No. 04-___

IN THE

Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, AND JOHN DOE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *pro se* prisoner's untimely notice of appeal, filed within seven days after the prisoner received notice of entry of judgment and drawing attention to the fact that the prisoner acted promptly after receiving notice of entry of judgment, can be construed as a motion to reopen the time to file a notice of appeal under Rule 4(a)(6) of the Federal Rules of Appellate Procedure?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel T. Poole respectfully seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 368 F.3d 263 (3d Cir. 2004), and appears in this Petition's Appendix ("Pet. App.") at 1a-12a. The court of appeals' first order denying the petition for rehearing and rehearing *en banc* appears at Pet. App. 23a-24a. The amended order denying the petition for rehearing and rehearing *en banc* appears at Pet. App. 25a-26a. The opinion of the district court is unreported and appears at Pet. App. 13a-22a.

JURISDICTIONAL STATEMENT

The court of appeals entered its decision on May 13, 2004. The court of appeals denied the petition for rehearing and rehearing *en banc* on June 8, 2004, in an order indicating that Judge Friedman, who had sat by designation on the panel, would have granted panel rehearing. An amended order, dated June 15, 2004, removed the reference to Judge Friedman's having voted for panel rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of Rule 4(a) of the Federal Rules of Appellate Procedure appears at Pet. App. 29a-32a. Rule 4(a)(6), which is of particular relevance here, provides:

> (6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> > (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the

> moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

STATEMENT

This case presents an important and recurring question of federal law that has divided the courts of appeals. Federal Rule of Appellate Procedure 4(a)(6) authorizes federal district courts to reopen the time for appeal in cases in which the would-be appellant has not received notice within 21 days after entry of judgment. This case presents the question whether a *pro se* plaintiff's untimely notice of appeal, filed with seven days after the plaintiff received notice of entry of judgment and mentioning the late receipt, can be construed as a motion to reopen the time for appeal under Rule 4(a)(6).

In the decision below, the Third Circuit held that Rule 4(a)(6) requires the filing of a formal motion and that a notice of appeal can never suffice. The court acknowledged that the Eleventh Circuit has taken precisely the opposite view—at least in those cases in which a *pro se* plaintiff files a notice of appeal that mentions late receipt of notice of entry of judgment. The court failed, however, to notice that the established practice in the circuits is much more heavily to the contrary than a single reported decision from the Eleventh Circuit might suggest. The First, Second, Fourth, and Tenth Circuits have all sided with the Eleventh Circuit, and the District of Columbia Circuit has suggested that it would consider treating a *pro se* filing as a Rule 4(a)(6) motion if the filing made clear that timeliness was an issue. The Ninth Circuit has taken an intermediate position; it

ordinarily requires a formally noticed motion but permits district courts to dispense with that requirement at their discretion.

And the split may be even wider than that. The issue is not one that is likely to produce many published opinions. A court of appeals confronts the question only if the would-be appellant knows enough to mention in his notice of appeal that he received notice of entry of judgment late, but not enough to file a formal Rule 4(a)(6) motion. By definition, then, these would-be appellants—typically *pro se* prisoners, if petitioner's research is any indication—are not going to be in a position to argue about the intricacies of Rule 4(a)(6). While a court of appeals could choose to respond to an untimely notice of appeal by launching, *sua sponte*, into an extended discussion of Rule 4(a)(6), the more likely response is a remand to the district court with brief instructions to consider whether the would-be appellant can satisfy Rule 4(a)(6) or a curt dismissal on timeliness grounds. And, indeed, several of the decisions discussed below are short unpublished orders.

The issue is, however, no less important and recurs no less frequently for that. Quite the contrary, the fact that many decisions are likely to be unpublished suggests that the cases petitioner discusses below represent the tip of the iceberg. And what is at stake in these cases is nothing less than access to the courts of appeals, which for many litigants means access to justice. The divide among the circuits on this point is a real one, with real consequences for a large pool of litigants. This Court should act now to establish a single rule for the entire country.

