No. 16-1022

In the Supreme Court of the United States

TIMOTHY BELL,
PETITIONER,

v.

EUGENE MCADORY AND TARRY WILLIAMS,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether the denial of a motion under Federal Rule of Appellate Procedure 4(a)(5) is a separately appealable final order, as defined by 28 U.S.C. § 1291.

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STATEMENT

1. Petitioner Timothy Bell is civilly detained as a sexually violent person under Illinois law, and is in the custody of the Illinois Department of Human Services ("Department"). Dist. Ct. Doc. 1. In 2012, Petitioner filed a complaint in the district court against Respondents Eugene McAdory and Tarry Williams, which the district court construed as stating claims under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. *Ibid.* On August 11, 2014, the district court granted summary judgment to Respondents and denied Petitioner's motion for judgment on the pleadings. Pet. App. 10a–31a. In accordance with Federal Rule of Civil Procedure ("FRCP") 58, a separate judgment order was entered on the district court's docket that same day. Dist. Ct. Doc. 60.

2. Petitioner did not file a notice of appeal. Instead, on September 11, 2014—30 days after judgment was entered—Petitioner moved under FRCP 59(e) to alter or amend the judgment, seeking reconsideration of the district court's summary judgment ruling. Dist. Ct. Doc. 61. Petitioner entitled it "Plaintiff's Motion for Reconsideration on Summary Judgment." *Ibid.* In it, Petitioner argued that he was prejudiced during the summary judgment proceedings because he was not recruited counsel or provided with documents during discovery. *Ibid.* He also argued that the district court was biased against him, "completely ignored" his Fourteenth Amendment claims, and used inappropriate case law to support its decision. *Ibid.*

3. A FRCP 59(e) motion must be filed in the district court "no later than 28 days after entry of judgment."

Because Petitioner's FRCP 59(e) motion was untimely, the district court treated it as a motion for relief from judgment under FRCP 60(b). Dist. Ct. Doc. 63. The district court denied the motion on October 1, 2014. *Ibid.* Petitioner again did not file a notice of appeal. Instead, on October 14, 2014, Petitioner filed a "Motion for Status Up Date," stating that he had not received any ruling on his FRCP 59(e) motion and asking the district court to give him the "current status of his case." Dist. Ct. Doc. 70.

4. On November 6, 2014, Petitioner moved for leave to file a late notice of appeal from the August 11, 2014 judgment. Dist. Ct. Doc. 66. In the motion, Petitioner claimed that the district court clerk and the legal liaison at the facility where he was detained had not been updating him on the status of his case. *Ibid.* The district court denied the motion on November 14, 2014, because it was untimely under Federal Rule of Appellate Procedure ("FRAP") 4(a)(5) and in any event did not show "excusable neglect or good cause." Dist. Ct. Doc. 11/14/14 Text Entry.

5. Two weeks later, on December 1, 2014, Petitioner moved the district court to reconsider based on the same reasons stated in his original motion. Dist. Ct. Doc. 67. The district court denied the motion for the same reasons stated in its prior order. Dist. Ct. Doc. 12/11/14 Text Entry.

6. On December 29, 2014, Petitioner filed a mandamus petition in the Seventh Circuit, asking it to order the district court to allow him to appeal from the August 11, 2014 judgment. 7th Cir. Doc. 1 (No. 14-

3793). A panel of that court denied the petition. 7th Cir. Doc. 4 (No. 14-3793). But that panel ordered the district court to treat Petitioner's October 2014 case status request as a timely notice of appeal from the denial of his FRCP 60(b) motion. *Ibid.* This began the appeal that this brief in opposition refers to as "*Bell I*." 7th Cir. Doc. 1 (No. 15-1036).

7. On April 29, 2016, the Seventh Circuit issued a published opinion in *Bell I*. Pet. App. 32a–39a. In the opinion, the court stated that "[i]t is canonical that an appeal from the denial of a motion under [FRCP] 60(b) does not allow the court of appeals to address the propriety of the original judgment," for doing that "would be equivalent to accepting a jurisdictionally untimely appeal." Pet. App. 35a. Because review by the court of appeals of the denial of a FRCP 60(b) motion is limited, the panel did not disturb the district court's decision to deny Petitioner's FRCP 60(b) motion. Pet. App. 36a–37a.

