No. 13-1406

In the Supreme Court of the United States

LOUIS CASTRO PEREZ, PETITIONER

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

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

BRIEF FOR RESPONDENT IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

MATTHEW H. FREDERICK
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
matthew.frederick@texasattorneygeneral.gov
(512) 936-1700

CAPITAL CASE

QUESTION PRESENTED

In 28 U.S.C. § 2107, Congress set a jurisdictional limit on the time to file a notice of appeal, which is reflected in Federal Rule of Appellate Procedure 4(a). Federal courts have no authority to create equitable exceptions to jurisdictional limits, and the Federal Rules of Civil and Appellate Procedure provide that courts may not extend the time to file an appeal except as provided in Appellate Rule 4(a). Does Federal Rule of Civil Procedure 60(b)(6) authorize a district court to vacate and reenter a judgment solely to relieve a party from the jurisdictional limits on the time to file a notice of appeal?

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BRIEF IN OPPOSITION

Congress has established clear limits on the time to file a notice of appeal in a civil case. *Bowles v. Russell* confirms that those limits are jurisdictional and that courts lack authority to create equitable exceptions.

Perez did not file a timely notice of appeal. Relying on Civil Rule 60(b)(6), the district court vacated and reentered its judgment for the sole purpose of restarting the time for appeal, holding that Perez lacked notice of the judgment because he had been abandoned by counsel.

The Fifth Circuit correctly followed *Bowles* and dismissed the appeal for lack of jurisdiction. The Fifth Circuit's decision reaffirmed a consensus among the circuits that Rule 60(b) cannot extend the time to file a notice of appeal beyond the limits imposed by Congress. It did not conflict with *Maples v. Thomas*, which recognized an exception to the court-created doctrine of procedural default, not an equitable exception to a jurisdictional rule.

Even if *Bowles* permitted an equitable exception based on attorney abandonment, this case provides a poor vehicle to create such an exception for at least two reasons. First, Perez did not lose his ability to appeal because of abandonment by counsel. His lawyer did not file an appeal because she did not believe there were any viable issues to raise. This exercise of professional judgment bears no resemblance to the conduct at issue in *Holland*, where counsel failed to act on his client's behalf or

respond to his inquiries for several years, or *Maples*, where the attorneys left their firm without notifying the petitioner to take employment that prevented them from continuing the representation.

Second, even if an equitable exception were appropriate, the district court could have reopened the time to appeal for no more than 14 days. Perez filed his notice of appeal 29 days after the district court vacated and reentered its judgment. Even if the district court had the authority to reopen the time for appeal under Rule 60(b), Perez's appeal would still be untimely unless he could secure a second equitable exception.

The petition should be denied.

STATEMENT

1. *Legal Background*. Congress has established clear limits on the time to file a notice of appeal in a civil case:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(a). The 30-day notice-of-appeal deadline is implemented by Appellate Rule 4(a), which provides, "In a civil case, except as provided in

Rules 4(a)(1)(B),[1] 4(a)(4),[2] and 4(c),[3] the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A).

The statute provides two exceptions to the general 30-day deadline. First, the court may extend the time to appeal for excusable neglect or good cause if a motion is filed "not later than 30 days after the expiration of the time otherwise set for bringing appeal." 28 U.S.C. § 2107(c). Second, if the would-be appellant did not receive notice of the judgment or order within 21 days of entry, and no party would be prejudiced,

> the district court may, upon motion filed within 180 days after entry of

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[1] Rule 4(a)(1)(B) implements § 2107(b), establishing a 60-day notice-of-appeal deadline when the parties include the United States, a federal agency, or a federal officer or employee. Fed. R. App. P. 4(a)(1)(B); *accord* 28 U.S.C. § 2107(b).

[2] Rule 4(a)(4) postpones the start of the time to file an appeal until the disposition of a timely filed motion "(i) for judgment under Rule 50(b); (ii) to amend or make additional factual findings under Rule 52(b) . . . ; (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58; (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered." Fed. R. App. P. 4(a)(4)(A).

[3] Rule 4(c) specifies the operation of appellate deadlines in an appeal by a confined inmate. Fed. R. App. P. 4(c).

> the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Id. The statutory exceptions to the 30-day notice-of-appeal deadline are reflected in Appellate Rules 4(a)(5) and 4(a)(6).

Rule 4(a)(5) permits the district court to extend the time to file a notice of appeal if a motion to extend is filed "no later than 30 days after the time prescribed by this Rule 4(a) expires," and the moving party "shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A). An extension under Rule 4(a)(5) may not extend the deadline by more than "30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." *Id.* 4(a)(5)(C).

