No. 15-1530

In the Supreme Court of the United States

Alfredo Rosillo,

Petitioner,

v.

Matt Holten and Jeff Ellis,

Respondents.

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

BRIEF IN OPPOSITION

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Questions Presented

I.

Whether a notice of appeal that designates an order and judgment that expressly exclude a party from their purview fails to provide sufficient notice under Fed. R. App. P. 3(c) that the appellant intends to include the unnamed party as an appellee in the appeal.

II.

Whether Petitioner has failed to preserve the questions of whether the court of appeals should have considered the merits briefs or the issue of prejudice by failing to raise these arguments on appeal.

III.

Whether there are unresolved questions regarding the application of *Foman v. Davis*, *Torres v. Oakland Scavenger Co.*, and *Smith v. Barry* that require review by this Court.

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Parties to the Proceeding and Rule 29.6 Statement

The caption of this case contains the names of all of the parties in this matter. Respondent Matt Holten is not a nongovernmental corporation.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is reported at 817 F.3d 595. The judgments and orders of the United States District Court for the District of Minnesota (Pet. App. B, D, F) are unpublished.

Jurisdiction

Respondent Matt Holten agrees with Petitioner's statement of this Court's jurisdiction.

Statement of the Case and Facts

Petitioner Alfredo Rosillo brought this lawsuit against Respondent Lieutenant Matt Holten of the Austin Police Department and Deputy Jeff Ellis of the Mower County Sheriff's Office, alleging that Holten and Ellis used excessive force to bring him into custody. Pet. App. A at 1a-2a. On December 23, 2014, the United States District Court for the District of Minnesota, the Honorable Joan N. Ericksen presiding, issued an order granting Holten's motion for summary judgment and dismissing the claims against him (Docket No. 33) (hereinafter "the first order"). Pet. App. B at 16a. Ellis did not file a motion for summary judgment. *See generally* Pet. App. B.

Shortly after granting Holten's summary judgment motion, the district court ordered Petitioner and Ellis to file briefs addressing whether Ellis was entitled to summary judgment on the same grounds as Holten. Pet. App. A at 2a. Before filing the briefs, however, Petitioner and Ellis reached a settlement and filed a stipulation for dismissal. *Id.*; Pet. App. C at 17a-18a. On December 31, 2014, the district court ordered the dismissal of the claims against Ellis ("the second order") and entered a judgment of dismissal (Docket Nos. 36 and 37). Pet. App. A at 2a; Pet. App. D, E at 19a-22a.

A few days later, on January 5, 2015, the district court vacated the second order and the judgment issued on December 31, pursuant to Rule 60(a) of the Federal Rules of Civil Procedure. Pet. App. F at 23a-24a. The court vacated the second order and judgment because they failed to specify that they did not apply to Holten. *Id.* The district court issued a new order (Docket No. 38) (hereinafter "the third order"). The third order expressly stated that because Holten had already been dismissed, the stipulation and the third order "d[id] not involve or pertain to Holten." *Id.* at 24a. Judgment to that effect was entered the same day (Docket No. 39). Pet. App. G at 25a-26a. The judgment entered did not mention Holten. *See id.*

On February 2, 2015, Rosillo filed a notice of appeal, stating that he "appeal[s] from the January 5, 2015, Order [Doc. No. 38] and Judgment [Doc. No. 39] entered by the U.S. District Court for the District of Minnesota in their entirety." Pet. App. H at 27a. The January 5, 2015 order and judgment to which the notice referred (Docket Nos. 38 and 39) were the third order and corresponding judgment, which clarified that the second order, which pertained to the

dismissal of the claims against Ellis, expressly stated that it "d[id] not involve or pertain to Holten." Pet. App. F, 6 at 23a-26a.

On March 3, 2015, Petitioner filed an application to proceed in forma pauperis. The application stated, "The district court improperly dismissed my case because of a pleading technicality." Mot. & Aff. for Permission to Appeal in Forma Pauperis at 1 (Docket No. 44). This was the first notice Petitioner gave that he intended Holten to be a party to the appeal, since the notice of appeal had identified only the third order and judgment—that which pertained to Ellis and expressly excluded Holten.