The Federal Rules of Appellate Procedure

Federal Rule of Appellate Procedure 4(a) deals with the timing of appeals in civil cases. Rule 4(a)(1)(A) requires the filing of a notice of appeal "with the district clerk within 30 days after the judgment or order appealed from is entered."

Before 1991, Rule 4(a) provided just one way for a party to seek relief from the ordinary time limit. Rule 4(a)(5) authorized (and still authorizes) a party to move within 30 days after the Rule 4(a)(1) time limit has expired for an extension of the time in which to file an appeal. A party seeking relief under Rule 4(a)(5) must show "excusable neglect or good cause."

The Advisory Committee recognized, however, that Rule 4(a)(5) could be too "strict" in cases in which a party missed the deadline because he or she did not receive notice of entry of judgment in time. Rule 4(a)(6) was added in 1991, along with companion amendments to Federal Rule of Civil Procedure 77(d), "to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment." Fed. R. Civ. P. 77 advisory committee's note. Rule 4(a)(6) authorizes a party who does not receive notice of entry of judgment in a timely fashion to move in the district court to reopen the period for filing an appeal.

There are four elements that a party must satisfy to qualify for relief under Rule 4(a)(6). First, the party must establish that he or she was entitled to notice of entry. Second, the party must establish that he or she did not receive notice from the district court, the district clerk, or any party within 21 days of entry. Third, the party must establish that no other party will be prejudiced by the extension. The Advisory Committee has explained that "prejudice" means "some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal." Fed. R. App. P. 4 advisory committee's note. Fourth, the party must show that he or she submitted a motion within 180 days of entry or within seven days of receipt of notice of entry, whichever is earlier. If each of the four elements is met, the district court may reopen time for appeal for a period of 14 days from the date of entry of the order granting the motion.

See Fed. R. App. P. 4(a)(6); *see also* 20 James W. Moore, *Moore's Federal Practice* §304.14[3] (3d ed. 1999).

The Present Action

Petitioner Samuel Poole filed this action on May 4, 2001, while incarcerated in Smyrna, Delaware. His "Petition for Writ of Habeas Corpus" alleged that several public officials involved in two family court proceedings interfered with his right of access to his son—violating his Fifth and Fourteenth Amendment rights. The District Court construed the petition as a complaint filed under 42 U.S.C. § 1983. Pet. App. 13a.

On March 24, 2002, Poole was transferred from the Smyrna, Delaware prison to one in Graterford, Pennsylvania. Two days later, the district court *sua sponte* entered an order dismissing the claims as to two of the defendants for lack of personal jurisdiction, and dismissing the remaining claims as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). Pet. App. 21a-22a.

Unaware of Poole's new address—despite the fact that Poole had earlier sent the district court a note bearing his new address—the district court clerk mailed notice of entry of judgment to the Delaware prison in late March 2002. The letter was not returned to the clerk as undeliverable until April 24, 2002—29 days after it was first mailed. Upon receiving the returned notice, the clerk promptly requested a new address from the Department of Corrections and on April 29, 2002, mailed notice of entry to Poole at the prison in Graterford, Pennsylvania. Pet. App. 3a.

Poole received notice of entry of judgment on May 6, 2002. He filed his notice of appeal three days after receiving the notice, on May 9, 2002, which was within the period allowed by Rule 4(a)(6) for a motion to reopen. In his notice of appeal, Poole used underlining to draw particular attention to the fact that he did not receive notice of entry of judgment until May 6, 2002. Pet. App. 40a.

The Third Circuit's Decision

On May 13, 2004, the Third Circuit issued its decision dismissing Poole's appeal. The court found that it "lacked jurisdiction" to entertain the appeal and declined to grant Poole relief under Rule 4(a)(6).