Rule 4(a)(6) permits the district court to reopen the time to file the notice of appeal for a period of 14 days only if (1) the moving party did not receive notice of the judgment within 21 days of entry, (2) the moving party files a motion to reopen "within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier," and (3) "no party would be prejudiced." Fed. R. App. P. 4(a)(6).

The district court's ability to extend the notice-of-appeal deadline is limited to the circumstances outlined in Appellate Rules 4(a)(5) and 4(a)(6). Civil Rule 77(d) provides, "Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a)." Fed. R. Civ. P. 77(d)(2). Appellate Rule 26(b) similarly restricts the district court's ability to extend the time to file a notice of appeal:

> For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. **But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4)** or a petition for permission to appeal . . . .

Fed. R. App. P. 26(b) (emphasis added). The Rules thus establish that courts may extend the 30-day notice-of-appeal deadline only as permitted by Appellate Rule 4(a).

The Advisory Committee's notes reflect the same limitation on the district court's ability to reopen the time to file a notice of appeal. When the rules were amended in 1991 to include Rule 4(a)(6), the Advisory Committee explained that the new rule "establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a

judgment to seek additional time to appeal." Fed. R. App. P. 4—1991 Advisory Committee's Note. The Advisory Committee's note confirms that Rule 4(a)(6) provides the exclusive means of reopening the time to appeal when a party does not receive timely notice of a judgment. *See id.* ("Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier.").

2. *Procedural History*. A Texas jury convicted Perez of capital murder and sentenced him to death. The conviction was affirmed on direct appeal, and Perez's petition for state habeas relief was denied. R. 511-21.

Perez filed a federal habeas petition in the United States District Court for the Western District of Texas. Perez was represented in federal court by Sadaf Khan, with the assistance of Richard Burr, "a national expert in death penalty cases." R. 497-510. A magistrate judge recommended denial of Perez's claims on December 29, 2011. R. 511-73. Khan filed objections to the magistrate's report on March 5, 2012. R. 588-97. The district court adopted the magistrate's report and recommendation, denied Perez's application, and denied a certificate of appealability. R. 598-602. The district court entered judgment on March 27, 2012. R. 603. Khan received notice of the judgment that day. R. 618.

After researching applicable law, Khan "chose not to pursue an appeal" because she concluded that it "was not viable" and would divert resources from an

actual-innocence claim. R. 767-68. The time to file a notice of appeal expired on April 26, 2012. On June 12, 2012, the day after he became aware of the district court's order and judgment, Burr sent an e-mail to Khan stating that "even though there are no decent issues for appeal, in a death case an appeal must be taken to stave off the setting of an execution date." R. 678, 769. Burr's candid comment about the lack of any "decent issues for appeal" supports Khan's initial assessment.

On June 25, 2012, Khan moved to reopen the time to file a notice of appeal under Appellate Rule 4(a)(6). R. 604-09. The district court denied the motion because Khan had notice of the judgment. The court noted that Perez had missed the May 29, 2012, deadline to move for an extension under Rule 4(a)(5). R. 617-18.

The district court appointed substitute counsel on August 15, 2012. R. 638-40. Perez then filed motions under Civil Rule 60(b)(6) and Appellate Rules 4(a)(5) and 4(a)(6), arguing that he failed to file a timely notice of appeal because Khan abandoned him from March 2012 to June 2012. R. 645-706. The district court granted the Rule 60(b)(6) motion and "directed [the clerk] to reenter the March 27, 2012 judgment to allow [Perez] the opportunity to file a notice of appeal." R. 789-94. The district court noted that it would otherwise have granted his Rule 4(a)(6) motion. R. 794 n.3. On December 18, 2012, the district court vacated and reentered the March 12, 2012, judgment. R. 794-95. Perez filed a notice of

appeal 29 days later, on January 16, 2013. R. 796-97. The Director filed his own notice of appeal the next day and later moved to dismiss Perez's appeal for lack of jurisdiction.

On February 26, 2014, the Fifth Circuit granted the Director's motion, vacated the district court's order, and dismissed Perez's appeal for lack of jurisdiction. App. 3a. The Fifth Circuit considered whether the district court had "the power to allow an otherwise untimely appeal by using Civil Rule 60(b)(6) to reenter a judgment solely in order to permit such an appeal to become timely." App. 5a.