On March 12, 2015, Holten filed a motion to dismiss the appeal for lack of jurisdiction, since the notice of appeal did not identify him as a party to the appeal. *See generally* Mot. to Dismiss Appeal (8th Cir. Document No. 4253628). The Eighth Circuit Federal Court of Appeals denied the motion without prejudice to his ability to reassert the argument in his brief on the merits. Order dated Apr. 8, 2015 at 1 (8th Cir. Document No. 4262992). Holten renewed his jurisdictional challenge in his brief on the merits. Pet. App. A at 2a.

Approximately one year later, on March 24, 2016, the United States Court of Appeals for the Eighth Circuit dismissed the appeal. *See generally* Pet. App. A. The Eighth Circuit held that Petitioner's notice of appeal did not meet the requirements of Rule 3(c) of the Federal Rules of Appellate Procedure, and, as such, did not confer jurisdiction to review the unmentioned Holten order. *Id.* at 3a-4a. The court further held that Petitioner's statement that he appealed the January 5, 2015 order and judgment "in their entirety" brought the notice no closer to

encompassing Holten, since the order and judgment (Docket Nos. 38 and 39) specified that they did not apply to Holten.[1] *Id.* at 4a. The court also noted that, at the time the notice of appeal was filed, there was no judgment in favor of Holten, since it was not entered until May 22, 2015. *See id.* at 3a (stating that judgment was entered by operation of law pursuant to Fed. R. Civ. P. 58(c)(2)(B)).

Reasons for Denying the Petition

This case does not warrant the exercise of certiorari jurisdiction. This Court has provided consistent and clear guidance to lower courts on how to determine whether a technically defective notice of appeal is sufficient to confer appellate jurisdiction. The issue does not need to be revisited or clarified by this Court.

This matter also need not be reviewed because the "split" among the circuits alleged by Petitioner is illusory. The appellate courts in all twelve circuits follow the direction of this Court to deem a notice of appeal sufficient as long as it provides "the functional equivalent" of what the rules require, and so long as there is no prejudice to the respondent. While there may be some intra-circuit inconsistencies, they are minor and require neither review nor harmonization by this Court. Indeed, the Court has recently denied petitions for certiorari addressing similar issues. *See,*

[1] The district court never entered judgment against Holten in a separate document, as instructed by Rule 58(a) of the Federal Rules of Civil Procedure. Pet. App. A at 3a. As such, judgment for Holten was entered by operation of law on May 22, 2015, 150 days after the order for summary judgment in Holten's favor was entered and 109 days after the notice of appeal was filed. Fed. R. Civ. P. 58(c)(2)(B); *see also* Pet. App. A at 3a.

e.g., *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 882 (2008); *see also Schramm v. LaHood*, 318 F. App'x 337 (6th Cir. 2009), *cert. denied*, 559 U.S. 1067 (2010).

I. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE ISSUES PRESENTED BY PETITIONER.

Petitioner argues that there is uncertainty about how liberally courts should construe notices of appeal, and what materials the courts should review, when determining whether a notice identifies the issues to be considered on appeal. The Court should not grant the petition for certiorari because Petitioner did not raise these issues before the court of appeals;[2] thus, they have not been preserved for review on a writ of certiorari. *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988). In any event, this case does not present an appropriate vehicle for resolving this uncertainty, even if it exists, because resolution of this case likely will not require the Court to revisit *Foman v. Davis*, 371 U.S. 178 (1962), *Torres v.*