Noting that Rule 4(a)(1) generally requires a notice of appeal to be "filed with the district court within 30 days after the judgment or order appealed from is entered" the court determined that Poole had filed his notice of appeal 44 days after the entry of judgment, and thus out of time. Since "[t]he timeliness of an appeal is a mandatory jurisdictional prerequisite," Pet. App. 2a, and Poole was not entitled to tolling under a Third Circuit doctrine that extends the appeal period for *pro se* prisoners under certain limited circumstances, Pet. App. 3a-6a, the court concluded that it would lack jurisdiction to hear the appeal unless Poole was entitled to seek relief under Rule 4(a)(6), Pet. App. 6a.

Poole received notice on May 6, 2002, and therefore had until May 13, 2002 to move to reopen the time for appeal under Rule 4(a)(6). Poole filed his notice of appeal during that seven-day period. The question for the court was therefore whether it could possibly "construe his notice of appeal as a motion to reopen." Pet. App. 7a.

The court answered that question in the negative. It reasoned that Rules 4(a)(5) and 4(a)(6) should receive parallel constructions. Because the Third Circuit has interpreted Rule 4(a)(5) as requiring a formal motion and not just a notice of appeal, the court concluded that Rule 4(a)(6) requires a formal motion as well. Pet. App. 7a-9a.

The court acknowledged that its decision was in direct conflict with the Eleventh Circuit's decision in *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997) (per curiam), and stated that it did not find that court's reasoning persuasive. In particular, the Third Circuit panel rejected the

Eleventh Circuit's arguments that Rule 4(a)(6) is less strict than Rule 4(a)(5) and that *pro se* submissions should receive a more liberal construction than ordinary submissions. The court also dismissed the *Sanders* court's concern that prison officials may act to prevent prisoners from receiving notice until after the time to appeal has expired, calling the scenario an "extreme hypothetical." Pet. App. 9a-11a.

Despite that, the Third Circuit allowed that its holding "may lead to harsh results under both rules, and it may be that it would be preferable to treat a *pro se* notice of appeal as a motion under both rules." The court felt itself bound, however, to read "Appellate Rules 4(a)(5) and 4(a)(6) . . . consistently" in light of existing circuit precedent, and therefore declined to endorse the less "harsh" and possibly "preferable" result. Pet. App. 11a.

The court accordingly concluded that Poole's notice of appeal was not timely filed and dismissed the appeal for lack of jurisdiction. Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE OTHER COURTS OF APPEALS.

The Third Circuit's decision directly conflicts with decisions of the First, Second, Fourth, Tenth, and Eleventh Circuits. Those courts have held that a *pro se* prisoner's late notice of appeal may be construed as a Rule 4(a)(6) motion to reopen the time to appeal—at least in those cases in which the notice of appeal draws some attention to the timeliness problem. The D.C. Circuit has suggested that under appropriate circumstances, it might accept a *pro se* notice of appeal as a motion to reopen. While no other court of appeals has adopted the Third Circuit's "harsh" position, the Ninth Circuit has held that Rule 4(a)(6) ordinarily requires a formal motion, subject to the district court's discretion.

As noted above, the Third Circuit recognized that it was creating a conflict, although it did not appreciate the conflict's full extent. A large portion of the decision below addresses the Eleventh Circuit's decision in *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997) (per curiam). Sanders, proceeding *pro se*, sought to appeal the district court's denial of his habeas petition. In his notice of appeal, he stated that he did not receive the district court's order until after the Rule (4)(a)(1) deadline had passed. *See id.* at 186. The court of appeals initially dismissed Sanders's appeal for lack of jurisdiction.