The court recognized that before 1991, it had "allowed the use of Civil Rule 60(b)(6) to circumvent Appellate Rule 4(a) in cases where the clerk failed to send the required notice to the parties that a judgment had been entered." App. 5a-6a (citing *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970) (per curiam)). But after Rule 4(a) and 28 U.S.C. § 2107 were amended in 1991 to allow an extension of the time to appeal when a party did not receive notice of the judgment, the Fifth Circuit held that Rule 60(b)(6) could no longer provide such relief. App. 6a (citing *In re Jones*, 970 F.2d 36, 37-39 (5th Cir. 1992)). The majority cited *Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir. 2002) (per curiam), which "makes it particularly clear that where the sole purpose of a Civil Rule 60(b) motion is 'to achieve an extension of the time in which to file a notice of appeal, it must fail.'" App. 8a (quoting *Dunn*, 302 F.3d at 493). The majority recognized similar

holdings in *Vencor Hospitals v. Standard Life & Accident Insurance Co.*, 279 F.3d 1306, 1312 (11th Cir. 2002), and *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994). App. 6a-7a.

The majority also relied on *Bowles v. Russell*, 551 U.S. 205, 214 (2007), which held that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and rejected the "unique circumstances" doctrine as an illegitimate equitable exception, which the court had "no authority to create." App. 8a (quoting *Bowles*, 551 U.S. at 214). The majority held that "using Civil Rule 60(b)(6) to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*'s clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based." App. 9a. The majority distinguished *Maples v. Thomas*, 132 S. Ct. 912 (2012), *Holland v. Florida*, 560 U.S. 631 (2010), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), on the ground that they "do not involve exceptions to statutory limits on appellate jurisdiction; they address equitable exceptions to judge-created procedural bars or non-jurisdictional statutes." App. 10a.

The dissenting judge argued that *Maples*, *Holland*, and *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012), supported the district court's order. He distinguished *Bowles* on the grounds that "there was no assertion of attorney abandonment . . . nor is there an express analog in Rule 4 to Rule 60(b)(6)'s allowance for equitable relief under extraordinary

circumstances." App. 31a (Dennis, J., dissenting). According to the dissent, "no case from the Supreme Court, this circuit or any other court provides that attorney abandonment does not constitute the kind of extraordinary circumstances envisioned by Rule 60(b)(6), permitting the reentry of judgment and a new appeal therefrom." App. 34a. Because "Khan abandoned Perez right when he needed her most," App. 20a, the dissent would have affirmed.

REASONS TO DENY THE PETITION

I. THE CIRCUITS ARE NOT IN CONFLICT ON THE QUESTION PRESENTED.

A. Every Circuit To Consider The Question Presented Has Held That Rule 60(b) Cannot Circumvent Jurisdictional Limits On The Time To Appeal.

1. The circuit courts are not split on the question presented by Perez's petition. The Fifth Circuit's order dismissing Perez's appeal for lack of jurisdiction reflects a consensus among the circuits that Rule 60(b) cannot extend the time to file a notice of appeal beyond the limits imposed by 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4(a). The Fifth Circuit's decision in this case broke no new ground, and it did not create a circuit split.

Every circuit to address the question has reached the same conclusion: Rule 60(b) cannot be used to circumvent the jurisdictional appellate deadlines established by 28 U.S.C. § 2107. *See Dunn v.*

Cockrell, 302 F.3d at 492-93 (holding that Appellate Rule 4(a)(5) forbids the use of Rule 60(b) to extend the notice-of-appeal deadline); *see also Baker v. United States*, 670 F.3d 448, 456 (3d Cir. 2012); *Hall v. Scutt*, 482 F. App'x 990, 991 (6th Cir. 2012) (per curiam) ("Rule 4(a)(6) is the exclusive remedy for reopening the time to file an appeal, and Rule 60(b) cannot be used to circumvent Rule 4(a)(6)'s requirements." (citations omitted)); *In re Sealed Case*, 624 F.3d 482, 487 (D.C. Cir. 2010); *Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008) ("Rule 60(b) was not an appropriate vehicle . . . . If Big Top wanted to extend the time to file an appeal, it should have filed a motion under Fed. R. App. P. 4(a)(6)."); *Bowles v. Russell*, 432 F.3d 668, 676 (6th Cir.2005) ("[T]he fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180–day period in that same Rule. The 'limited opportunity for relief' contemplated by the Rule includes both enumerated periods."), *aff'd*, 551 U.S. 205 (2007); *Vencor Hospitals, Inc. v. Standard Life and Acc. Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002) ("Federal Rule of Civil Procedure 60(b) cannot be used to circumvent the 180-day limitation set forth in Rule 4(a)(6). In so holding, we join all of the other circuits examining this issue."); *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000) (finding "no latitude on the clear and restrictive language of Rule 4(a)(6)"); *In re Stein*, 197 F.3d 421, 426 (9th Cir. 1999) ("Rule 4(a) and Rule 77(d) now form a tessellated scheme; they leave no gaps for Rule 60(b) to fill."); *Zimmer St. Louis, Inc. v.*

