No. 07-

IN THE

Supreme Court of the United States

INTERNATIONAL RECTIFIER CORPORATION,

Petitioner,

v.

IXYS CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit erred in exercising jurisdiction over a civil appeal even though the notice of appeal was not filed until 46 days after entry of the judgment, basing its jurisdiction instead on a routine post-judgment motion asking the district court to stay enforcement of the judgment?

PARTIES TO THE PROCEEDING

Petitioner International Rectifier Corporation ("IR") was the plaintiff in the district court and an appellee or cross-appellant in the proceedings on appeal.

Respondent IXYS Corporation ("Ixys") was the defendant in the district court and appellant in the appeal proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, International Rectifier Corporation has no parent corporation, and no publicly listed company holds more than 10% of IR's stock.

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Cited Authorities

OPINIONS BELOW

Judgment in the Central District of California was entered September 14, 2006. The district court's order denying Ixys's motion for an extension of time to file its notice of appeal was entered on December 8, 2006. (App.18a-35a.) Ixys abandoned its appeal of this order. On February 11, 2008, the Court of Appeals for the Federal Circuit entered its opinion and judgment reversing the September 14, 2006 judgment. (App. 1a-17a.) That decision was published at *International Rectifier Corp. v. Ixys Corp.*, 515 F.3d 1353 (Fed. Cir. 2008).

JURISDICTION

The Federal Circuit entered its opinion and judgment now sought to be reviewed on February 11, 2008. The Federal Circuit's order denying IR's petition for rehearing *en banc* was issued on April 4, 2008. (App. 36a-37a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2107 is quoted at Appendix page 38a. The pertinent provisions of Rules 3 and 4 of the Federal Rules of Appellate Procedure are set forth at Appendix pages 39a-43a.

STATEMENT OF THE CASE

This petition lies from the Federal Circuit's wrongful exercise of jurisdiction over Ixys's untimely appeal from an adverse judgment of patent infringement.

IR filed this lawsuit in June 2000, averring that certain of Ixys's specialized transistor products infringe particular claims of three of IR's patents. Jurisdiction was based on 28 U.S.C. §§ 1331 (jurisdiction over claims arising under federal law) and 1338(a) (jurisdiction over claims of patent infringement). In 2001, the district court found as a matter of law that Ixys infringed IR's patents and awarded summary judgment of infringement in favor of IR and against Ixys. At the damages trial in 2002, the jury found that Ixys willfully infringed IR's patents, and judgment was entered awarding damages of approximately $29 million. On appeal, the Federal Circuit construed the claims *de novo*, found that Ixys could not have literally infringed the patents based on the new constructions, reversed the judgment and remanded for a new trial on liability and damages.

On remand, a jury found that Ixys had infringed one of the asserted patents under the doctrine of equivalents and awarded IR damages of $6.241 million for Ixys's past infringement. Judgment, including a permanent injunction against further infringement, was entered on September 14, 2006.

Ixys did not file a notice of appeal during the subsequent 30-day period for doing so. Indeed, Ixys filed no papers during that period except those related to a routine motion asking the district court to stay

enforcement of the judgment, which the district court denied by order entered November 14, 2006. Ixys did not submit a notice of appeal until October 30, 2006 – 46 days after entry of the judgment.

Concurrently with its notice of appeal, Ixys filed a motion under Rule 4(a)(5) of the Federal Rules of Appellate Procedure for an extension of time in which to file its notice of appeal. The district court denied that motion by order entered December 8, 2006. (App. 18a-35a.) In its order, the district court found that Ixys had neither good cause nor excusable neglect entitling Ixys to relief from its failure to file its notice of appeal. Rather, *the court found that Ixys's delay in filing its notice* "was at least in part strategic rather than merely neglectful." (App. 33a, ¶26.)

Although Ixys timely appealed that denial, it did not challenge that ruling in its opening brief, and the Federal Circuit did not review or discuss the district court's December 8, 2006 order.

After Ixys moved the Federal Circuit for a stay of the permanent injunction, a motions panel, in a January 18, 2007 order denying Ixys's motion in that court to stay enforcement of the judgment, concluded that the Federal Circuit would "likely" have jurisdiction because the relevant regional circuit (the Ninth Circuit) would view Ixys's motion to stay filed in the district court as equivalent to a notice of appeal. In its principal brief, IR demonstrated that the motion panel's interim ruling on jurisdiction was wrong because it contravened the plain language of Appellate Rule 3, Supreme Court authority and the law of the other Circuit Courts of

Appeals, including the Ninth and Tenth Circuits, both of which had refused to construe a motion to stay as a notice of appeal.

In an opinion dated February 11, 2008, the Federal Circuit reversed field on the choice-of-law issue and held that Federal Circuit and not regional circuit law would be applied to the jurisdictional question. Thus unconstrained by contrary Ninth Circuit precedent, the Federal Circuit relied on a single line from *Smith v. Barry*, 502 U.S. 244 (1992), to construe Ixys's motion to stay as a notice of appeal: "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." (App. 6a.)