Sanders asked the court to reconsider, and upon reconsideration, the court vacated its earlier order and construed the late notice of appeal as a motion to reopen the time for appeal pursuant to Rule 4(a)(6). The court held that if Sanders could prove his allegations of having received notice of entry of judgment late, the most appropriate means of obtaining an extension would be through Rule 4(a)(6), not Rule 4(a)(5). The court noted that there are "powerful reasons" to permit the reopening of time to appeal "when a *pro se* litigant files a late notice of appeal because he did not receive notice of the entry of the order or judgment from which he seeks to appeal." 113 F.3d at 187. The court explained that because Rule 4(a)(6) was added to the Federal Rules of Appellate Procedure to create "more liberal provisions for extension of time" where a litigant has received notice of entry of judgment late, it makes sense that potential Rule 4(a)(6) motions should be treated "differently" and "more favorably" than potential Rule 4(a)(5) motions. *Id*. The court emphasized that if it dismissed Sanders's claim, he would be shut out from any chance to appeal the district court's order through no fault of his own. The court also expressed concern that denying a *pro se* prisoner any relief from prison delay would leave prison officials able to block access to appellate courts by slowing the delivery of mail. These reasons, combined with the duty liberally to construe *pro se* pleadings, led the court to hold that "when a

pro se appellant alleges that he did not receive notice of the entry of judgment . . . within twenty-one days of its entry, we must treat his notice as a Rule 4(a)(6) motion." *Id*. The panel remanded the case to the district court with instructions to determine whether Sanders satisfied Rule 4(a)(6)'s requirements.

The circuit split extends, however, well beyond the Third and Eleventh Circuits. The Tenth Circuit, like the Eleventh, is on record in a published decision as holding that an untimely notice of appeal can be construed as a Rule 4(a)(6) motion to reopen the time to appeal. In *Ogden v. San Juan County*, 32 F.3d 452 (10th Cir. 1994), the plaintiff, proceeding *pro se*, attempted to appeal the dismissal of his § 1983 action. Ogden filed a late notice of appeal in which he noted that he did not receive notice of the district court's order dismissing the case. The Tenth Circuit found that "by proffering an excuse, the plaintiff appeared to recognize he had a timeliness problem" and therefore the court "liberally construe[d] the notice of appeal as a motion to reopen for appeal pursuant to Fed. R. App. P. 4(a)(6)." *Id*. at 454.

The Tenth Circuit has consistently applied this interpretation. In *United States v. Dodds*, 1994 U.S. App. LEXIS 33673 (10th Cir. 1994), the district court clerk sent the *pro se* plaintiff's copy of the order to the wrong address, resulting in an untimely appeal, as in the present case. In allowing the appeal, the court explained, "[b]ecause Defendant recognized that he had a timeliness problem, we liberally construe Defendant's notice of appeal as a motion to reopen the time for appeal pursuant to Rule 4(a)(6)." *Id.* at *3; *see also United States v. Muldrow*, No. 99-3357 (10th Cir. Apr. 13, 2000) ("Because Defendant recognizes he has a

timeliness problem, we liberally construe his notice of appeal as a motion under Fed. R. App. P. 4(a)(6).").[1]

When unpublished decisions and orders are taken into account, it emerges that several other circuits have construed untimely notices of appeal as Rule 4(a)(6) motions.

The First Circuit has directed a district court to treat a *pro se* plaintiff's untimely notice of appeal as a motion to reopen the time for appeal. *See Abreu v. United States*, 1999 U.S. Dist. LEXIS 2690, at *1 (D.R.I. Feb. 4, 1999) ("[I]n remanding this matter to the district court, the First Circuit intends that the *pro se* petitioner's notice of appeal be considered as a motion made pursuant to Fed. R. App. P. 4(a)(6).").

The Second Circuit has several times instructed district courts to construe a *pro se* plaintiff's untimely notice of appeal as a motion to reopen the time for appeal. In *Martinez v. Scully*, No. 94-2190 (2d Cir. May 6, 1994), the court of appeals remanded to the district court with instructions "to determine when petitioner received a copy of the judgment and to treat appellant's notice of appeal as a motion to extend the time for appeal under Fed. R. App. P. 4(a)(6)." *See Martinez v. Scully*, 1995 U.S. Dist. LEXIS 7430, at *1-*2 (S.D.N.Y. May 31, 1995) (quoting Second Circuit's order). Similarly, in *Powless v. Grose*, No. 96-2091 (2d Cir. Mar. 22, 1996), the court of appeals instructed the district court "to construe the appellant's notice of appeal as a motion to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6)." *See Powless v. Grose*, 1996 U.S. Dist.