Zimmer Co., 32 F.3d 357, 361 (8th Cir. 1994) ("[T]he plain language of both Fed. R. App. P. 4(a)(6) and Fed. R. Civ. P. 77(d) addresses specifically the problem of lack of notice of a final judgment. That specificity, in our view, precludes the use of Fed. R. Civ. P. 60(b)(6) to cure problems of lack of notice."); *see also* 16A Wright, Miller & Cooper, Federal Practice and Procedure § 3950.6 at 228 (3d ed. 1999) ("Rule 4(a)(6) provides the exclusive means for extending appeal time for failure to learn that judgment has been entered. Once the 180–day period has expired, a district court cannot rely on the one-time practice of vacating the judgment and reentering the same judgment in order to create a new appeal period.").

2. The Fifth Circuit's opinion below did not create a split with the Ninth Circuit; both courts had already joined other circuits in holding that Rule 60(b) cannot be used to extend the time to file a notice of appeal beyond the limits imposed by Rule 4(a). In *Dunn*, 302 F.3d at 492, the Fifth Circuit recognized that Appellate Rule 4(a)(5) "provide[s] a party specific limited relief from the requirement to timely file a notice of appeal" by permitting the district court to extend the deadline. The court also recognized that using Rule 60(b) to provide further extensions would "circumvent" those specific limitations and render Rule 4(a)(5) a nullity. *Id.* at 492-93. The Fifth Circuit had also held that Rule 60(b)(6) does not permit the vacation and reinstatement of judgments to extend appellate

deadlines for parties who did not receive notice unless the requirements of Rule 4(a)(6) are satisfied. *See In re Jones*, 970 F.2d at 37-39.

The Ninth Circuit reached the same conclusion, rejecting a party's attempted use of Rule 60(b) to vacate and reenter a judgment to permit an appeal from the reentered decision. *See In re Stein*, 197 F.3d at 426. In *Stein*, the 30-day period to file a notice of appeal began on October 1, 1997, when the district court denied various post-trial motions. *Id.* at 423. The appellants' attorneys did not receive notice of the orders until April 9 and 10, 1998. *Id.* Within 14 days of receiving notice, the appellants moved to vacate and reenter the judgment under Rule 60(b)(1) through 60(b)(6). One appellant also moved to extend the time to appeal under Appellate Rules 4(a)(5) and (6). *Id.* The district court denied the Rule 60(b) motions on the ground that Rule 4(a) provides the exclusive remedy for failure to file a timely notice of appeal due to lack of notice of the judgment, and the appellants had not satisfied its requirements. *Id.* at 424. The Ninth Circuit agreed and affirmed.

Comparing the text of the rules and the Advisory Committee's note to the 1991 amendment of Rule 4(a), the Ninth Circuit commented, "Rule 77(d) and the changes to Rule 4(a) set *an outer* limit on the time a party can wait, but is it *the outer* limit? The answer is yes." *Id.* at 425. The court expressly endorsed the Eighth Circuit's analysis in *Zimmer*, concluding that "[u]se of Rule 60(b)(1), no less than use of Rule 60(b)(6), would derogate from the

purpose and effect of Rule 4(a)." *Id.* Finding no contrary authority, the Ninth Circuit concluded that "Rule 4(a) and Rule 77(d) now form a tessellated scheme; they leave no gaps for Rule 60(b) to fill." *Id.* at 426.[4] As a result, "[o]nce the 180-day period has expired, a district court cannot rely on the one-time practice of vacating the judgment and reentering the same judgment in order to create a new appeal period." *Id.* at 425 (quoting 16A Wright, Miller & Cooper, Federal Practice and Procedure § 3590.6 at 228 (3d ed. 1999)).