Citing contrary opinions of this Court and the other Circuits, IR petitioned the Federal Circuit for *en banc* review. After ordering Ixys to respond, the Federal Circuit then denied without comment IR's petition by order dated April 4, 2008.

REASONS FOR GRANTING THE PETITION

A fundamental issue, relevant to all circuit courts of appeals, arises when an appellant in a civil case fails to file a timely notice of appeal. In such cases, the rule adopted by the Federal Circuit permits an appellate court to manufacture its own jurisdiction, in derogation of the controlling statutes and rules as well as the decisions of this Court and those of the other circuits. This ruling creates an issue of significance far beyond this case because it directly impacts all civil litigants in federal courts, ensures idiosyncratic determinations of appellate jurisdiction, and repudiates a century's worth of practice and precedent in federal courts.

Applicable statutes and rules condition the exercise of appellate jurisdiction to hear civil appeals on the timely filing of a notice of appeal – a document that puts the district court, the appellate court and the parties on notice that the appellant is invoking the jurisdiction of the appellate court, and specifying the identity of any appellants, the judgment or order that is the subject of the appeal, and the particular appellate court whose jurisdiction is being invoked. While courts may exercise some liberality in construing the sufficiency of such notices to prevent unfairness, particularly to *pro se* prisoners or where liberty is otherwise at stake, this Court's precedents confirm that such liberality cannot excuse the failure to file a timely notice of appeal.

The Federal Circuit's ruling in this case crosses that line. Based on an out-of-context sentence from *Smith v. Barry*, the court of appeals converted Ixys's routine post-judgment motion asking the district court to stay enforcement of the judgment into a notice of appeal based only on the statement in the motion that Ixys intended *in the future* to invoke the appellate jurisdiction of the Federal Circuit. As discussed in Section I below, however, that rationale ignores the fundamental quality of a notice of appeal – it must notify the courts and other parties that the jurisdiction of the appellate court is *then* being invoked, not merely that the party filing the document is unhappy with the judgment and might later take an appeal. This is particularly true of a post-trial motion to the district court, which necessarily invokes the jurisdiction of the district court and not that of the appellate court.

The Federal Circuit's ruling is also inconsistent with this Court's precedents, which dictate that although Rule 3 may be read liberally, an overly broad reading results in non-compliance with the rules and is tantamount to an impermissible time extension for filing a notice of appeal. Although this Court has endorsed the limited practice of construing another document as the functional equivalent of a notice of appeal, the situations where it has done so have been very narrow. For example, the case containing the sentence quoted by the Federal Circuit, *Smith v. Barry*, merely held that a *pro se* prisoner had substantially complied with the applicable rules when he filed a premature notice of appeal followed by an appeal brief within the time for noticing the appeal. Indeed, lower-court cases applying the so called functional-equivalent doctrine have typically done so where a notice of appeal, albeit a defective one, had been filed, or at the very least where the substitute notice purported to invoke (or assumed the earlier invocation of) the appellate court's jurisdiction.

Moreover, as discussed in Section II below, the Federal Circuit also created a split with the Ninth and Tenth Circuits, both of which have held that a motion to stay is not a notice of appeal, and the Ninth and Fifth Circuits, which reject the approach that a counseled party (like Ixys) in a non-*habeas* civil case who could have timely noticed its appeal but failed to do so can be rescued by the functional-equivalent doctrine. The Fifth Circuit cautions that a practice such as the one adopted by the Federal Circuit eviscerates the rules proscribing jurisdiction.

The Federal Circuit's willingness to excuse outright non-compliance with the rules sets a dangerous precedent. First and foremost, its published opinion creates confusion and ambiguity where jurisdictional rules must be clear-cut. It ensures that appellate jurisdiction will be randomly and disparately exercised, in stark contrast to the uniform national law intended by Congress when it enacted a statute of general applicability mandating the timely filing of a notice of appeal. Ironically, the Federal Circuit's generosity – which goes well beyond that previously afforded *pro se* prisoners – benefits exactly the parties who need it the least: counseled patent litigants. Moreover, the Federal Circuit's wide-open standard will permit virtually any post-judgment motion to the district court to retroactively qualify as a notice of appeal whenever (as in most cases) the motion has been filed within 30 days of the judgment. Its effect in practice thus will be to nullify the mandatory and jurisdictional nature of a notice of appeal.

Guidance from this Court is urgently needed to prevent the above, which if left uncorrected will efface the boundaries of appellate jurisdiction. *Certiorari* should be granted so that this Court can clarify its holding in *Smith*, restore the requirement of a meaningful notice of appeal, and ensure nationwide uniformity in the proper interpretation and application of the federal rules and statutes governing appellate jurisdiction. *U.S. v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958) (granting *certiorari* because of need for uniformity of federal rules "governing the time within which appeals may be taken from judgments of District Courts in actions for money only tried without a jury").