[2] Petitioner's arguments before the court of appeals regarding the court's jurisdiction to hear the appeal were limited. Petitioner argued only that the notice of appeal provided sufficient notice because: (1) Ellis had been dismissed pursuant to stipulation, so Holten should have inferred that his dismissal was being appealed; and (2) Petitioner included the final judgment in the notice of appeal, which he argued encompassed all prior orders. Response to Mot. to Dismiss at 1-2 (8th Cir. Document No. 4256987); Reply Br. at 1-2 (8th Cir. Document No. 4310480). Petitioner did not, however, argue that the court should consider his merits briefs when interpreting his notice of appeal, nor did he argue that *Foman*, *Torres*, or *Smith* instructed that the court exercise jurisdiction. Response to Mot. to Dismiss at 1-2 (8th Cir. Document No. 4256987); Reply Br. at 1-2 (8th Cir. Document No. 4310480).

Oakland Scavenger Co., 487 U.S. 312 (1988), and *Smith v. Barry*, 502 U.S. 244 (1992).

Petitioner discusses at length how courts in each of the circuits have answered whether a notice of appeal that specifies the wrong order is nonetheless sufficient to notify the opposing party of the *issues* the appellant intended to appeal. *See* Pet. for Cert. at 5-9. This case is different. Petitioner not only failed to specify the correct order, he failed to specify *any* order that pertained to the Respondent. In fact, the order the Petitioner identified in his notice of appeal *excluded* Holten from its purview—the order stated that it "d[id] not involve or pertain to Holten." Pet. App. F at 23a (Docket No. 38). The question in this case is not whether the Petitioner's notice fairly illuminated the issues to be resolved between a particular appellant and appellee. Rather, the unavoidable question on further review would be whether Holten, who had been expressly excluded from the designated order and judgment, had any notice that he was a party to the appeal.

Petitioner suggests that consideration of this case would resolve uncertainty about the operation of Supreme Court precedent and resolve a circuit split, but there is no disagreement among the courts over what to do when a notice of appeal fails to identify a particular respondent. This case presents a narrow question: whether an appellee in a case that involves multiple appellees is provided sufficient notice by a notice of appeal that designates an order or judgment that applies to other appellees, but not to him or her. The courts that have reviewed this precise issue, regardless of the circuit in which they reside, have uniformly concluded that they lack jurisdiction over the unnamed appellees. *E.g.*, *Jackson v. Lightsey,* 775 F.3d 170, 176-77 (4th Cir. 2014) (holding that a notice

of appeal that identified a 2013 order did not confer appellate jurisdiction over defendants who were dismissed in 2012 and not mentioned in the 2013 order); *Davis v. Fulton Cnty., Ark.*, 90 F.3d 1346, 1354 (8th Cir. 1996) (stating in dicta that omitting appellees could be interpreted as abandonment of those claims); *Smith v. Barry*, 985 F.2d 180 (4th Cir. 1993), *on remand from* 502 U.S. 244 (1992), *cert. denied*, 510 U.S. 874 (1993) (no jurisdiction over defendant dismissed as a matter of law when notice of appeal sought review of "all issues triable by Jury"); *Carver v. Plyer*, 115 F. App'x 532 (3d Cir. 2004) (where appellant listed only one defendant in the notice of appeal and amended notice, and omitted two of the individual defendants entirely, the court concluded that it did not have jurisdiction over the unnamed appellees); *see also Chathas v. Smith*, 848 F.2d 93, 93-94 (7th Cir. 1988) (stating that court would not exercise jurisdiction over defendant omitted from notice of appeal when doing so would prejudice defendant). *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988) ("We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal.").[3]

[3] In several cases, the various courts of appeals conclude that, since Rule 3(c) requires designation of the appellant, omitting the appellee does not necessarily pose a jurisdictional bar to the appeal. These cases, however, are factually distinct from the one before the Court. These cases involved only a single order that unambiguously applied to all potential appellees, or the notice of appeal designated a final judgment that encompassed all prior orders of the court. In other words, the appellees were all subject to the orders from which the appellant appealed. For that reason, these cases did not raise the concern that any of the appellees lacked notice that they were parties to the appeal.