B. The Only Split That Perez Has Identified Is An Intra-Circuit Split In The Ninth Circuit.

Other than the district court's order in this case, the only decision cited in support of an equitable exception to Rule 4(a)'s mandatory, jurisdictional requirements is a panel opinion from the Ninth Circuit. In *Mackey v. Hoffman*, 682 F.3d at 1251-53, a panel of the Ninth Circuit attempted to avoid circuit precedent by borrowing the concept of attorney abandonment from a variety of inapposite sources. The court relied on *Maples v. Thomas* for the proposition that attorney abandonment is an "extraordinary circumstance," which provides cause

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[4] The court distinguished prior Ninth Circuit authority, explaining that "insofar as our decision in *Rodgers v. Watt*, 722 F.2d 456, 459-60 (9th Cir. 1983), reflects the old one-time practice regarding notice, it has been rendered obsolete and inapplicable to this type of case by the 1991 addition of Rule 4(a)(6)." *Stein*, 197 F.3d at 426.

to excuse a state prisoner's procedural default of state post-conviction remedies. *See id.* at 1252-53. It also relied on *Lal v. California*, 610 F.3d 518 (9th Cir. 2010), which held that an attorney's gross negligence resulting in dismissal with prejudice for failure to prosecute constitutes an "extraordinary circumstance" that warrants relief from the judgment of dismissal under Rule 60(b)(6). *See Mackey*, 682 F.3d at 1251. Finally, the *Mackey* panel relied on *Community Dental Services v. Tani*, 282 F.3d 1164 (9th Cir. 2002), in which an attorney deliberately deceived his client and failed to pursue his client's defense despite court orders to do so, ultimately resulting in a default judgment. *See Mackey*, 682 F.3d at 1251. The lawyer's virtual abandonment constituted gross negligence, which vitiated the agency relationship and provided "extraordinary circumstances" justifying relief from the default judgment under Rule 60(b)(6). *See Tani*, 282 F.3d at 1171. Not one of these cases recognized an equitable exception to the mandatory, jurisdictional limit on the time to file a notice of appeal.

Its dubious merit aside, the decision in *Mackey* did not create (or set the stage for) a circuit split. The Ninth Circuit had already joined the Fifth Circuit in holding that Rule 60(b) does not permit district courts to vacate and re-enter a judgment solely for the purpose of extending the deadline to file a notice of appeal. *See In re Stein*, 197 F.3d at 426.

The only split of authority that Perez has identified is confined to the Ninth Circuit. That intra-circuit split can and should be resolved by the Ninth Circuit; it does not warrant certiorari review by this Court. *See, e.g.*, *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *MAPLES V. THOMAS*.

A. *Maples* Recognized An Equitable Exception To A Non-Jurisdictional Doctrine.

In *Maples v. Thomas*, the Court considered whether a state prisoner's abandonment by his state habeas counsel provided cause to excuse the procedural default of his federal constitutional claims in state court. As a general rule, "[w]hen a procedural default bars litigation of a constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice.'" *Reed v. Ross*, 468 U.S. 1, 11 (1984) (quoting *Engle v. Isaac*, 456 U.S. 107, 129 (1982)); *see also Maples*, 132 S. Ct. at 922. Recognizing that mere negligence does not qualify as "cause," this Court held that abandonment could constitute "extraordinary circumstances" sufficient to excuse a procedural default under the cause-and-prejudice standard. *Id.* at 924.

Unlike 28 U.S.C. § 2107, the procedural-default doctrine does not reflect a jurisdictional limitation; it is a non-jurisdictional body of judge-made rules designed to guide federal courts' discretionary exercise of habeas power when state prisoners fail to properly present their federal constitutional claims in state court. *See generally Reed*, 468 U.S. at 9-11. There is no question that the federal courts have the authority to consider such claims. *See id.* at 9 ("Our decisions have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated."). The procedural-default doctrine merely reflects the Court's forbearance to exercise its authority in appropriate circumstances. *See, e.g.*, *Francis v. Henderson*, 425 U.S. 536, 539 (1976) ("This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power.").

By recognizing attorney abandonment as sufficient cause to excuse a state prisoner's procedural default, *Maples* did not extend judicial authority beyond any congressionally imposed limit, nor did it invest the phrase "extraordinary circumstances" (or litigants who invoke it) with the power to nullify jurisdictional rules. *Maples* interpreted a prudential, court-created doctrine and

determined that the circumstances justified the exercise of the Court's existing authority.