I. The Federal Circuit's Ruling Eviscerates The Statutes And Rules Defining Appellate Jurisdiction And Is Inconsistent With This Court's Decisions.

A. As A Practical Matter, The Federal Circuit's Ruling Nullifies The Applicable Statutes And Rules Governing Notices Of Appeal.

Congress has limited the exercise of appellate jurisdiction in civil cases to those cases where a notice of appeal is filed within 30 days of entry of the judgment to be reviewed, unless the federal government is a party or the district court extends the time based on a showing of excusable neglect or good cause. 28 U.S.C. § 2107. The purpose of a notice of appeal is

> to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.

Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978). "The filing of a notice of appeal is an event of jurisdictional significance-it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

This statutory mandate is implemented by Rules 3 and 4 of the Federal Rules of Appellate Procedure, which together constitute "a single jurisdictional threshold." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). Rule 3 provides that an appeal may be taken "only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Fed. R. App. P. 3(a)(1). Rule 4, in turn, provides that the notice of appeal in a civil case "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). Non-compliance with these rules deprives the appellate court of jurisdiction. *Bowles v. Russell*, 551 U.S. __, 127 S. Ct. 2360, 2364 (2007), *citing Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883).

As noted above, there is a statutory exception to the 30-day requirement that Ixys sought to take advantage of below – a "district court may . . . extend the time for appeal upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c); *see also* Fed. R. App. P. 4(a)(5). In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), this Court established a four-factor test to guide district court discretion in deciding such motions. Consistent with the *Pioneer* holding, and in accordance with the procedures established by the relevant regional circuit, *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (*en banc*), the district court weighed the relevant factors and concluded that Ixys had not established the requisite grounds for an extension of time to notice its appeal. (App. 18a-35a.)

Although Ixys timely appealed that order, it did not challenge the district court's ruling in any of its briefing on appeal, and the Federal Circuit never reviewed the district court's discretionary decision to deny the requested extension. Under the foregoing authorities, that should have resulted in the dismissal of Ixys's appeal for want of jurisdiction.

Yet, the Federal Circuit did not dismiss the appeal, and instead exercised its jurisdiction to reverse the judgment. The Federal Circuit based this exercise of jurisdiction on Ixys's motion for stay filed in the district court, which it treated as a notice of appeal because the Federal Circuit (wrongly) concluded that it contained the three pieces of information specified by Rule 3(c)(1): a specification of the party or party supposedly "taking the appeal" (Fed. R. App. P. 3(c)(1)(A) – in this case the moving party, Ixys); a designation of the judgment "being appealed" from (Fed. R. App. P. 3(c)(1)(B) – in this case the judgment that was the subject of the stay motion); and the name of "the court to which the appeal is taken" (Fed. R. App. P. 3(c)(1)(C) – in this case the Federal Circuit). (App 6a.) To the Federal Circuit, that was the beginning and end of the analysis – if a document filed within 30 days of a judgment contains those three bits of information, then the appellate court has jurisdiction despite the lateness or absence of an actual notice of appeal. (App 6a-7a.)

The Federal Circuit got the requirements exactly backwards. Rule 3(c)(1) states that a "notice of appeal must" contain the specified information, not that any arbitrary document that contains the specified information is necessarily a notice of appeal. To the

contrary, as discussed above, a notice of appeal is exactly that – a document that provides notice to the courts and to the other parties that the jurisdiction of the appellate court is *then* being invoked – not that such jurisdiction might be invoked at some point in the future. *Thomas v. Morton Int'l*, 916 F.2d 39, 40 (1st Cir. 1990) (*per curiam*) (a motion for extension of time in which to notice an appeal "in no way purported to place the court and opposing party on notice that he was at that time appealing. . . . To treat such a request for extra time as the notice itself would be to render the notice requirement meaningless");[1] *Barrett v. U.S.*, 105 F.3d 793, 795-96 (2d Cir. 1997) (a constructive notice of appeal must "accomplish the dual objectives of (1) notifying the court and (2) notifying opposing counsel of the taking of an appeal"), *quoting Van Wyk El Paso Inv., Inc. v. Dollar Rent-A-Car Sys.*, 719 F.2d 806, 807 (5th Cir. 1983) (*per curiam*). Wright & Miller's synthesis of the relevant

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1. Although *Thomas* came before *Smith v. Barry*, many post-*Smith* courts continue to follow this rationale in finding that motions asking the district court for extensions of time in which to perfect an appeal do not qualify as notices of appeal, at least outside of the *pro se* prisoner context. *See, e.g., Isert v. Ford Motor Co.*, 461 F.3d 756, 761 (6th Cir. 2006) (motion for an extension of time not a constructive notice of appeal because it "does not give notice, but conveys only ambivalence, about whether they wish to appeal at all"); *Harris v. Ballard*, 158 F.3d 1164, 1166 (11th Cir. 1998) (motion for extension of time not a constructive notice because it "indicates uncertainty as to whether the party will in fact appeal and compels the conclusion that the notice of appeal is something yet to be filed"), *distinguished by Rinaldo v. Corbett*, 256 F.3d 1276, 1279 (11th Cir. 2001) (construing *pro se* prisoner's motion for time extension as notice of appeal because he "stated unequivocally that he did intend to appeal").

cases also confirms that a substantial equivalent to a notice of appeal must provide notice of a present appeal:

> [I]f a party has failed to abide by the simple requirement of filing a notice of appeal with the clerk, an effective substitute demands some sort of paper or entry on the written record that might reasonably be construed as a notice of appeal and that in fact gives adequate notice to the courts and the other parties as to the appeal from a particular judgment.