The courts' approach is a sound one. When there is only one defendant, or when the order or judgment designated applies to all potential appellees, "the only result of a vague notice of appeal [i]s to broaden the scope of briefing." *Williams v. Henagan,* 595 F.3d 610, 624 (5th Cir. 2010) (Jones, J. dissenting) (stating that parties that "had no basis to think they had to file a brief" would be "blind-sided" by exercise of jurisdiction). Here, the notice of appeal did not provide Holten notice that he was even a party to the appeal. This disadvantage is precisely what Rule 3 was intended to avoid. *Smith v. Barry*, 502 U.S. 244, 248 (1992) (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988)) (holding that purpose of Rule 3 "is to ensure that the filing provides sufficient notice to other parties and the courts" that the litigant intends to seek appellate review).

Resolving the issues in this matter would not, as Petitioner suggests, shed any light on the

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E.g., *Frieder v. Morehead State Univ.*, 770 F.3d 428, 429-30 (6th Cir. 2014), *aff'g* No. 11–127–HRW, 2013 WL 6187786, at *1 (E.D. Ky. Nov. 25, 2013) (order and judgment designated in notice expressly encompassed all individual defendants); *Williams v. Henagan*, 595 F.3d 610, 616 (5th Cir. 2010) (acknowledging precedent establishing that "if a party names some but not all defendants, the unnamed defendants are excluded" from the appeal); *Thomas v. Gunter*, 32 F.3d 1258 (8th Cir. 1994) (appeal from order granting all defendants summary judgment); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. United Screw & Bolt Corp.*, 941 F.2d 466, 471 (6th Cir. 1991) (stating that order appealed from granted both defendants summary judgment); *Miller v. City of Monona*, 784 F.3d 1113, 1118-19 (7th Cir. 2015) (final judgment encompassing all defendants designated in notice); *Morin v. Moore*, 309 F.3d 316, 320-21 (5th Cir. 2002) (same); *Doe v. City of Pharr, Texas*, No., 15–40838, 2016 WL 3254061, at *4 (5th Cir. June 13, 2016) (same); *Howard v. Terry*, 527 F. App'x 507, 510 (7th Cir. 2013) (same).

application of *Foman v. Davis*, *Torres v. Oakland Scavenger Co.*, or *Smith v. Barry*. These cases address the question of whether a notice of appeal properly places a party on notice that the party intends to appeal a particular issue. Each of these cases involved an appellee who was on notice that he or she was a party to the appeal, regardless of deficiency in the notice. Resolving the narrow issue of whether a notice that identifies an order that expressly excludes a party from its purview is sufficient to put that party on notice that he or she is an appellee would not require the Court to revisit *Foman*, *Torres*, and *Smith*.

II. THE COURTS OF APPEALS ARE NOT DIVIDED OR CONFUSED ABOUT THE APPLICATION OF *FOMAN*, *TORRES*, OR *SMITH*.

The Court should not grant review, even if *Foman*, *Torres*, and *Smith* applied to this case. Contrary to Petitioner's suggestion, the courts of appeals are not divided on how to address the question of whether they have jurisdiction to hear an appeal from an order not identified in the notice of appeal.

The purpose of the requirements of Federal Rule of Appellate Procedure 3(c) "is to ensure that the filing provides sufficient notice to other parties and the courts" that the litigant intends to seek appellate review. *Smith v. Barry*, 502 U.S. 244, 248 (1992) (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988)). A notice of appeal must, in some manner, "specify the parties or party taking the appeal; . . . designate the judgment, order or part thereof appealed from; and . . . name the court to

which the appeal is taken." Fed. R. App. P. 3(c). *Foman*, *Torres*, and *Smith* are in agreement that "if a litigant files papers in a fashion that is technically at variance with the letter of the 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." *Torres*, 487 U.S. at 316-17; *see also Smith*, 502 U.S. at 248-49; *Foman*, 371 U.S. at 181-82. Though courts are to construe Rule 3 liberally, the Rule's requirements are jurisdictional in nature, and failing to comply with them is fatal to the appeal. *Smith*, 502 U.S. at 248 ("The principle of liberal construction does not . . . excuse noncompliance with the rule. Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.").

