserve claims, not arguments—much less variations on an argument that was in fact presented below. This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido,* 503 U.S. 519, 534 (1992)).

In any case, this Court may review any issue passed upon by the lower court, even if a party did not present it below. *Lebron*, 513 U.S. at 379. Here, the Eighth Circuit ruled on the sufficiency of notice to Holten. In doing so, it took a position on the questions presented by treating the briefs as irrelevant and allowing Holten to defeat appellate jurisdiction without any showing of prejudice. Pet. App. 3a-4a.

## II. THIS CASE PROVIDES A SOUND VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED IN THE PETITION.

Holten attempts to portray this case as distinct or unusual by suggesting that there is a difference in how an appellate court should proceed in two circumstances: (1) the notice of appeal omits Order A but mentions Order B, and both orders pertain to the same appellee; and (2) the notice of appeal omits Order A but mentions Order B, and the orders pertain to different appellees. Br. Opp'n 6-9.

This is a distinction without a difference. There is no reason to think the answers to the questions presented would be any different in one circumstance versus the other. To determine the scope of the appeal, either the appellate court should look to the briefs or it should not. Either the appellate court should consider prejudice to the appellee or it should not.

Indeed, Holten does not cite, and Petitioner's research has not disclosed, any case in which any court has ever drawn the distinction that Holten advocates. Nor would such a distinction make any sense given the text of Appellate Rule 3(c), which does not require the notice to identify appellees at all. Appellate Rule 3(c)(1)(A) requires the notice to identify the party "taking the appeal"—*i.e.,* the appellant, not the

appellee. Fed. R. App. P. 3(c)(1)(A); *Conway v. Vill. of Mount Kisco, N.Y.*, 750 F.2d 205, 212 (2d Cir. 1984). The cases monolithically state that identification of the appellee is unnecessary. *House v. Belford*, 956 F.2d 711, 717 (7th Cir. 1992) (collecting cases).

Because identification of the appellee is not required, the relevant question in either circumstance is whether the appellant has done enough to secure appellate jurisdiction over the relevant order. Indeed, both situations are governed by the same Rule, Appellate Rule 3(c)(1)(B), which states that the notice should "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). The Rule has nothing to with the specification of a given appellee.

In any case, Holten's contention that appellate courts consistently decline to exercise jurisdiction where a notice of appeal does not mention an order regarding a given appellee is simply untrue. There are many cases in which a federal court of appeals has exercised jurisdiction in the precise circumstances here: Order A dismisses all claims against Defendant A; Order B dismisses all claims against Defendant B, and leaves no remaining claims against any defendant; and the Notice of Appeal refers only to Order B. In this case, Holten is Defendant A and the order granting summary judgment to Holten (Doc. No. 33) is Order A. Ellis is Defendant B, and the order dismissing Ellis and leaving no remaining claims (Doc No. 38) is Order B.

Examples of cases in which federal appellate courts have exercised jurisdiction in these exact circumstances include: *Shea v. Smith*, 966 F.2d 127, 129-30 (3d Cir. 1992) (Order A grants summary judgment to Rumgay; Order B grants summary

judgment to Smith and Baker; notice of appeal refers only to Order B; Court of Appeals nonetheless exercises jurisdiction over Order A and Rumgay); *Conway v. Vill. of Mount Kisco, N.Y.*, 750 F.2d 205, 210-212 (2d Cir. 1984) (Order A grants Cerbone judgment on the pleadings; Order B dismisses the remaining defendants; notice of appeal refers only to Order B; Court of Appeals nonetheless exercises jurisdiction over Order A and Cerbone); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 446, 451 (9th Cir. 1983) (Webb's third-party complaint against law enforcement officers is dismissed in Order A; Webb's car is forfeited to the government in Order B; Webb's notice of appeal refers only to Order B; Court of Appeals nonetheless exercises jurisdiction over Order A and law enforcement officers); *Crawford v. Roane*, 53 F.3d 750, 752-53 (6th Cir. 1995) (Order A denies leave to amend complaint as to widow and trustees; Order B grants summary judgment to widow, leaving no remaining claims; notice of appeal refers only to Order B; Court of Appeals nonetheless exercises jurisdiction over Order A and trustees); *Tapp v. Brazill*, 645 F. App'x 141, 143-44 (3d Cir. 2016) (Order A dismisses medical defendants; Order B dismisses prison defendants, leaving no remaining claims; notice of appeal refers only to Order B; Court of Appeals nonetheless exercises jurisdiction over Order A and medical defendants).