16A C. Wright, A. Miller & E. Cooper, Fed. Prac. & Proc. § 3949.6 pp. 86-90 (3d ed. 1999).

Such notice of a *present* appeal was distinctly *not* provided by the post-judgment motion relied on by the Federal Circuit in this case, which sought relief from the district court, did not reflect the invocation or existence of a present appeal, and merely referred to a contemplated *future* appeal. *See U.S. v. Little*, 392 F.3d 671, 681 (4th Cir. 2004) (letter not constructive notice of appeal where "[t]he entire purpose of Little's letter was to request that the *district court* take action") (emphasis in original).

Indeed, the requirement of a *present* appeal – not a possible future one – is inherent in the language of Rule 3(c)(1), which requires the notice to specify the party "taking the appeal" (not, as found sufficient by the Federal Circuit, the party filing a district-court motion and who may later take an appeal); the judgment "being appealed" from (not, as found sufficient by the Federal Circuit, the judgment that would be the subject of a

possible later appeal); and the name of "the court to which the appeal is taken" (not, as found sufficient by the Federal Circuit, the court to which the appeal might later be taken).

It is also noteworthy that the Federal Circuit's rationale has the practical effect of permitting virtually every post-judgment motion to create appellate jurisdiction, for every such motion will identify the party filing it and the judgment contended to be erroneous, and virtually all such motions will also refer to the appropriate appellate court whose decisions are contended to be inconsistent with the judgment. Thus, as a practical matter, the statutory requirement of a notice of appeal shall cease to exist in any civil case where the loser happens to file a post-judgment motion.

For these reasons, the expansive rule advanced by the Federal Circuit is at war with the language of the controlling statutes and rules. Yet none of that language was analyzed by the Federal Circuit, which instead based its far-reaching result on a single out-of-context sentence from *Smith v. Barry*. As discussed below, however, neither *Smith v. Barry* nor any of the cases following it supports the Federal Circuit's ruling.

B. The Federal Circuit's Ruling Is Not Supported By This Court's Ruling In *Smith v. Barry* Or By This Court's Other Decisions.

Smith v. Barry is a relatively recent case in a line of cases where this Court has found appellate jurisdiction based on substantial compliance with Rules 3 and 4. As discussed in more detail below, where the appellant is *pro se* and/or where liberty interests are at stake, appellate courts have exercised jurisdiction following substantial though imperfect compliance due to some technical deficiency in the notice of appeal.

An early decision enunciating this so-called functional-equivalent doctrine notes that it is based on the "liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal." *Coppedge v. U.S.*, 369 U.S. 438, 444 n.5 (1962). In support of that statement, Chief Justice Warren cited numerous opinions in which courts had construed other documents filed by such appellants as notices of appeal. *Id.* In these cases, the appellant filed a premature or otherwise non-compliant notice of appeal, or filed an appeal-related document directly in the appellate court.[2] As such documents invoke the appellate court's jurisdiction (or are at least part of the appellate process), they thus clearly reflect the present "taking" of an appeal.

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2. In one instance cited by the Court, the appellant filed a motion in the district court to waive the appeal filing fee and proceed *in forma pauperis*.

Two years later, the Court applied the functional-equivalent doctrine to a letter to the sentencing court written by a *pro se* prisoner (who was also paraplegic and hospitalized) whom the government prevented from obtaining counsel. *Fallen v. U.S.*, 378 U.S. 139 (1964), *superseded by statute on other grounds as stated in Carlisle v. U.S.*, 517 U.S. 416 (1996). The Court highlighted the circumstances that determined its ruling: that the sentencing judge promised to provide appellate counsel, as required by the rules, but failed to do so; that the prisoner was "whisked away from the place of trial . . . [and] not permitted to have visitors, nor afforded the opportunity to secure another attorney . . . and . . . confined in a hospital both in Jacksonville and in Atlanta"; and that, as soon as he was released from the hospital, he wrote and promptly mailed two letters to the district court asking for both a new trial and an appeal. *Id.* at 142-43. Because the petitioner "did all he could under the circumstances," the Court declined "to read the Rules so rigidly as to bar a determination of his appeal on the merits." *Id.* at 144.