The appellate courts in every circuit apply the "functional equivalent" test from *Foman*, *Torres*, and *Smith*. *E.g.*, *Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 233-34 (1st Cir. 2007); *Casey v. Long Island R.R. Co.*, 406 F.3d 142, 146 (2d Cir. 2005); *United States v. Carelock*, 459 F.3d 437, 441-43 (3d Cir. 2006), *abrogated on other grounds by Virgin Islands v. Martinez*, 620 F.3d 321, 326-27 (3d Cir. 2010); *Witasick v. Minn. Mut. Life Ins. Co.*, 803 F.3d 184, 190-91 (3d Cir. 2015); *Bailey v. Cain*, 609 F.3d 763, 766-67 (5th Cir. 2010), *cert. denied*, 562 U.S. 1150 (2011); *Isert v. Ford Motor Co.*, 461 F.3d 756, 758-60 (6th Cir. 2006); *Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621, 624-26 (7th Cir. 1993); *Lincoln Composites, Inc. v. Fireface USA, LLC*, 825 F.3d 453 (8th Cir. 2016); *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 690 n.2 (9th Cir. 2009); *Rodgers v. Wyo. Atty. Gen.*, 205 F.3d 1201, 1205-06 (10th Cir. 2000), *overruled on other grounds by Slack*

v. McDaniel, 529 U.S. 473 (2000); *Rinaldo v. Corbett*, 256 F.3d 1276, 1278-80 (11th Cir. 2001); *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394-95 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 1108 (1997); *Sinclair Broadcast Group, Inc. v. F.C.C.*, 284 F.3d 148, 156-57 (D.C. Cir. 2002); *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357-58 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 882 (2008); *see also Biltcliffe v. CitiMortgage, Inc.*, 772 F.3d 925, 929-30 (1st Cir. 2014); *Clark v. Cartledge*, No. 15–6248, 2016 WL 3741864, at *2 (4th Cir. July 12, 2016); *Franklin v. Bausby*, 212 F. App'x 167, 170 (8th Cir. 2005); *Birbari v. United States*, 485 F. App'x 910, 912-13 (10th Cir. 2012); *Brackett v. Hautamaa*, 200 F. App'x 758, 760 (10th Cir. 2006); *Patel v. McCall*, 200 F. App'x 841, 846-47 (11th Cir. 2006).

Petitioner attempts to create a split where none exists by showing that some appellate courts have considered the parties' briefs on the merits when determining whether a notice of appeal sufficiently identifies the order or judgment being appealed from. Pet. for Cert. at 5-9. Petitioner argues, therefore, that the circuits fall into two classes: a class that considers the briefs and a class that will consider only the face of the notice. *Id.* The appellate courts, however, do not fit neatly into the groups Petitioner has created for them. Courts in each circuit have looked to the briefs in some circumstances, but have refused to do so in others. *Compare, e.g.*, *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005) (finding that appellant's intent to appeal order could be "readily inferred from the discussion in her opening brief"), *with Jackson v. Lightsey*, 775 F. 3d 170, 176-77 (4th Cir. 2014) (holding that appellate court did not have jurisdiction to review order not included in the notice of appeal,