8. The Seventh Circuit also rejected Petitioner's "excuses for his failure to appeal on time." Pet. App. 36a. On appeal, Petitioner claimed to believe that the time to file a FRCP 59(e) motion or notice of appeal started to run when he *received* the district court's judgment, not when it was *entered*. *Ibid.* The Seventh Circuit observed that "no ambiguity" exists in the rules and there "can be no equitable exceptions to the time for appeal." *Ibid.*

9. But the Seventh Circuit went on to wonder "why" the district court construed Petitioner's untimely FRCP 59(e) motion as a FRCP 60(b) motion instead of

a motion to extend the time for filing a notice of appeal under FRAP 4(a)(5). Pet. App. 37a. The court remanded the case and instructed the district court to "treat the document filed on September 11, 2014, as a request for an extension of time under [FRAP] 4(a)(5)" and decide whether to grant the extension motion. Pet. App. 38a–39a.

10. The Seventh Circuit also invoked 7th Cir. R. ("CR") 57. Pet. App. 38a. That rule authorizes the court to grant a limited remand if a party files a FRCP 60 motion in the district court while an appeal is pending and if the district court indicates that it is inclined to grant the motion. Although neither of those events had occurred, the court relied on CR 57 to grant the district court "permission" to "revisit the judgment" if it so desired. *Ibid.*

11. The Seventh Circuit entered a final judgment in *Bell I* on April 29, 2016. 7th Cir. Doc. 45 (No. 15-1036). On May 6, 2016, Respondents filed an agreed motion requesting an extension of time to file a petition for panel rehearing and rehearing *en banc* in *Bell I*. 7th Cir. Doc. 47 (No. 15-1036). On May 10, 2016, the court entered two orders. In the first, the court, "on its own motion," vacated the final judgment in *Bell I* that was entered on April 29, 2016, as "erroneously issued." 7th Cir. Doc. 48 (No. 15-1036). In the second, the court denied Respondents' extension motion. 7th Cir. Doc. 49 (No. 15-1036). Because the final judgment had been vacated, the court stated that it was "not [yet] possible to seek rehearing." *Ibid.* The court continued:

> If the district court denies an extension of time [for Petitioner to file a notice of appeal], then the appeal will be dismissed. If the district court grants an extension, but declines to issue a [CR] 57 notice, then it will be decided on the merits. Until one of those things happens, the case is pending still pending [*sic*] in this court.

Ibid. Respondents sought reconsideration of the non-final opinion in *Bell I* or *en banc* consideration, but the court denied the motion because the "appeal remain[ed] pending." 7th Cir. Docs. 52, 53 (No. 15-1036).

12. On limited remand to the district court in *Bell I*, Respondents filed a memorandum responding to the Seventh Circuit's opinion, arguing that Petitioner's FRCP 59(e) motion should not be construed as a FRAP 4(a)(5) motion. Dist. Ct. Doc. 89. Alternatively, Respondents argued that the district court should deny relief under FRAP 4(a)(5) because Petitioner's FRCP 59(e) motion contained no statements regarding FRAP 4(a), no intention to file a notice of appeal, no request for additional time to file a notice of appeal, or no excusable neglect or good cause. *Ibid.*

13. Petitioner then filed a memorandum in support of the Seventh Circuit's opinion, urging the district court to construe his FRCP 59(e) motion as a FRAP 4(a)(5) motion as the Seventh Circuit had directed. Dist. Ct. Doc. 93. Petitioner argued that the district court should grant his FRAP 4(a)(5) motion because he could show both "good cause" and "excusable neglect." *Ibid.* First, Petitioner argued that he established "good cause" because he lacked access to the law library, legal

assistance, or the federal procedural rules. *Ibid.* Next, Petitioner argued that he established"excusable neglect" because he misunderstood the federal procedural rules and was confused about the filing deadline. *Ibid.* Petitioner supported his memorandum with an affidavit. Dist. Ct. Doc. 92.

14. On remand, the district court issued an order in *Bell I* on September 6, 2016, denying Petitioner an extension of time to file a notice of appeal. Pet. App. 3a–9a. As in its two prior orders, see Dist. Ct. Docs. 11/14/14 Text Entry, 12/11/14 Text Entry, the district court concluded that Petitioner failed to show excusable neglect or good cause, Pet. App. 4a–7a. The district court noted that it had not initially construed the self-styled FRCP 59(e) motion that Petitioner filed on September 11, 2014, as a FRAP 4(a)(5) motion because the motion did not "hint that [Petitioner] wanted an extension of time" to appeal, did not "address appellate relief in any way," and made "no attempt to show excusable neglect or good cause." Pet. App. 4a, 6a–7a. Instead, it "focused on his attempt to persuade the court that it erred in its Summary Judgment Order." Pet. App. 7a. Even considering the excuses that Petitioner offered "following remand," the district court observed that Petitioner was "not a first-time, inexperienced *pro se* litigant," given that he had filed 25 lawsuits in federal courts. *Ibid.* And the district court pointed out that it had explicitly advised Petitioner about the deadline for an appeal in its summary judgment order. Pet. App. 7a–8a.