In another early case, the Court applied the functional-equivalent doctrine outside the prisoner context and found the jurisdictional mandate satisfied where the appellant had filed two notices of appeal (one after the judgment and a second after the denial of post-trial motion) as well as interim appellate papers. *Foman v. Davis*, 371 U.S. 178 (1962). Even if (under the then-applicable version of Rule 4) the first notice had been rendered ineffective by the post-judgment motion, the Court reasoned that collectively the documents should have been treated as an effective, albeit technically

flawed, notice of appeal of the underlying judgment as well as of the denial of the post-judgment motion:

> Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. . . . It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.

Id. at 181.

Following these decisions, Appellate Rules 3 and 4 were adopted in 1967. The Advisory Committee noted at the time that although the timely filing of a notice of appeal is jurisdictional and mandatory, and that "compliance with the provisions of these rules is of the utmost importance," certain decisions "which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules." The cited illustrative decisions all involve prisoners acting without counsel, including *Fallen*, *Coppedge* and its list of cases cited in support of its "liberal view" shown to "indigent and incarcerated defendants." Fed. R. App. P. 3 Advisory Committee Notes 1967 Adoption.

When the Rules were amended in 1979, a line was added to Rule 3(c) to give recognition to the court practice of construing documents as functional equivalents: "An appeal shall not be dismissed for informality of form or title of the notice of appeal." The accompanying Advisory Committee Notes explain that

the rule was amended to distinguish between lapses in form and true jurisdictional impediments to appeal:

> [I]t is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with.

Fed. R. App. P. 3 Advisory Committee Notes 1979 Amendments.

Following these amendments, the Court confirmed *Foman*'s principle that a proper notice of appeal should not be dismissed for "mere technicalities." *Torres*, 487 U.S. at 316. "Thus if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Id.* at 316-17. Nevertheless, the *Torres* Court rejected a claim by a plaintiff class member that the notice of appeal encompassed him, even though he had not been named in the notice due to an error by his counsel's secretary. The Court found such an omission to be more than a mere technicality because, by omitting the name of that appellant, the notice of appeal did not contain all the information required by Rule 3(c). *Id.* at 317. In cautioning that liberality cannot be so broad as to "waive the jurisdictional requirements of Rules 3 and 4," the Court held that the exercise of jurisdiction over the unnamed party would do just that and be "equivalent to permitting courts to extend the time for filing a notice of appeal." *Id.* at 316-17.

Four years later, this Court confronted Rule 3 and the functional-equivalent doctrine again when the Court granted *certiorari* on the issue of "whether an appellate brief may serve as the notice of appeal required by Rule 3," a question that then divided the circuit courts. *Smith v. Barry*, 502 U.S. 244, 247 (1992). Acting *pro se*, Smith first filed a premature (and, under then-applicable rules, ineffective) notice of appeal and then, during the 30-day time period for noticing an appeal, Smith filed his informal appeal brief in the court of appeals on the form for such briefs supplied to him by the clerk of that court. *Id.* at 246-47. Even though the brief conveyed notice of a present appeal and contained the information required by Rule 3(c), the Fourth Circuit found that it lacked jurisdiction because Smith acted in response to a briefing order (in what he mistakenly believed was an existing appeal) rather than from an "intent to initiate an appeal." *Smith v. Galley*, 919 F.2d 893, 896 (4th Cir. 1990). The Court dismissed this logic as "dubious, since Smith received the briefing form as a result of filing a notice of appeal, albeit a premature one" and rejected this narrow approach:

> More importantly, the court should not have relied on Smith's reasons for filing the brief. While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts. Thus, the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time specified

> by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Smith, 502 U.S. at 248-49 (internal cites omitted).

The actual holding, which matched the narrow scope of the issue on which *certiorari* had been granted, simply rejected the categorical exclusion of appeal briefs from the possibility of providing the required notice of appeal: "In this case, we hold that a document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3." *Id.* at 245. Thus, *Smith* is consistent with this Court's prior dictates that leniency under the functional-equivalent doctrine applies, in light of all the circumstances, to a *pro se* prisoner (as in *Coppedge*), who took steps to get his appeal underway (as in *Fallen*), and filed a premature notice along with another appellate document (as in *Foman*) – always provided (as in *Torres*) that leniency does not forgive non-compliance with the rules or provide an impermissible extension of time to appeal. *Smith* falls well short of holding that *every* document containing the information specified by Rule 3(c) and filed within the appropriate time limit is a substitute for a notice of appeal regardless of the circumstances of the case. *Smith*'s language that "a document filed within the time specified by Rule 4 gives the notice required by Rule 3 is effective as a notice of appeal" does not dispense with the requirement to file a timely notice of appeal – *i.e.*, a document filed within 30 days of entry of a judgment notifying the court and the opposing party that the jurisdiction of the appellate court is then being invoked and containing the information about that present appeal specified in Rule 3(c).