B. The Fifth Circuit Correctly Followed *Bowles*; There Is No Conflict With *Maples*.

1. In *Bowles v. Russell*, the Court expressly held that the time to file a notice of appeal under Appellate Rule 4(a) and 28 U.S.C. § 2107 is jurisdictional; therefore, the courts have no power to create equitable exceptions. 551 U.S. at 214. The Court accordingly rejected the use of the "unique circumstances" doctrine to extend the appellate deadlines beyond the terms of Rule 4(a). *See id.*

The Fifth Circuit's dismissal of Perez's untimely appeal follows from this Court's holding in *Bowles*. Section 2107 establishes jurisdictional limits on the time to file a notice of appeal. Courts lack authority to alter those limits by creating equitable exceptions. *See id.* at 213-15. It follows that courts cannot "create exceptions to circumvent the appellate deadlines as set forth in Appellate Rule 4(a) and § 2107." App. 9a. Dismissing the appeal for lack of jurisdiction, the Fifth Circuit recognized that "using Civil Rule 60(b)(6) to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*'s clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based." *Id.*

Like *Bowles*, the Fifth Circuit's decision in this case does not conflict with *Maples* because it

addresses a different question. *Maples* stands for the proposition that judge-made doctrines and non-jurisdictional rules are subject to equitable exceptions. *See* Section II.A, *supra*; *cf. Holland*, 560 U.S. at 653-54 (holding that attorney abandonment may create "extraordinary circumstances" sufficient to justify equitable tolling of the non-jurisdictional limitations period under 28 U.S.C. § 2244(d)). The question whether Rule 60(b), or any source of equitable power, can be used to extend appellate deadlines beyond the limits provided by § 2107 and Rule 4(a) was not before the Court in *Maples*. But that proposition was presented, and squarely rejected, in *Bowles*.

2. Perez's reliance on the distinction between "excusable neglect" (at issue in *Bowles*) and abandonment (allegedly at issue here) misses the point. Perez implies that *Maples* and *Bowles* represent two sides of the same equitable coin—abandonment is an extraordinary circumstance that requires equitable relief; mere excusable neglect is not. *See* Pet. 23 (arguing that *Bowles*'s rejection of excusable neglect as "a ground for extending the jurisdictional deadline of Rule 4(a)(6) . . . is entirely consistent with *Maples*, which similarly held that attorney negligence—as distinguished from abandonment—was not an extraordinary circumstance that could excuse the failure to appeal"). This argument ignores the distinction between the jurisdictional requirement presented here and in *Bowles* and the judge-made doctrine at

issue in *Maples*. That distinction—not the distinction between negligence and abandonment—makes the difference in this case. The jurisdictional character of the notice-of-appeal deadline means just what *Bowles* says: the only exceptions are those expressly provided; courts lack authority to create additional exceptions based in equity.

That *Bowles* did not address Rule 60(b) specifically does not change the impact of its holding on Perez's claim. *Cf.* Pet. 22 ("Rule 60(b)(6), which was neither cited nor discussed in *Bowles*, permits a district court to relieve a party from a final judgment for 'any . . . reason that justifies relief.'"). *Bowles* expressly rejected the "unique circumstances doctrine," explaining that the jurisdictional time limits do not allow for equitable exceptions. *See Bowles*, 551 U.S. at 214. Perez does not explain how Rule 4(a) could permit an equitable exception based on "extraordinary circumstances" when the Court has already rejected an equitable exception based on "unique circumstances." Rule 4(a) permits no such exception.

Bowles forecloses any equitable exception to the appellate deadlines, including an "extraordinary circumstances" exception based in Civil Rule 60(b)(6). "No authority to create equitable exceptions to jurisdictional requirements," *Bowles*, 551 U.S. at 214, means no authority to create an equitable exception, regardless of its source. Whatever equitable power inheres in Rule 60(b), it cannot

overcome the jurisdictional limits of § 2107 and Rule 4(a). *Bowles*, 551 U.S. at 213-15.

Perez's focus on the distinction between excusable neglect and abandonment also fails to account for the text of Rule 4(a)(5), which extends to both excusable neglect and good cause. The Advisory Committee's notes recognize that "[t]he good cause and excusable neglect standards have 'different domains.'"[5] Fed. R. App. P. 4—2002 Advisory Committee's Note ¶ 10 (quoting *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990)). Rule 4(a)(5) thus provides a remedy for attorney negligence under "excusable neglect" and for attorney abandonment under "good cause." Fed. R. App. P. 4(a)(5)(A). But that distinction makes no difference in this case. To the extent Perez seeks an extension based solely on attorney abandonment, as opposed to lack of notice, Rule 4(a)(5) provides his exclusive remedy.

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[5] The Advisory Committee's note explains further that the excusable-neglect and good-cause standards

> are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Fed. R. App. P. 4—2002 Advisory Committee's Note ¶ 10.