[1] The Tenth Circuit's order in *Muldrow* is reproduced at Pet. App. 37a-39a.

LEXIS 10694, at *2-*3 (N.D.N.Y. July 18, 1996) (noting Second Circuit's order).[2]

The Fourth Circuit has consistently held that where "a *pro se* appellant filed an untimely notice of appeal offering some excuse for untimeliness, that notice is properly construed as a motion to reopen the time to note an appeal under Fed. R. App. P. 4(a)(6)." *United States v. Akinkoye*, 16 Fed. Appx. 179, 180 (4th Cir. 2001). In *United States v. Blakely*, 97 Fed. Appx. 453, 454 (4th Cir. 2004), the would-be appellant, acting *pro se*, sought to appeal the denial of a motion but did not file the notice of appeal until after the allotted time. The Fourth Circuit allowed the appeal: "Blakely's *pro se* motion to extend and notice of appeal, in which she alleged that she did not timely receive notice of her action being dismissed, may be properly construed as a motion to reopen the time to note an appeal." *Id*. at *2. The court remanded to the district court with instructions to determine whether Blakely's notice met the requirements of 4(a)(6). In *Buckley v. Freund*, 22 Fed. Appx. 185, 186 (4th Cir. 2001), the court found that a motion titled "motion notice appeal," in which the appellant requested that his late appeal be accepted, qualified as a motion for extension "due to Buckley's expressed desire to pursue his appeal." The Fourth Circuit addressed this issue again recently in *United States v. Gray*, 2004 U.S. App. LEXIS 10077 (4th Cir. May 21, 2004). Gray sought to appeal a district court order denying relief on his motion filed under 28 U.S.C. § 2255. Gray's appeal was untimely, but since Gray stated in his notice of appeal that he did not receive notice of the order, the court "construe[d] Gray's statement as a motion to reopen the time to note an appeal under Fed. R. App. P. 4(a)(6)." *Id*. at *2.

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[2] The Second Circuit's orders in *Martinez* and *Powless* are reproduced at Pet. App. 33a-34a and Pet. App. 35a-35a, respectively.

Finally, the D.C. Circuit has cited the Eleventh Circuit's *Sanders* decision in a way that suggests a willingness to construe a notice of appeal as a Rule 4(a)(6) motion to reopen in an appropriate case. *See United States v. Feuver*, 236 F.3d 725, 728-29 & n.7 (D.C. Cir. 2001). The court did not have to decide the question, however, because it was impossible to construe the filing at issue in *Feuver*—a "Motion for Determination of Status" that did "not even mention the word 'appeal'"—as a motion to reopen. *Id.* at 729. *But cf. Kidd v. District of Columbia*, 206 F.3d 35, 38 (D.C. Cir. 2000) (noting that Rule 4(a)(6), like Rule 4(a)(5), "requires a motion asking the district court to reopen the time for appeal").

Although no other court of appeals has taken the Third Circuit's "harsh" position, the Ninth Circuit has held that Rule 4(a)(6) ordinarily requires "noticed motions," not "informal application[s]." *Nunley v. City of Los Angeles*, 52 F.3d 792, 795 (9th Cir. 1995). The court also held, however, that district courts have broad discretion to dispense with service requirements and the like, and accepted an *ex parte* application that failed to mention Rule 4(a)(6) as a motion to reopen, noting that "we will not rigidly deny . . . review under the authority of Rule 4(a)(6)." *Id.* at 794 n.4. Accordingly, it is not clear how the Ninth Circuit would answer the question presented today.

In sum, with the Third Circuit's decision in this case, the courts of appeals are now squarely divided over whether a *pro se* litigant's untimely notice of appeal may be construed as a motion to reopen.

II. THE DECISION BELOW MISCONSTRUES RULE 4(a)(6).

The Third Circuit's interpretation of Rule 4(a)(6) is mistaken.