This same qualification can be discerned in the post-*Smith* amendments to Rule 3. After discussing notices in the context of class action and *pro se* petitioners, the Advisory Committee concluded that "dismissal of an appeal should not occur when it is otherwise clear from the *notice* that the party *intended* to appeal." Fed. R. App. P. 3 Advisory Committee Notes 1993 Amendments (emphasis added). Moreover, the amendments show that the "intent" requirement was not prospective; rather, the objective intent of the document must be to further the appeal in some way, as a notice would do, or a functional equivalent that is part of the appellate process.

The Court's confirmation of this intent is reflected in a post-*Smith* decision, *Becker v. Montgomery*, 532 U.S. 757 (2001), where the appellant had typed but not signed his name on the notice of appeal. Citing *Foman* and *Smith*, the Court observed that "[o]ther opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Id.* at 767. This language in *Becker* makes clear that at most the functional-equivalent doctrine applies to a document that presently invokes or presupposes appellate jurisdiction. Significantly, the Court's opinion implied that had Rule 3 required a signature, the defect would have been more than technical and dismissal would have been required. Thus, *Becker* confirms the limits on the leniency principles enunciated in *Smith*.

This strict enforcement of the limits of appellate jurisdiction and confirmation of the import of a timely notice of appeal is also reflected by this Court's recent decision in *Bowles v. Russell*, where the Court abolished the "unique circumstances" doctrine recognized in earlier cases which had excused the failure to file a timely notice of appeal. 127 S. Ct. 2360. Appellant Bowles had not timely filed a notice of appeal (in that case, after the denial of a federal *habeas* petition), so he accordingly sought and obtained from the trial court additional time to do so. *Id.* at 2362. Although Bowles filed within the time frame given to him by the district court, the court of appeals dismissed the appeal for lack of jurisdiction and this Court affirmed. *Id.* at 2362-63. Finding not dispositive the equitable principles emphasized by a strong dissent, the Court held that Bowles' reliance on the order was an "error . . . of jurisdictional magnitude" and that he "cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations." *Id.* at 2366. To drive home the importance of such compliance, the Court observed that it had recently declined to hear the petition of a condemned prisoner before his execution because that first-time petitioner's filing was one day late. *Id.* at 2365 n.4. In so ruling, the Court expressly overruled longstanding precedent showing leniency to tardy appellants.

Although *Bowles* dealt with the timing of the notice of appeal rather than its contents, the point the Court was making is the same one it made in *Coppedge*, *Fallen*, *Foman*, *Torres*, *Smith* and *Becker*: while a court may permit technical deficiencies to be cured when a good-faith effort at compliance falls short, it is entirely inappropriate for a court to distort the meaning of the

jurisdictional requirement in order to transform an outright violation into an act of compliance.

The open-ended ruling of the Federal Circuit, effectively eviscerating the requirement for a notice of appeal whenever a post-judgment motion is filed, is not supported by *Smith v. Barry* or this Court's other decisions.

II. The Federal Circuit's Ruling Creates A Conflict With Rulings In Other Circuits.

In applying this Court's precedents, no federal court of appeals has interpreted *Smith* in the broad manner as did the Federal Circuit, nor has one adopted such a lenient standard for *any* tardy appellant, let alone a counseled litigant in a non-*habeas* civil case. Two Circuits have directly rejected the standard adopted by the Federal Circuit.

The Fifth Circuit explicitly renounced the Federal Circuit's catch-all approach in *Williams v. Chater*, 87 F.3d 702 (5th Cir. 1996). In *Williams*, the appellant was a disability claimant who had properly noticed his appeal of the judgment, but had neglected to file a separate notice of appeal for a post-judgment order denying reconsideration of the appealed judgment. *Id.* at 704. The appellant did file his opening brief attacking the post-judgment order within the time period for filing a notice of appeal, and although the document contained the information required by Rule 3(c) the Fifth Circuit nevertheless held that *Smith* was "inapplicable" because Smith was a *pro se* prisoner who attempted to file a notice of appeal that was "technically deficient"

whereas Williams was a counseled party who "made no attempt to file any notice of appeal from the denial of his requested 60(b) relief." *Id.* at 705. Accordingly, the court refused to construe the appellate brief as a notice of appeal of the post-judgment order because "[e]ven when construed liberally, to conclude on these facts that the requirements of Rule 3(c) have been met would be to essentially eviscerate the rule." *Id.*; *see also Isert v. Ford Motor Co.*, 461 F.3d 756, 763 (6th Cir. 2006) ("Courts can, and should, work overtime to excuse errors of form but they cannot simultaneously excuse errors of form *and* function without assuming authority to waive compliance with the Rules altogether").

The Ninth Circuit, the regional circuit in this case, has also rejected the Federal Circuit's aggressive reading of *Smith*. In *S.M. v. J.K.*, 262 F.3d 914 (9th Cir. 2001), a represented litigant had failed to timely notice her cross-appeal and asked that her civil appeals docketing statement be deemed the equivalent of the required notice. *Id.* at 922. Even though this failure did not constitute a jurisdictional barrier because it related to a cross-appeal, the Ninth Circuit refused to exercise jurisdiction because the cross-appellant "knew within the time period for filing her notice of cross-appeal that she intended to appeal" and "could have filed her notice of cross-appeal on time." *Id.* at 923. The court held that *Smith* did not require a different result and that "[t]here is no reason to allow Plaintiff to bring her cross-appeal without filing the requisite notice." *Id.* at 923.