15. On September 13, 2016, Petitioner filed a new notice of appeal from the denial of his FRAP 4(a)(5)

motion. Dist. Ct. Doc. 100 ("*Bell II*"). The Seventh Circuit docketed *Bell II* the same day as appeal No. 16-3420. 7th Cir. Doc. 1 (No. 16-3420).

16. On September 14, 2016, the Seventh Circuit issued an order dismissing the *Bell I* appeal for lack of appellate jurisdiction given the district court's decision to deny Petitioner additional time to appeal. Pet. App. 40a–41a. In its order, the Seventh Circuit found that it "did not see any problem in the district court's disposition," particularly because Petitioner's miscalculation of the notice of appeal date was not justified given the "information provided directly by the court." Pet. App. 41a. Thus, Petitioner could not show good cause and his delay in appealing could not be attributed to excusable neglect. *Ibid.* The Seventh Circuit entered a final judgment in *Bell I* that same day. 7th Cir. Doc. 59 (No. 15-1036). Respondents sought rehearing *en banc* in *Bell I* to address the panel's erroneous order to the district court to treat Petitioner's late FRCP 59(e) motion as a motion for extension of time under FRAP 4(a)(5), but the Seventh Circuit denied the petition. 7th Cir. Docs. 62, 65, 69–71 (No. 15-1036).

17. Five days after the *Bell I* dismissal, the Seventh Circuit dismissed *Bell II* for lack of a final appealable order. Pet. App. 1a–2a. The court stated that "procedural matters such as orders under [FRAP] 4(a)(5) are not separately appealable. Instead they are reviewable in the initial appeal." Pet. App. 2a. A final judgment was entered in *Bell II* that same day. 7th Cir. Doc. 2 (No. 16-3420).

REASONS FOR DENYING THE PETITION

In *Bell I*, the Seventh Circuit issued a limited remand pursuant to CR 57, ordering the district court to treat Petitioner's FRCP 59(e) motion as a motion for extension of time to file a notice of appeal under FRAP 4(a)(5), simply because it was filed within 60 days after judgment was entered. Pet. App. 37a–39a. The district court complied and denied the motion because Petitioner did "not hint that he wanted an extension of time to appeal" and did not otherwise show excusable neglect or good cause. See Pet. App. 6a–8a. Rather than asking the Seventh Circuit in *Bell I* for leave to brief whether the denial of the FRAP 4(a)(5) motion was an abuse of discretion, Petitioner filed a duplicative appeal, *Bell II*, which the Seventh Circuit dismissed. Petitioner's request for certiorari is based on that dismissal.

This Court's review of the Seventh Circuit's dismissal of *Bell II* is unwarranted for at least three reasons. First, although Petitioner claims that the Seventh Circuit is in conflict with 12 other circuits, no conflict exists. Contrary to Petitioner's assertion, the Seventh Circuit in *Bell II* did not announce a categorical rule that the denial of a FRAP 4(a)(5) motion is never separately appealable. It merely stated that when a prior appeal in a case still is pending, the propriety of the denial may be addressed in that already live appeal rather than by filing a second, duplicative one. Indeed, in its published decisions, the Seventh Circuit has treated the denial of a FRAP 4(a)(5) motion as a final and separately appealable order. To the extent that there is tension between the Seventh Circuit's published

and unpublished decisions, that intramural conflict does not merit this Court's attention.

Second, even if there was error in *Bell II*, the unique circumstances of this case caution against this Court's intervention. Petitioner could have sought leave from the Seventh Circuit in *Bell I* to brief the district court's denial of his FRAP 4(a)(5) motion or asked for rehearing once the Seventh Circuit issued its *Bell I* order. Instead, Petitioner brought an unnecessary, duplicative appeal, *Bell II*, creating an unusual sequence of events that is unlikely to be repeated. Moreover, because the Seventh Circuit concluded in *Bell I* that the district court did not abuse its discretion in denying Petitioner's FRAP 4(a)(5) motion, that decision is law of the case, meaning that a reversal by this Court in *Bell II* would not change the result on remand. In short, granting the petition would amount to error correction in a case featuring rare circumstances that are not likely to recur—and in which the Seventh Circuit already has concluded that Petitioner is not entitled to relief no matter how the question presented is resolved.