Courts in this circumstance face the very questions presented by this case—whether to consider the briefs and whether to consider prejudice to the appellee. *See Shea*, 966 F.2d 127, 130 (1992) (stating that appellate jurisdiction exists because an appellee "briefed the issues . . . and was not misled"); *One 1997 Mercedes Benz*, 708 F.2d at 451 (stating that appellate jurisdiction exists because a party addressed the

relevant order "in her opening brief" and the appellee "can show no prejudice"); *Crawford*, 53 F.3d at 752-53 (stating that appellate jurisdiction exists where appellee would suffer no prejudice and the appellant briefed the orders not mentioned in the notice of appeal); *Tapp*, 645 F. App'x at 144 (stating that appellate jurisdiction exists over unmentioned orders where the appellant briefed them and the appellees were not prejudiced).

Finally, the facts of this case make Holten's distinction all the more insubstantial. It is undisputed that the notice of appeal listed Holten in the caption and that the notice was served on his counsel. Pet. App. 4. Thus, even if there were some special rule for circumstances in which a given appellee is totally omitted or not notified of the appeal, such a rule would have no relevance here.

## III. RESPONDENT'S BRIEF UNDERSCORES THAT THE LOWER COURTS ARE IN DISARRAY OVER WHETHER TO CONSIDER THE BRIEFS IN DETERMINIG THE SCOPE OF AN APPEAL.

Holten attempts to reconcile the "face of the notice" cases with the "consider the briefs cases" by arguing that many of them apply, at a high level of generality, the "functional equivalent" language sometimes used in this Court's jurisprudence. Br. Opp'n 10-11. So what? The point is that there is an ongoing conflict over whether to consider the briefs or ignore them. Even if the same label is sometimes assigned to the standard, these divergent ways of deciding whether to forgive technical non-compliance with the designation of the order or judgment constitute distinct tests, with important—and unpredictable—consequences for litigants.

The "face of the notice" and "consider the briefs" cases cited in the Petition, Pet. 6-9, show that even if federal courts of appeals sometimes purport to be applying the same standard, the analytical rules they actually follow are quite different—some consider the briefs, others do not. This not a "misapplication of a properly stated rule of law," Sup. Ct. R. 10, but a conflict over whether the proper rule is to consider the briefs or put them aside.

Nor is this a question in which a body of lower court decisions undertake the same analysis for functional purposes but use slightly different verbal formulations to describe the applicable standard, as Holten suggests in likening the issue here to Fourth Amendment reasonableness. Br. Opp'n 14-15. In this case, the conflict among the lower courts is binary—consider the briefs or do not. The disarray over this binary question makes this Court's resolution of the issue important, and this case presents an opportunity to provide a clear answer.

Holten also does not attempt to show that cases cited in the Petition—the "face of the notice" cases from the First, Second, Sixth, Eighth, and Eleventh Circuits and the "consider the briefs" cases from the Fourth, Fifth, Ninth, and Tenth Circuits—are consistent with each other. Instead, he argues that "the appellate courts . . . do not fit neatly into the groups Petitioner has created for them." Br. Opp'n 11. Indeed they do not. The intra-circuit divisions are so severe as to allow only for general circuit-by-circuit characterizations, not a rigid taxonomy—a point underscored in the Petition itself. Pet. at 9.

Internal divisions do not change the fact that decisions are also divided across the circuits. They just make the current problem worse, defeating

predictability even within a given circuit. The leading federal practice treatise complains of this disarray: "[C]aselaw appears to vary even within a given circuit," producing "a variegated, and not always entirely consistent, body of lower court case law." 16A Charles Alan Wright et al., Federal Practice & Procedure: Jurisdiction §§ 3949.4 & 3949.6 (4th ed. 2008). Respondent's catalogue of decisions in which the same appellate court applies the "consider the briefs" rule in some cases and the "face of the notice" rule in other cases, Br. Opp'n at 11-12, underscores the confusion further.

Sometimes an appellate court considers the briefs, sometimes it does not, and all without much rhyme or reason. Holten seems to agree, for he notes that "[c]ourts in each circuit have looked to the briefs in some circumstances, but have refused to do so in others," Br. Opp'n at 11, without offering a suggestion about how a court should know when to do one and when to do the other. This case presents an opportunity to answer a question that current law does not—whether, or in what circumstances, the briefs should be considered in deciding whether to forgive technical non-compliance with Appellate Rule 3(C)(1)(B).

## IV. THE FEDERAL COURTS OF APPEALS ARE DIVIDED OVER WHETHER A DEFICIENT NOTICE OF APPEAL SUFFICES TO CONFER APPELLATE JURISDICTION WHERE THE APPELLEE IS NOT PREJUDICED OR MISLED.