In basing its jurisdiction on Ixys's motion to stay filed in the district court, the Federal Circuit also directly contradicted rulings in the Ninth and Tenth Circuits that

a motion to stay is not the functional equivalent of a notice of appeal. *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232-33 (9th Cir. 1989);[3] *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 568-69 (10th Cir. 1979).

In *Century Laminating*, the defendant had filed a notice of appeal within 30 days of the final judgment, but motions for judgment n.o.v. and for an injunction were still pending, which rendered the notice premature and ineffective under the rule in force at that time. 595 F.2d at 568. In denying defendant's argument that the court "look beyond the technical requirements of Rule 4" where the plaintiff was not prejudiced, the court of appeals held that all jurisdictional requirements are technical, but that does not render them unimportant:

> Litigant appellees as well as appellants have a right to rely on conformity by their adversaries with applicable statutes and rules, especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself. Expense, inconvenience, and what a litigant may believe to be injustice, are unavoidable consequences of failure to abide by a statute or rule, e.g., a

3. In 1949, the Ninth Circuit affirmed the district court's construction of a motion to stay execution so a supersedeas bond could be posted as a notice of appeal. *Cutting v. Bullerdick*, 178 F.2d 774 (9th Cir. 1949). At that time, however, the defect was not jurisdictional: "At this time the practice for Alaska was in doubt, 2107 not providing for the contents of a notice of appeal and Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A., not applying to Alaska." *Id.* at 776. In any event, the Ninth Circuit later distinguished *Cutting* as "not dispositive." *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 667 (9th Cir. 1982) (*per curiam*).

> statute of limitation. There is some virtue in finality in an end to litigation.

Id.

The court then observed that the premature filing did not render the defendant without options, since he still could have filed a timely notice, and rejected his request to construe his motion to stay as a timely notice of appeal:

> The motion to stay was, by its own recitations, filed under the provisions of Rule 62(c), Fed. R. Civ. P., which has reference to an appeal from a final judgment granting or denying an injunction. Both Civil Rule 62(c) and Appellate Rule 8 presuppose the existence of a valid appeal. Obviously Montgomery, when he prepared and filed his motion for an order staying the injunction, believed that he had effectively appealed from the judgment and did not then intend his motion to serve as a notice of appeal, and we do not so construe it.

Id. at 568-69.

In *Hollywood*, the Ninth Circuit held that a motion to stay cannot be a constructive notice of appeal when the party is represented by an attorney "absent extraordinary circumstances." 886 F.2d at 1232. The circumstances in *Hollywood*, like those here, were not extraordinary – a represented party in a civil case simply failed to timely file a notice of appeal. *Id.* at 1229. Like the majority of appellants seeking refuge in the

functional-equivalent doctrine (but not like Ixys), the *Hollywood* appellant had filed a notice of appeal, not realizing that it was premature and therefore ineffective. *Id.* Although sympathetic to her plight, the Ninth Circuit followed its prior holding in *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 387-88 (9th Cir. 1988), that "[w]e will not extend any leniency that is not demanded by [our] cases to one where the party is represented by an attorney." *Munden* in turn relied on *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 667 (9th Cir. 1982) (*per curiam*), in which the Ninth Circuit refused to treat a motion for injunction pending appeal as a constructive notice of appeal:

> Since appellant is represented by counsel and neither life nor liberty is at stake, solicitude for unwary pro se and criminal litigants, a factor which often warrants exercise of the court's discretion to tolerate informalities, is not applicable to this case.

Cel-A-Pak, 680 F.2d at 667 (internal cites omitted).

This ruling reaffirmed a long-standing rule in the Ninth Circuit that relief of the kind extended to a *pro se* party would not be extended to represented parties. *Allah v. Superior Court*, 871 F.2d 887, 889 (9th Cir. 1989). This still represents the law in the Ninth Circuit. *See, e.g.*, *Estrada v. Scribner*, 512 F.3d 1227, 1236 (9th Cir. 2008) ("liberally" construing inmate's motion for appellate counsel as a notice of appeal because "he is *pro se*"); *S.M.*, 262 F.3d at 922. Other courts of appeals are similarly reluctant to extend leniency outside the *pro se* context unless life or liberty is at stake. *See, e.g.*,

Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 233 n.6 (1st Cir. 2007) ("defendants are public officials, and their reliance on pro se cases does not advance their cause"); *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231 (11th Cir. 2007) ("a *pro se* appellate pleading filed within the time limits governing notices of appeal may be treated as one if it contains all of the elements of a notice of appeal"); *Arrington v. U.S.*, 473 F.3d 329, 334 (D.C. Cir. 2006) (two notices of appeal by *pro se* litigant); *Little*, 392 F.3d at 681 (liberal construction applies "especially" to *pro se* filings); *Rodgers v. Wyoming Attorney Gen.*, 205 F.3d 1201, 1205 (10th Cir. 2000) (extending liberality to "counseled habeas petitioners"), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473 (2000); *Barrett*, 105 F.3d at 795 ("we take a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal") (internal quotes omitted); *Thomas*, 916 F.2d at 40 ("The history behind this proviso indicates that courts have, at times, interpreted the formal requirements of a notice to appeal liberally, especially in cases of uncounseled persons like pro se prisoners, where letters evidencing a desire to appeal have been accepted as timely, informal notices of appeal"); *McMillan v. Barksdale*, 823 F.2d 981, 983 (6th Cir. 1987).