Third, Petitioner's case presents a poor vehicle for review because it would require this Court to correct an antecedent legal error. In its published decision in *Bell I*, the Seventh Circuit departed from its own published precedent and the precedent of 10 other circuits by ordering the district court to construe Petitioner's FRCP 59(e) motion as a motion for an extension of time to file a notice of appeal under FRAP 4(a)(5). If it granted certiorari, this Court would first need to resolve whether that practice was proper before it could

consider the question presented by Petitioner. And because the Seventh Circuit's order in *Bell I* was erroneous, this Court likely would never reach that question. Accordingly, this Court should await a more suitable vehicle to resolve any conflict that may arise on the question presented here.

I. The Seventh Circuit's published decisions do not conflict with those of other circuits on the question presented.

The 12-to-1 circuit split that Petitioner identifies is nonexistent because there is no conflict among the circuits concerning whether the denial of a FRAP 4(a)(5) motion is separately appealable as a final order as defined by 28 U.S.C. § 1291. The Seventh Circuit did not announce a contrary rule in *Bell II*. Instead, the court simply stated that where there already was an appeal pending in which the denial of the FRAP 4(a)(5) motion could be addressed, it was unnecessary to file a second appeal from that denial. Petitioner arrives at the conclusion that the Seventh Circuit announced a categorical rule by misreading its opinion. While the court did state that denials of FRAP 4(a)(5) motions "are not separately appealable," in the very next sentence it explained that such denials "are reviewable in the initial appeal." Pet. App. 2a.

This reading of the decision below both acknowledges the context in which the *Bell II* dismissal was entered and reconciles that dismissal with the Seventh Circuit's prior, published precedent. In two published orders, the Seventh Circuit has allowed an appellant to appeal directly from the denial of his FRAP

4(a)(5) motion and has thus implicitly recognized that the denial of a FRAP 4(a)(5) motion can be a separately appealable order under 28 U.S.C. § 1291. See *Reinsurance Co. of Am. v. Administratia Asigurarilor de State*, 808 F.2d 1249 (7th Cir. 1987) (allowing appeal from denial of FRAP 4(a)(5) motion); *Labuguen v. Carlin*, 792 F.2d 708, 709–10 (7th Cir. 1986) (allowing appellant to file separate notice of appeal from denial of FRAP 4(a)(5) motion). The Seventh Circuit also has allowed a cross-appellant to file a notice of appeal to contest whether a FRAP 4(a)(5) motion was properly granted. See *Sherman v. Quinn*, 668 F.3d 421 (7th Cir. 2012).

Ten[1] other circuits also treat denials of FRAP 4(a)(5) motions as separately appealable. See *Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 232 n.4 (1st Cir. 2007); *In re Orbitec Corp.*, 520 F.2d 358, 360 (2d Cir. 1975); *In re Diet Drugs Prod. Liab. Litig.*, 401 F.3d 143, 153 (3d Cir. 2005); *Rodriguez v. VIA Metro. Transit Sys.*, 802 F.2d 126, 132 (5th Cir. 1986); *Flowers v. Gen. Motors Corp.*, 860 F.2d 1078 (6th Cir. 1988); *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 428 (8th Cir. 1990); *Diamond v. U.S. Dist. Court for Cent. Dist. of Cal.*, 661 F.2d 1198 (9th Cir. 1981); *Bishop v.*

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[1] Two other circuits have treated denials of FRAP 4(a)(5) motions as separately appealable orders but in unpublished decisions. See *Donovan v. Potter*, 356 Fed. App'x 634, 635 (4th Cir. 2009) (per curiam); *Fastov v. Christie's Int'l PLC*, 222 Fed. App'x 4, 5 (D.C. Cir. 2007).

Corsentino, 371 F.3d 1203 (10th Cir. 2004); *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 997 (11th Cir. 1997); *Two-Way Media LLC v. AT&T Inc.*, 782 F.3d 1311, 1314 (Fed. Cir. 2015).