even though issues were argued in merits briefs), *and United States v. Cohn*, 166 F. App'x 4, 9-11 (4th Cir. 2006) (concluding, without considering the briefs on the merits, that motion to extend time was not functional equivalent of notice of appeal); *compare Williams v. Henagan*, 595 F.3d 610, 616 (5th Cir. 2010) *and Cantu v. Jackson Nat'l Life Ins. Co.*, 579 F.3d 434, 436 (5th Cir. 2009), *with Carraway v. United States ex rel. Fed. Emergency Mgmt. Agency*, 471 F. App'x 267, 268-69 (5th Cir. 2012) (dismissing appeal without considering briefs because notice of appeal "completely failed to comply with the rule's requirements"), *and Bailey v. Cain*, 609 F.3d 763, 766-67 (5th Cir. 2010) (concluding that certificate of appealability was not the functional equivalent of notice of appeal without considering briefs on the merits); *compare Schramm v. LaHood*, 318 F. App'x 337, 343-44 (6th Cir. 2009), *with Crawford v. Roane*, 53 F.3d 750, 752-53 (6th Cir. 1995); *compare Haberthur v. City of Raymore, Mo.*, 119 F.3d 720, 722 (8th Cir. 1997) (considering briefs to determine whether parties had notice that dismissal of due process claim was being appealed), *and Johnson v. Cook*, 481 F. App'x 283, 284 n.1 (8th Cir. 2012), *with Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409, 411 (8th Cir. 1993), *and Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058-59 (8th Cir. 2002); *compare Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007) (concluding that court lacked jurisdiction to review request for attorneys' fees because order was not included in notice of appeal, even though issue was raised in merits briefs), *with Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993) (holding that court had jurisdiction to review order not identified in notice of appeal because the issue was fully briefed and no party was prejudiced); *see*

also Constructora Andrade Gutierrez, S.A. v. Am. Int'l Ins. Co. of Puerto Rico, 467 F.3d 38, 44 (1st Cir. 2006) (explaining that court construes the requirements of Rule 3 liberally, "analyzing the notice of appeal in the context of the entire record"); *Strong v. Judicial Review Monterey Peninsula, Monterey Peninsula College*, 56 F.3d 73 (9th Cir. 1995) (unpublished table opinion).

Petitioner characterizes the courts' practice of considering the merits briefs in some cases but not all as an intolerable inconsistency and evidence of vast confusion amongst the lower courts. *See* Pet. for Cert. at 9. Petitioner's characterization is wrong. Instead, consistent with this Court's direction in *Smith* and *Torres*,[4] the courts of appeals consider each notice on a case-by-case basis to determine if, considering the totality of the circumstances, it provides the notice required by Rule 3 and can be considered the functional equivalent of the notice of appeal.[5] *See*

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[4] Petitioner argues that there is confusion among the courts of appeals regarding whether *Torres*'s "functional equivalent" rule applies to only the designation of the appellant required by Rule 3(c)(1)(B), or whether it also applies to the specification of the order from which the appeal is taken. Pet. for Cert. at 12-16. This issue, however, was resolved by the Court's decision in *Smith v. Barry*. In *Smith*, the Court applied the *Torres* "functional equivalent" test to Rule 3 generally, establishing that the "functional equivalent" test applies to all three requirements of Rule 3. *Smith*, 502 U.S. at 247-48. Most of the cases Petitioner cites to suggest confusion among the courts of appeals were decided before *Smith*. Pet. for Cert. at 14-15 (primarily citing cases from before 1992, when *Smith v. Barry* was decided).

[5] Petitioner argues that the Third Circuit employs a unique analysis, not used in any other circuit. The Third Circuit, however, uses the same totality of the circumstances test as the other circuits. The Third Circuit has held that a document is the functional equivalent of the notice required by Rule 3 if "(1)

Torres, 487 U.S. at 316 (describing test as whether "in light of all the circumstances" the appellant has complied with Rule 3). *Foman*, *Smith*, and *Torres* say nothing specific about the factors to be considered when determining whether an appellant has filed and served the "functional equivalent" of the notice of appeal required by Rule 3. What notice meets this standard has necessarily been fleshed out by the circuit courts—but, as with the Court's Fourth Amendment reasonableness determinations, it has been done "case by case . . . as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of the circumstances." *See United States v. Banks*, 540 U.S. 31, 35-36 (2003) (discussing the Fourth Amendment reasonableness analysis). Like the Fourth Amendment reasonableness test, the "functional equivalent" rule is not served well by formulaic analysis since it would mean "giving short shrift to details that turn out to be important in a given instance, and . . . inflating marginal ones." *Id.* at 36. (citing *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Ker v. California*, 374 U.S. 23, 33 (1963); *Go-Bart Importing Co. v. United States*, 282 U.S. 344,