3. Perez maintains that the district court did not create an exception to the notice-of-appeal deadline because he "appealed within 30 days of the reentered order denying habeas relief." Pet. 23. This sleight of hand cannot mask the obvious defect in the district court's order. Perez merely begs the question whether courts can go beyond the exceptions provided by Rule 4(a) and § 2107 to relieve litigants of jurisdictional deadlines.

Perez effectively argues that the district court did not extend the time to appeal; it merely reset the clock. But he cannot dispute that the district court's order to vacate and reenter the judgment had the purpose and effect of relieving Perez from the appellate deadlines that followed the district court's denial of habeas relief on March 27, 2012. The only reason for Perez's Rule 60(b) motion was to avoid the mandatory, jurisdictional deadlines that barred his appeal. The court granted that motion for the express purpose of permitting Perez to file a notice of appeal where the governing statute and rules did not allow it.

The district court's order did not, as Perez contends, "g[i]ve effect to both provisions by vacating the March 27, 2012 judgment to remedy the 'extraordinary circumstance' of abandonment, thereby allowing Perez to comply with Rule 4(a)'s 30-day deadline to appeal the reentered judgment." Pet. 24. There is no merit or logic to the claim that the district court "gave effect" to Rule 4(a)(1)'s jurisdictional 30-day deadline by resetting the clock

to give Perez an additional 30 days. Whatever label Perez chooses to put on it, this was an extension of the appellate deadlines under Rule 60(b)(6).

It is no answer to argue that Rule 4(a) does not apply because Perez sought relief for abandonment under Rule 60(b), not lack of notice. First, the distinction Perez attempts to draw between abandonment and lack of notice is illusory. According to Perez, he did not seek a remedy for his lack of notice of the judgment; he merely sought to "cure the problem caused when Khan abandoned him." Pet. 24 (quoting App. 17a (Dennis, J., dissenting)). But "the problem caused when Khan abandoned him" was lack of notice that the district court had entered judgment against him. *See* Pet. 27 ("Perez's putative attorney unilaterally ceased all work on his case *without ever notifying him that he had lost that case* . . . ." (emphasis added)).[6] However the facts are framed, the harm alleged is lack of notice.

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[6] The court attempted to draw the same distinction in *Mackey*, with similar results. The panel claimed that "Mackey is not receiving relief pursuant to Rule 4(a)(6). . . . Mackey is seeking relief pursuant to Rule 60(b)(6) to cure a problem caused by attorney abandonment and not by a failure to receive Rule 77(d) notice." *Mackey*, 682 F.3d at 1253. But in the very next sentence, it stated, "Mackey contends that he has demonstrated that extraordinary circumstances—here, abandonment by counsel of record—*prevented him from being notified of the order* denying his federal habeas petition." *Id.* (emphasis added).

Second, Perez cannot avoid the jurisdictional limits by disavowing Rule 4(a) because Rule 4(a) provides the exclusive means of reopening the time to file a notice of appeal. *See* Fed. R. App. P. 26(b) ("[T]he court may not extend the time to file . . . a notice of appeal (except as authorized in Rule 4) . . . ."); Fed. R. Civ. P. 77(d)(2) ("Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a)."). It also incorporates the statutory "limit on how long a district court may reopen that period." *Bowles*, 551 U.S. at 213 (citing 28 U.S.C. § 2107(c)); *cf.* Fed. R. App. P. 4—2005 Advisory Committee's Note ¶ 11 ("Even with respect to those cases [in which a party does not receive notice], an appeal cannot be brought more than 180 days after entry, no matter what the circumstances."). If Perez did not rely on Rule 4(a), he had no basis to extend the time to file his notice of appeal.

III. PETITIONER'S FAILURE TO FILE A TIMELY NOTICE OF APPEAL DID NOT RESULT FROM ABANDONMENT BY COUNSEL.

Even if attorney abandonment could support an exception to the jurisdictional limits on the time to file a notice of appeal, this case presents a poor vehicle to establish such an exception because Perez's lawyer did not abandon him. An attorney does not abandon her client unless she stops "operating as [her client's] agent in any meaningful

sense of that word,'" thus "sever[ing] the principal-agent relationship." *Maples*, 132 S. Ct. at 922-23 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)). No such circumstances exist in this case.[7]

In *Maples*, the Court found that "the extraordinary facts" demonstrated abandonment by state habeas counsel. At the time he filed his state habeas petition, Maples was represented by two associates at a large New York law firm. While his state habeas petition was pending, both lawyers left the firm for jobs that disqualified them from continuing the representation, but they did not notify Maples or seek leave to withdraw from the case. *Id.* at 916-17. When the state court denied his petition, it sent notice to his New York attorneys at their former firm, but the notices were returned unopened, and the deadline to appeal passed without any lawyer reviewing the judgment. *Id.* at 917. Maples then filed a federal habeas petition, which was