Despite the Seventh Circuit's precedential decisions in this area, Petitioner contends that the court created a circuit split through its unpublished orders in *Bell II* and *Cooper v. IBM Personal Pension Plan & IBM Corp.*, 163 Fed. App'x 424 (7th Cir. 2006). But even if the decisions in *Bell II* and *Cooper* describe denials of FRAP 4(a)(5) motions as never separately appealable, those decisions are unpublished and non-precedential, and thus do not supersede the Seventh Circuit's published case law. See *Reinsurance Co. of Am.*, 808 F.2d at 1249; *Labuguen*, 792 F.2d at 709–10. Any intra-circuit conflict between the Seventh Circuit's published and unpublished decisions should be addressed by that court on rehearing *en banc*, not by this Court on certiorari.

II. The circumstances of Petitioner's case are unique, and reversal on the question presented would not change the outcome.

The procedural history of Petitioner's case is idiosyncratic and factbound. Counsel for Respondents found no other case where a court of appeals ordered a district court to construe a FRCP 59(e) motion as an implicit motion for an extension of time to file a notice of appeal under FRAP 4(a)(5) while retaining appellate jurisdiction and granting a limited remand to the district court under a circuit court, as happened in *Bell I*. The sequence of events in this case became stranger still after the district court denied Petitioner's FRAP

4(a)(5) motion, which prompted Petitioner to file a second appeal to contest the denial of the motion (*Bell II*). Meanwhile, the appellate court considered the district court's order denying the FRAP 4(a)(5) motion and affirmed in *Bell I*, only to turn around and dismiss the *Bell II* appeal for want of jurisdiction. It is highly unlikely that this series of procedural twists and turns would ever be repeated, meaning that this Court's review would be a waste of resources.

Indeed, this Court's review is unnecessary because Petitioner could have sought review in the Seventh Circuit of the question he now presents, but failed to do so. When the Seventh Circuit remanded *Bell I* for the district court to treat the FRCP 59(e) motion as a FRAP 4(a)(5) motion for extension of time, it retained jurisdiction under CR 57. Thus, Petitioner had a live appeal, *Bell I*, available to him to challenge the district court's denial of his FRAP 4(a)(5) motion. He could have asked the Seventh Circuit for leave to brief whether the district court abused its discretion in denying his motion under FRAP 4(a)(5) or sought rehearing after the Seventh Circuit dismissed *Bell I*. But he did neither of these things. Instead, he filed a duplicative appeal (*Bell II*). Dismissal of that appeal is consistent with the long-standing principle against duplicative appeals. See *Lottie v. W. Am. Ins. Co. of Ohio Cas. Grp. of Ins. Cos.*, 408 F.3d 935, 940 (7th Cir. 2005) ("To avoid time-consuming duplicative appeals, the norm in litigation one appeal per case.").

Moreover, even if it was error for the Seventh Circuit to dismiss *Bell II*, reversal on that issue would not change the result in this case because that court

already has rejected the argument that Petitioner showed excusable neglect or good cause, and that decision is law of the case.

Indeed, in *Bell I*, after being ordered to treat Petitioner's motion as one for an extension of time to file a notice of appeal under FRAP 4(a)(5), the district court denied the motion because it did not "hint that [Petitioner] wanted an extension of time" to appeal, and did not make any "attempt to show excusable neglect or good cause." Pet. App. 4a–6a. The district court pointed out that Petitioner was an experienced litigant and that it had explicitly advised him about the deadline for filing an appeal in its summary judgment order. Pet. App. 7a–8a. Reviewing that order in light of the highly deferential standard of review for denials of motions for extension of time under FRAP 4(a)(5), the Seventh Circuit "did not see any problem in the district court's disposition." Pet. App. 40a–41a. The Seventh Circuit determined that because the district court had directly provided information about the filing date for the notice of appeal, any miscalculation in filing the notice of appeal was unjustified, and so there could be no excusable neglect or good cause. Pet. App. 41a. Thus, in *Bell I*, the Seventh Circuit resolved whether the district court's denial of the FRAP 4(a)(5) motion was an abuse of that court's discretion. That determination would be given law-of-the-case effect on remand by the Seventh Circuit in *Bell II*, a subsequent appeal. See *Musacchio v. U.S.*, 136 S. Ct. 709, 716 (2016) (citing Wright, et al., 18B FED. PRACTICE & PROC. § 4478, p. 646 & n. 16 (2d ed. 2002)).