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there is a connection between the specified and unspecified orders; (2) the intention to appeal the unspecified orders is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues." *Muhammed v. Newark Hous. Auth.*, 515 F. App'x 122, 124 (3d Cir. 2013) (quoting *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 184 (3d Cir. 2010)). Petitioner's suggestion seems to be that the Third Circuit is so confused by this Court's case law that it has come up with its own rule. The Third Circuit's approach, however, does not represent a different rule. Rather it presents only a different way of expressing the functional equivalency test. The difference is not evidence of a circuit split—it means only that the circuits have differed in the terminology they have used.

357 (1931)). The rule proscribed by *Foman*, *Smith*, and *Torres* is stated generally by design. It is an analysis "not susceptible to Procrustean application." *Id.* As such, the slight differences between the cases is to be expected and is not evidence of a circuit split requiring this Court's attention.[6]

III. INCONSISTENCY BETWEEN THE CIRCUITS' APPROACH TO INTERPRETING NOTICES OF APPEAL, IF ANY EXISTS, DOES NOT PRESENT A CONFLICT ON AN "IMPORTANT MATTER."

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court aims to grant a petition for a writ of certiorari when, *inter alia*, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same *important* matter." U.S. Sup. Ct. Rule 10(a) (emphasis added). As Mr. Chief Justice Taft explained,

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of

[6] Even if Petitioner had identified a genuine, relevant circuit split on this issue, this case would still be an inappropriate vehicle for review because the Eighth Circuit's decision was fact-based—the order and judgment designated in the notice expressly stated that they "d[id] not involve or pertain to Holten," an unusual circumstance that is not likely to be repeated. *See, e.g.*, *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (stating that the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way").

> importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). The case before the Court falls under neither category.

To the extent that the courts of appeals have taken different approaches to applying the "functional equivalent" rule, the differences cannot fairly be described as "important to the public." The courts of appeals apply the same legal standard, looking at the relevant facts and circumstances to make case-by-case determinations regarding whether an appellant has satisfied the functional equivalent of the requirements in Rule 3. Slight differences among the circuits do not deprive any party of the right to appellate review. Rule 3 does not impose onerous requirements—it requires that opposing parties and the courts have adequate notice of the issues on appeal. Harmonizing the minor differences in approach between the circuits is not an issue of importance to the public. Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). *Cf.* U.S. Sup. Ct. Rule 10(a) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). As Justice Breyer has noted, petitions for certiorari "often present cases that involve not actual divides among the lower courts, but merely different verbal formulations of the same underlying legal rule," and the Court is "not

particularly interested in ironing out minor linguistic discrepancies among the lower courts because those discrepancies are not outcome determinative." Breyer, *Reflections on the Role of Appellate Courts*, 8 J. App. Prac. & Process at 96.

IV. THE COURTS OF APPEALS ARE NOT SPLIT ON THE ISSUE OF WHETHER A DEFICIENT NOTICE OF APPEAL CONFERS JURISDICTION WHEN THE APPELLEE IS NOT PREJUDICED OR MISLED.

The Court should not grant the petition for certiorari because Petitioner has not preserved the issue of prejudice by raising it before the court of appeals. *See supra* note 2. However, even if he had, it would not merit review. Petitioner's emphasis on prejudice elevates form over substance. A court need not expressly find that an appellee was or was not prejudiced by a defect in the notice of appeal. In many cases, the fact that a notice of appeal is defective and does not satisfy the requirements of Rule 3 is itself proof that the appellee was prejudiced. The inverse is also true. When a notice of appeal satisfies the "functional equivalent" test and is "objectively clear" in indicating that a party intended to appeal, it goes without saying that a court would not prejudice the appellee by exercising jurisdiction. *Cf. Fisher v. Office of State Atty. 13th Judicial Circuit Fla.*, 162 F. App'x 937, 941-42 (11th Cir. 2006) (considering "functional equivalent" rule and intent, but no express consideration of prejudice).