Holten attempts to marginalize the conflict over whether prejudice to the appellee is required for an erroneous designation of the relevant order to defeat appellate jurisdiction by arguing that the prejudice

analysis folds into an analysis of whether the notice of appeal makes the appellant's intent sufficiently clear. Br. Opp'n 17-19. Of course, if an appellee does not apprehend the scope of an appeal until it is too late to respond, then the appellee is prejudiced. But the heart of the conflict among the appellate decisions is this: For jurisdiction to be defeated, does the appellee have to suffer real prejudice—such as a diminished opportunity to present arguments to the appellate court—or will a notice of appeal that is unclear as to the scope of the appeal defeat appellate jurisdiction even if the appellee ultimately has a full and fair opportunity to argue the issue and therefore suffers no prejudice?

Viewed from this standpoint, the distinction between the "prejudice required" and "prejudice not required" cases is clear. In a "prejudice required" case, a full opportunity to respond shows the absence of prejudice to the appellee and allows the appellate court to assert jurisdiction. *E.g.*, *First Interstate Bank of Missoula, N.A. v. Fed. Leasing, Inc.*, 983 F.2d 1076 (9th Cir. 1992) (stating that although "the notice of appeal itself" did not give proper notice, there was no prejudice because a docketing statement, filed later, clarified the scope of the appeal and the appellee had a full opportunity to respond); *Taylor v. United States*, 848 F.2d 715, 718 (6th Cir. 1988) (stating that the appellate court had jurisdiction because the appellee was not misled since he "respond[ed] fully to all issues"); *Cornelius v. Home Comings Fin. Network, Inc.*, 293 F. App'x 723, 726 (11th Cir. 2008) (stating that appellees were not prejudiced because they responded fully on the merits); *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436, 440–41 (7th Cir. 2007) (stating that the court would proceed to the merits because there was no indication that the

appellee was harmed by a defective notice); *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 864 (9th Cir. 2004) (stating that the appeal could proceed despite the omission of the relevant order in a notice of appeal because there was no prejudice and the parties had a full opportunity to brief the issues); *Messina v. Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006) (Garland, J.) (where subsequent filings provide sufficient notice of the scope of the appeal, appellee is not misled or prejudiced by designation of the wrong order, and the appeal may proceed).

The analysis in a "prejudice not required" case is very different. Prejudice to the appellee is irrelevant, and the jurisdictional analysis is focused narrowly on the notice itself. *See* Pet. 10-11 (citing cases).

The Eighth Circuit's decision in this case lies squarely in the "prejudice not required" camp. Indeed, it is difficult to imagine a case in which the prejudice question could be presented more clearly, for it is undisputed that Holten understood which orders Rosillo intended to appeal within two weeks of the docketing of the appeal. Pet. 4-5. Nor is there any dispute that Holten had a full and fair opportunity to brief all issues, and that he did so. *Id*. Holten has never claimed prejudice, nor could he.

## V. THERE IS WIDESPREAD CONFUSION AMONG THE LOWER COURTS AS TO WHETHER *FOMAN V. DAVIS* OR *TORRES V. OAKLAND SCAVENGER CO.* GOVERNS ERRORS IN THE DESIGNATION OF THE ORDER FROM WHICH THE APPEAL IS TAKEN.

The "functional equivalent" formulation articulated by this Court in *Torres v. Oakland Scavenger Co.,* 487 U.S. 312 (1988), has not resolved confusion about whether the more stringent approach of *Torres* or the more lenient approach of *Foman v. Davis*, 371 U.S. 178 (1962), applies to the designation of the order appealed from under Appellate Rule 3(c)(1)(B). This is evident in the lower court decisions cited in the Petition. Pet. 12-16. Holten responds to this argument in a footnote, in which he contends that *Smith v. Barry*, 502 U.S. 244 (1992), somehow resolved this issue. Br. Opp'n 13 n.4. It did not.

*Smith v. Barry*, addressed whether a document other than a notice of appeal, if filed within the 30-day window of Appellate Rule 4, could substitute as a notice of appeal, not whether the stricter *Torres* standard or the more lenient *Foman* standard should be used to assess the scope of an appeal. Both before and after *Smith v. Barry*, courts and commentators alike have expressed confusion as to whether the stricter *Torres* approach or the more lenient *Foman* approach applies to the designation of the judgment or order from which the appeal is taken under Appellate Rule 3(c)(1)(B). Pet. App. 12-16.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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