In sum, Petitioner seeks error correction in a highly factbound procedural setting—and even if the asserted error were corrected, the Seventh Circuit already has determined that Petitioner is not eligible for relief. Such circumstances do not warrant certiorari.

III. This case is a poor vehicle to address the question presented because it would require this Court to correct an antecedent legal error committed by the Seventh Circuit.

If this Court were to grant review of the question presented by Petitioner, it would first need to answer an antecedent legal question—whether a district court must treat *any* document filed within 60 days after judgment is entered as a motion for extension of time to file a notice of appeal under FRAP 4(a)(5), even if that document does not manifest an intention to appeal, seek additional time to appeal, or allege excusable neglect or good cause. In this case, the Seventh Circuit erred by departing from its settled practice of declining to construe documents as implicit motions for extensions of time, see *United States ex rel. v. O'Leary*, 788 F.2d 1238, 1240 (7th Cir. 1986), and ordered the district court to consider Petitioner's FRCP 59(e) motion in *Bell I* as a motion for extension of time to file a notice of appeal under FRAP 4(a)(5). Pet. App. 37a–39a. This Court's correction of that underlying error would obviate the need to answer the question presented by Petitioner.

While district courts have the "authority to grant an extension of the 30-day" period to appeal, that authority

is "limited." *Bowles v. Russell*, 551 U.S. 205, 208 (2007). Indeed, a district court may grant an extension of time to file a notice of appeal only "*if* certain conditions are met." *Id.* (emphasis added). Those conditions are codified in 28 U.S.C. § 2107(c) and incorporated into FRAP 4(a)(5).

FRAP 4(a)(5) provides:

> (A) The district court may extend the time to file a notice of appeal if:
>
> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
>
> (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
>
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
>
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

Fed. R. App. P. 4(a)(5).

For more than 30 years, several circuits, including the Seventh Circuit, have read FRAP 4(a)(5)'s plain

language to mean that a district court may grant an extension of time to file a notice of appeal only when a party (1) files a "motion"; (2) does so "no later than 30 days after" the initial 30 days to appeal under FRAP 4(a)(1)(A) has expired; and (3) "shows excusable neglect or good cause."[2] Simply put, there can be no implicit request for an extension of time to appeal.

The Seventh Circuit first adopted this interpretation of FRAP 4(a)(5) in *Leonard*, see 788 F.2d at 1240, when it held that a belated notice of appeal could not be treated as a timely motion for an extension of time because it did not allege excusable neglect or good cause. All 10 of the other regional courts of appeals have interpreted FRAP 4(a)(5)'s language the same way. See *Wyzik v. Emp. Benefit Plan of Crane Co.*, 663 F.2d 348, 348 (1st Cir. 1981) ("tardy notice of appeal" cannot be treated as "substantial equivalent" of FRAP 4(a)(5) motion); *Campos v. LeFevre*, 825 F.2d 671, 673, 675–76 (2d Cir. 1987) (filing may be treated as "substantial equivalent" of a FRAP 4(a)(5) motion only if it can "fairly be read as a request to the district court to exercise its discretionary powers to permit a late appeal"); *Herman v. Guardian Life Ins. Co. of Am.*, 762 F.2d 288, 289–90 (3d Cir. 1985) ("tardy notice of

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[2] After *Bowles*, 551 U.S. at 209, these requirements may be viewed as jurisdictional. See *Blue v. Int'l Broth. of Elec. Workers Local 159*, 676 F.3d 579, 583 (7th Cir. 2012); *Prizevoits v. Ind. Bell Tele. Co.*, 76 F.3d 132, 134 (7th Cir. 1996); see also Wright, et al., 16A FED. PRAC. & PROC. JURIS. § 3950.3 (4th ed. 2016).