Petitioner argues that the courts in the Second, Sixth,[7] Seventh, and Eleventh Circuits "hold that errors in a notice of appeal that neither prejudice nor mislead the appellee do not defeat appellate jurisdiction." Pet. for Cert. at 10. Petitioner suggests that courts in these circuits do not apply the "functional equivalent" rule from *Torres*, but rather consider only whether the appellee has been prejudiced. *See id.* Petitioner's characterization of the cases, however, is not accurate, nor is it representative of each circuit's precedent. The courts in all four circuits identified by Petitioner apply the "functional equivalent" rule announced in *Torres*. *E.g.*, *In re Barnet*, 737 F.3d 238, 245 (2d Cir. 2013); *Harris v. United States*, 170 F.3d 607, 608 (6th Cir. 1999); *Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621, 624-26 (7th Cir. 1993); *Moton v. Cowart*, 631 F.3d 1337, 1340 n.2 (11th Cir. 2011).

Petitioner cites four cases in which, according to Petitioner, the issue was determined on the question of whether there was prejudice. But Petitioner oversimplifies these cases. All the cases Petitioner cites examine the appellant's intent *before* making a perfunctory statement that appellee was not prejudiced. *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004) (concluding that appellant's "intent to appeal his . . . claim is clear"); *Taylor v. United States*, 848 F.2d 715, 717-18 (6th Cir. 1988) (indirectly analyzing intent, but decided before *Torres*); *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev.*

[7] The case that Petitioner cites from the Sixth Circuit, *Taylor v. United States*, 848 F.2d 715 (6th Cir. 1988), was decided on June 6, 1988—18 days before *Torres*. As such, it is unsurprising that the court discussed prejudice without expressly analyzing whether the notice was the functional equivalent of what Rule 3 requires, since that test had not yet been announced.

Co., LLC, 476 F.3d 436, 440 (7th Cir. 2007) (explaining that based on procedural posture, intent to appeal order was apparent); *Cornelius v. Home Comings Financial Network, Inc.*, 293 F. App'x 723, 726 (11th Cir. 2008) (concluding that appellant's "overriding intent" to appeal the order was clear before considering prejudice). In determining the appellant's intent, each of these cases reviewed the same factors as those considered while applying the "functional equivalent" rule from *Torres*. This approach is consistent with that of the courts of appeals in other circuits. *See, e.g.*, *New Phone Co., Inc. v. City of New York*, 498 F.3d 127, 130-31 (2d Cir. 2007) (citing *Torres* and describing the test as determining whether litigant's intent to appeal is clear); *Gov't of Virgin Islands v. Mills*, 634 F.3d 746, 751-52 (3d Cir. 2011) (same); *Meehan v. Cnty. of Los Angeles*, 856 F.2d 102, 105-06 (9th Cir. 1988) (same); *see also C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981) (to determine whether litigant's intent to appeal was clear, court construes notice liberally to determine if it generally complies with Rule 3); *United States v. Moreno*, No. 16-6148, 2016 WL 3983125, at *1 (10th Cir. July 21, 2016) (no mention of "functional equivalent" language from *Torres*, but performing same analysis). That the courts in some circuits expressly conclude that prejudice is lacking after performing this test while others do not, does not create a circuit split worthy of this Court's attention.

Conclusion

In this case, the United States Court of Appeals for the Eighth Circuit properly determined that by identifying only the third order and judgment in the notice of appeal, both of which did not apply to

Holten, Petitioner failed to provide the court and Holten sufficient notice that Petitioner also intended to include Holten as a party to the appeal. That the court did not also expressly state that Holten was prejudiced is immaterial, since such prejudice can be presumed when notice is absent. *Cf. Fisher*, 162 F. App'x at 941-42. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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