First, the Rule's text shows that the Third Circuit was mistaken to require strictly parallel readings of the "motion" requirement in Rules 4(a)(5) and 4(a)(6). Rule 4(a)(5) is a general provision providing for the extension of the time to file a notice of appeal where the would-be appellant can show "excusable neglect or good cause." By its nature, a showing of excusable neglect or good cause requires some detail—more detail than appears in a notice of appeal. Rule 4(a)(6), by contrast, is a specific provision designed to address the situation in which a would-be appellant has filed a notice of appeal out of time because he or she did not receive notice within 21 days after entry of judgment. A showing of late receipt is much more straightforward than a showing of excusable neglect or good cause, and is the sort of a thing that a party can easily include in a notice of appeal, as the notices filed in this case and the cases discussed in Part I above illustrate. Indeed, the Ninth Circuit has held that a party seeking relief under Rule 4(a)(6) need only "specifically den[y] receipt of notice" to trigger the rule. *Nunley*, 52 F.3d at 796. Accordingly, it is reasonable to suppose, as courts in the First, Second, Fourth, Tenth, and Eleventh Circuits have, that a notice of appeal can satisfy the requirements of Rule 4(a)(6) without necessarily being able to satisfy the requirements of the more demanding Rule 4(a)(5).

Second, the Third Circuit's interpretation of Rule 4(a)(5) and 4(a)(6) as equally strict is fundamentally at odds with Rule 4(a)(6)'s purpose. As the Second Circuit has observed, "[t]he purpose of subdivision (6) [of Federal Rule of Appellate Procedure 4(a)] was to relieve parties of the rigors of subdivision (5) when the failure to timely appeal was caused by not having received notice of the entry of judgment." *Avolio v. County of Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994). The Advisory Committee notes confirm this reading—Rule 4(a)(6) was added to the Appellate Rules in 1991, along with companion amendments to Federal Rule of Civil Procedure 77(d), "to permit district courts to *ease strict*

sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment." Fed. R. Civ. P. 77 advisory committee's note (emphasis added). Given this history, it makes sense to conclude, as the majority of circuits to have considered the question have done, that Rule 4(a)(6) requires less in the way of formality than Rule 4(a)(5). By requiring the filing of a formal motion to extend the time for appeal, the decision below runs contrary to Rule 4(a)(6)'s purpose of relaxing Rule 4(a)(5)'s strictures and providing relief to parties who did not receive notice of entry of judgment.

Third, even if there were some reason to regard Rule 4(a)(5) and Rule 4(a)(6) as exactly alike, the better approach would be to treat appropriately worded *pro se* notices of appeal as motions under *both* provisions. That approach would accord with the well-recognized principle that a *pro se* plaintiff's pleadings are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (discussing the requirement to "[c]onstru[e] petitioner's inartful pleading liberally"). Indeed, the court below hinted at this outcome when it allowed that its "interpretation may lead to harsh results under both rules [4(a)(5) and 4(a)(6)], and *it may be that it would be preferable to treat a* pro se *notice of appeal as a motion under both rules.*" Pet. App. 11a (emphasis added).

Fourth, and relatedly, the Third Circuit's approach exalts form over substance. Samuel Poole's notice of appeal was unquestionably a plea to the court to accept the untimely appeal and consider the fact that he did not receive notice of entry of judgment until after the time to appeal had passed; the May 9, 2002 notice used underlining to draw attention to the fact that Poole had received notice of entry only three days earlier, on May 6. Pet. App. 40a. The only difference between Poole's notice of appeal and a motion satisfying the Third Circuit's standard is a caption at the top reading

"Motion to Reopen Under Rule 4(a)(6)." To deny anyone—let alone a *pro se* plaintiff—his day in the court of appeals based on such a slender distinction, and to do it in a case in which the would-be appellant filed late through no fault of his own, is the clearest sort of injustice.