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[7] Whether the district court's determination of abandonment was a finding of fact or a conclusion of law is not clear. Perez seems to contend that it was a factual finding, *see* Pet. 19 ("The district court made an express finding—which the court of appeals did not disturb . . . ."), but his reliance on principles of agency law suggests a legal question, *see id.* ("Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative." (quoting *Maples*, 132 S. Ct. at 922-23)). To the extent the determination was one of fact, the Director expressly disputes it. *See* Sup. Ct. R. 15.2. To the extent it was a conclusion of law, the court of appeals properly disregarded it.

denied as procedurally defaulted based on his failure to appeal the denial of his state-court petition. *Id.*

The Court determined that Maples had been abandoned "long before the default occurred" because his lawyers left the firm "at least nine months before" the state court denied relief, and "their commencement of employment that prevented them from representing Maples ended their agency relationship with him." *Id.* at 924. As a result, "Maples lacked the assistance of any authorized attorney" during the time to appeal the denial of his state habeas petition. *Id.* at 927.

Similarly, the facts that led the Court to recognize the possible existence of "extraordinary circumstances" in *Holland* demonstrate repeated, egregious failures by counsel over an extended period. In that case, petitioner's counsel "failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so"; he "apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules"; he "failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information"; and he "failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters." 560 U.S. at 652. The petitioner's allegations described "near-total failure to communicate with

petitioner or to respond to petitioner's many inquiries and requests over a period of several years." *Id.* at 659 (Alito, J., concurring). This protracted lack of assistance led the petitioner to undertake "efforts to terminate counsel due to his inadequate representation and to proceed *pro se*, [which] were successfully opposed by the State on the perverse ground that petitioner failed to act through appointed counsel." *Id.*

Perez cannot come close to the standard of abandonment set in *Maples* and *Holland*. In this case, Khan functioned as Perez's counsel before, during, and after the time for filing a notice of appeal. When the magistrate judge recommended denial of his habeas application, Khan secured extra time to prepare objections. R. 574-87. She filed timely objections on March 5, 2012. R. 588-97. After receiving the district court's order and judgment on March 27, 2012, R. 598-603, Khan conducted legal research and affirmatively "chose not to pursue an appeal" because the appeal "was not viable" and would consume scarce resources, R. 767-68. After consulting with Burr, Khan reconsidered her strategic decision, R. 768-70, and on June 25, 2012, filed a motion to reopen the time to file a notice of appeal under Rule 4(a)(6). R. 605-09.

Unlike the long-departed (and conflicted) lawyers in *Maples*, Perez's lawyer made a deliberate decision not to appeal because she determined that there were no meritorious issues to raise. This was an exercise of her professional judgment as Perez's

counsel, not an act of abandonment. This indisputable fact breaks the chain of causation between Khan's alleged abandonment and her failure to file a notice of appeal—even if Khan had discussed the judgment with Perez and learned that he wished to appeal, she would have been bound by her "ethical duty as an officer of the court . . . not to present frivolous arguments." *Smith v. Robbins*, 528 U.S. 259, 281 (2000). In any event, the record demonstrates that Perez did not file a timely notice of appeal because his lawyer evaluated the merits of his appeal and found none. That exercise of professional judgment by Perez's lawyer—not her alleged abandonment—prevented Perez from appealing the district court's denial of his habeas petition.

Even if an equitable exception could permit the reopening of Perez's appeal, his notice of appeal would still be untimely because it was not filed within 14 days of the district court's order vacating and reentering the judgment. A district court may reopen the time to file an appeal "for a period of 14 days from the date of entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c); *see also* Fed. R. App. P. 4(a)(6). Like the general 30-day notice-of-appeal deadline, the 14-day time limit is jurisdictional. *Bowles*, 551 U.S. at 213 ("Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'"). Assuming that the

district court entered a valid order to reopen, it could not have reopened the time for appeal for more than 14 days. Perez took 29 days to file his notice of appeal. R. 11. Without a second equitable exception to relieve him of the 14-day limit on the reopened time for appeal, Perez's notice of appeal would therefore remain untimely. Because Perez would not be entitled to relief in any event, this case presents a poor vehicle to create an equitable exception to the jurisdictional requirements of § 2107 and Appellate Rule 4(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

MATTHEW H. FREDERICK
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711
matthew.frederick@
texasattorneygeneral.gov
(512) 936-1700

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