appeal" not "substantial equivalent" of FRAP 4(a)(5) motion; 1979 amendment "drastically altered a flexible application of [that] Rule"); *Shah v. Hutto*, 722 F.2d 1167, 1169 (4th Cir. 1983) (*en banc*) ("bare notice of appeal" cannot be treated as FRAP 4(a)(5) motion "where no request for additional time is manifest"); *Bond v. W. Auto Supply Co.*, 654 F.2d 302, 303 (5th Cir. 1981) (FRAP 4(a)(5) "now expressly requires that an actual motion for an extension of time be filed"); *Pryor v. Marshall*, 711 F.2d 63, 64–65 (6th Cir. 1983) (after 1979 amendment, "[a] late notice of appeal which fails to allege excusable neglect or good cause can no longer serve as a substitute" for FRAP 4(a)(5) motion); *Campbell v. White*, 721 F.2d 644, 646 (8th Cir. 1983) ("[w]e are aware that before 1979 any kind of filing might be treated as a motion for extension and excusable neglect might be established" later, but the 1979 "amendment to [FRAP] 4(a)(5) requires that this practice be no longer followed"); *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949, 956 (9th Cir. 2010) ("agree[ing] with all the other circuits that have ruled on the issue" that "we cannot construe a notice of appeal as a motion for extension of time under [FRAP] 4(a)(5)"); *Mayfield v. U.S. Parole Comm'n*, 647 F.2d 1053, 1055 (10th Cir. 1981) (FRAP 4(a)(5) "makes clear that in a civil case a request for an extension must be made by motion" that shows excusable neglect or good cause; that showing cannot be made "long after the fact"); *Brooks v. Britton*, 669 F.2d 665, 666–67 (11th Cir. 1982) ("[o]ne of the primary purposes of the 1979 amendment was to remove the possibility of an 'informal application' for extension of time" under FRAP 4(a)(5)); see also Wright, et al., 16A

FED. PRAC. & PROC. JURIS. § 3950.3 (4th ed. 2016) (after 1979 amendment to FRAP 4(a)(5), court may "construe liberally a *pro se* litigant's request for an extension, *so long as* it seeks to invoke the district court's discretion to extend the appeal deadline" (emphasis added)).

More recently, a panel of the Ninth Circuit decided that a motion filed in the district court seeking a certificate of appealability could not be construed as a FRAP 4(a)(5) motion because it did not "indicate that it was intended to serve as a motion for an extension of time." *Washington v. Ryan*, 789 F.3d 1041, 1045 (9th Cir. 2015), *superseded (but not vacated) on reh'g en banc*, 811 F.3d 299 (9th Cir. 2015). Later, the Ninth Circuit sitting *en banc* issued a superseding opinion resolving the case on another ground. See *Washington v. Ryan*, 833 F.3d 1087, 1091–92, 1101–02 (9th Cir. 2016), *cert. denied* Apr. 17, 2017, No. 16-840. But the *en banc* opinion did reiterate that a filing can be treated as a FRAP 4(a)(5) motion only if it "'may fairly be read as a request to the district court to . . . permit a late appeal.'" *Id.* at 1101 (quoting *Campos*, 825 F.2d at 676).

This Court has held that when a document filed within the prescribed time is the functional equivalent of a FRAP 4(a)(5) motion, the district court may construe it as one. See *Smith v. Barry*, 502 U.S. 244, 248–49 (1992) (filings by *pro se* litigants should be liberally construed). But as most circuits—including the Seventh Circuit until *Bell I*—have held, district courts lack authority under FRAP 4(a)(5)'s plain language to grant implicit extension motions, even in *pro se* cases. See, e.g., *Senjuro v. Murray*, 943 F.2d 36,

36–37 & n.2 (10th Cir. 1991) (*pro se* litigant's letter not treated as FRAP 4(a)(5) motion; it "merely indicate[d]" a "desire to appeal," and so "no request for additional time [was] manifest"); *Malone v. Avenenti*, 850 F.2d 569, 572 (9th Cir. 1988) (*pro se* litigant's letter not viewed as FRAP 4(a)(5) motion; it "did not explicitly request an extension, but merely "inquired about the availability of an appeal").

In ordering the district court to consider Petitioner's FRCP 59(e) motion as an implicit motion for an extension of time to appeal, the Seventh Circuit departed from its own interpretation of FRAP 4(a)(5) as well as that of nearly every other circuit. If this Court were to grant certiorari, it would confront the question whether it was error for the Seventh Circuit to order the district court to treat as a motion for extension of time a document that (1) was not a motion under FRAP 4(a)(5), (2) did not request an extension of time to file an appeal, and (3) did not show excusable neglect or good cause. Were the Court to conclude that the Seventh Circuit erred in this respect, it would never reach the question presented by Petitioner. Indeed, if this Court were to so conclude, there never should have been a limited remand by the Seventh Circuit to the district court, a ruling by the district court on whether to grant an extension of time to appeal, or a second appeal.

In short, even if there were a split of published authority on the question presented, the Court would be well advised to await a more appropriate vehicle for addressing it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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