Fifth, following the Third Circuit's approach would allow prison officials to block prisoners' access to the courts by ensuring that they do not receive notice of an adverse decision until after the time provided by Rule 4(a)(1). The Third Circuit dismissed this as an "extreme hypothetical," Pet. App. 11a, but in fact a variant of this "extreme hypothetical" led this Court to create a special rule for assessing the timeliness of a *pro* se prisoner's notice of appeal. In *Houston v. Lack*, 487 U.S. 266 (1988), this Court adopted a "mailbox rule" for determining when a *pro se* prisoner submits his notice of appeal. Under the mailbox rule, the notice is deemed filed at the moment the prisoner gives it to prison authorities for mailing. *See id.* at 276. Among other things, the Court was worried about the fact that a *pro se* prisoner has no choice but to entrust the sending and receipt of his mail to prison authorities, "whom he cannot control or supervise and who may have every incentive to delay." *Id*. at 271. This is essentially the same concern the Third Circuit dismissed as an extreme hypothetical; the only difference is that in *Houston v. Lack*, the concern was delay in getting mail from the prisoner to the postal service, whereas here the concern is delay in delivering mail from the postal service to the prisoner. If the one concern was serious enough to trouble this Court in 1988, the other ought to have been serious enough to trouble the Third Circuit in 2004.

III. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT MERITS IMMEDIATE REVIEW

This court's review is appropriate not only to remedy the erroneous decision below, but also to prevent unjust denial of access to the courts and maintain the uniformity of the Federal Rules of Appellate Procedure.

Access to the courts of appeals is a critically important issue. In this case, for example, petitioner is seeking to vindicate his constitutional right to associate with his son. Pet. App. 2a. The district court made an elementary error in acting *sua sponte*, before the complaint was even served, to deny Poole's claims against several parties for lack of personal jurisdiction and failure to file within the limitations period. Pet. App. 18a-21a. Both personal jurisdiction and statute of limitations are waivable affirmative defenses, and therefore cannot serve as grounds for a *sua sponte* dismissal before the parties have even been served. But Poole will have to live with this error, which sounds the death knell for his constitutional claim, if he cannot win a hearing from the court of appeals. If his claim had arisen anywhere in the First, Second, Fourth, Tenth, or Eleventh Circuits, however, he would have had his hearing and gotten his reversal. This is precisely the sort of inconsistency on a pressing matter that this Court should not tolerate.

In addition, the House Committee on the Judiciary recognized that "uniformity of appellate procedure is urgently needed" when it authorized this Court, in 1966, to prescribe rules governing procedure in the federal appellate courts. H.R. Rep. No. 89-2153 (1966), *reprinted in* 1966 U.S.C.C.A.N. 4171, 4173. Judge Albert B. Maris, in a letter to the Committee, urged that "it is very much in the public interest that uniformity of such procedure be achieved." *Id.* at 4175. The need for uniformity in appellate procedure has not diminished in the interim. On the contrary, as the

number of appeals continues to rise, the need for uniformity also rises. *See, e.g.* Analytical Services Office, Administrative Office of the U.S. Courts, Judicial Facts and Figures Table 1.3 (2003) (reporting that the number of appeals filed has increased from 3,899 in 1960 to 60,847 in 2003).[3]

The issue is also recurring one. As the Advisory Committee noted in 1991, by way of justifying Rule 4(a)(6) and the companion amendments to Federal Rule of Civil Procedure 77(d), "[f]ailure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices." Fed. R. Civ. P. 77 advisory committee's note. Consistent with this observation, petitioner was able to unearth a dozen decisions and orders discussing how to interpret late notices of appeal in cases like this one. It is likely, however, that those decisions represent just the tip of the iceberg, since orders remanding for further consideration under Rule 4(a)(6) will rarely be published. *See supra* at 3.

In the interest of uniform access to the federal courts of appeals for the many future litigants who will receive late notices from district courts, this Court should grant certiorari and resolve the circuit split.

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[3] Available online at http://www.uscourts.gov/judicialfactsfigures/contents.html.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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