Prior to the case at hand, the Federal Circuit itself acknowledged that a more lenient standard applied to *pro se* appellants such as a *pro se* injured veteran. *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005) ("The adequacy of a notice of appeal must be determined with two background interpretive principles in mind. The first principle is that notices of appeal are to be liberally construed. . . . The second background principle is that

pro se pleadings are to be liberally construed") (cites omitted). But with its present ruling, the Federal Circuit went against its own law, that of its sister Circuits,[4] and of this Court's own precedents. If allowed to stand, the Federal Circuit's rationale will permit circuit courts of appeals to manufacture their own jurisdiction in virtually all civil cases where a post-judgment motion is filed.

III. Review Is Needed To Clarify *Smith v. Barry* And Prevent The Erosion Of The Bounds Of Appellate Jurisdiction

"Jurisdictional treatment of statutory time limits makes good sense." *Bowles*, 127 S. Ct. at 2365. Under the applicable rules and this Court's precedents, courts may accept jurisdiction based on notices of appeal or similar documents that suffer from some defect of form but provide the required notice to the court and the parties that appellate jurisdiction is being invoked. Typically, a court supplements a deficient notice of appeal with information provided in a separate, timely-filed document. *See, e.g., Arrington*, 473 F.3d at 334. Less common is where another document is allowed to substitute for a notice of appeal entirely. *See, e.g., Rodgers*, 205 F.3d at 1206 (habeas petitioner's certificate

4. Although no court of appeals has extended *Smith* as far as did the Federal Circuit, a smattering of cases strain to reach the merits despite the lack of a timely notice of appeal. *E.g., Haugen v. Nassau County Dep't of Soc. Servs.*, 171 F.3d 136, 138 (2d Cir. 1999) (construing as notice of appeal government's letter to district court asking for time extension to appeal; on the merits, the judgment was affirmed in a single paragraph without analysis). Such cases merely underscore the need for this Court to set clear boundaries on the functional-equivalent doctrine.

of probable cause construed as notice of appeal). Properly applied, the functional-equivalent doctrine exists in two situations: (1) so that mere technicalities do not bar an appeal where an otherwise proper notice of appeal has been filed (as in *Foman* and *Becker*); and (2) where a litigant, usually a *pro se* prisoner, who mistakenly thinks he has already invoked appellate jurisdiction files another document that satisfies the requirements of Rules 3 and 4 (as in *Smith*).[5] The doctrine also serves to assist appellants who are genuinely confused about what to appeal, such as whether an order is an interim ruling or is instead final and appealable. *See, e.g., Barrett*, 105 F.3d at 795. A routine motion filed by a counseled party to stay an identified final judgment meets none of these qualifications.

Had this appeal been before the Fifth, Ninth or Tenth Circuits, those appellate courts would have dismissed it because those jurisdictions do not apply the functional-equivalent doctrine to create a *de facto* notice of appeal out of a post-judgment motion seeking a stay from the district court filed by a counseled litigant who knows exactly what needs to be appealed but delays for strategic reasons filing the required notice. This Court should grant *certiorari* to resolve the clear split in the Circuits.

This split is particularly important because it affects the core of appellate jurisdiction, which by statute and

5. This concern was largely addressed by the 1991 amendments to Rule 4 that eliminated most situations that had resulted in premature notices of appeal. These amendments greatly reduced the need for the functional-equivalent doctrine.

rule should be uniform in all of the federal circuit courts of appeals. Appellate courts need "bright-line rules in this area, rules that can be easily applied at the early stages of a case to determine with certainty whether our jurisdiction has been properly invoked." *Faysound Ltd. v. Falcon Jet Corp.*, 940 F.2d 339, 343 (8th Cir. 1991). The orderly administration of justice requires that the bounds of such jurisdiction be clearly delineated, not plagued by confusion and uncertainty. Although enforcement of the rules may sometimes have harsh results, amendment of the rules may only be done by this Court or by Congress. This case presents an ideal opportunity to restore the integrity of appellate jurisdiction and to bring much needed clarity as to how far the functional-equivalent doctrine extends, if at all, to rescue a party who failed to file a timely notice of appeal.

CONCLUSION

IR respectfully urges Court to grant the present petition.

Respectfully submitted,

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