No. 15-1530

IN THE

Supreme Court of the United States

ALFREDO ROSILLO,

Petitioner,

v.

MATT HOLTEN, ET AL.,

Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question about whether the federal courts of appeals may exercise jurisdiction when a notice of appeal does not correctly identify the order to be reviewed, but the surrounding context nevertheless makes clear which order is being appealed. In this case, Petitioner Alfredo Rosillo brought suit against two police officers, Matt Holten and Jeff Ellis, asserting a cause of action for excessive force. The district court granted summary judgment in favor of Matt Holten, and Rosillo separately

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Although Jeff Ellis's counsel did not respond to the request for consent, Jeff Ellis is no longer considered a party under Rule 12.6. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

settled with Jeff Ellis. When Rosillo filed his notice of appeal from the district court's grant of summary judgment, he included both parties in the caption and electronically served Holten's counsel, but he inadvertently designated in his notice of appeal the order in which the district court approved his settlement with Ellis, rather than the order in which the court granted summary judgment to Holten. Even though the inadvertently designated settlement order was one that Rosillo himself had moved the court to issue, and Holten acknowledged early on that he understood that Rosillo intended to appeal the district court's summary judgment order, the Eighth Circuit concluded that it "lack[ed] jurisdiction to review the district court's order granting Holten's motion for summary judgment." Pet. App. 4a.

As the Petition demonstrates, there is an entrenched circuit split on this question, and Rosillo's appeal would likely have been able to move forward had it been brought in one of the circuits in which courts look beyond the face of the notice of appeal to determine whether the court has jurisdiction. Pet. at 5-16. That split alone is sufficient to merit this Court's review.

This Court should also review this case because the question it raises—one that affects the ability of litigants to access the federal appellate courts—is an incredibly important one. *Amicus* submits this brief to demonstrate that the Eighth Circuit's decision is at odds with the Federal Rules of Appellate Procedure, which were drafted to promote access to the appellate courts, and thereby undermines Article III's goal of ensuring that where there is a violation of a legal right, there is a legal remedy.

When the Framers drafted our enduring Constitution, their design sharply departed from the pre-

cursor Articles of Confederation in several respects. Most relevant here, the Framers created the federal judiciary as an independent, co-equal branch of government, vesting the newly created federal courts with the "judicial power" to resolve nine categories of cases and controversies. By vesting this broad power in the judicial branch, the Framers sought to ensure that the federal courts would have the authority to protect individual rights secured by federal law and to safeguard the Constitution.

The provision of this power in the federal courts reflected the Framers' firmly held belief that where there is a legal right, there is also a legal remedy for violation of that right. As this Court recognized in *Marbury v. Madison*, "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* *23).

The federal courts of appeals, though not mandated in the Constitution itself, have come to play a critical role in fulfilling Article III's guarantee by ensuring that every litigant has an opportunity to have one appeal as of right. Indeed, the courts of appeals were established precisely because Congress understood the importance of the appellate process and recognized that with the growth of the federal court system, the Supreme Court could no longer adequately fill that role.

Consistent with our nation's constitutional commitment to broad access to the courts, and the longstanding recognition of the importance of the appellate courts to our Article III judicial system, the Federal Rules of Appellate Procedure were designed to facilitate, not impede, access to the appellate courts.

Indeed, when originally adopted, they drew heavily upon the Federal Rules of Civil Procedure, which "embodied a justice-seeking ethos," Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 288 (2013). And in the years since their adoption, they have been repeatedly amended in ways that reflect the drafters' intent that they be liberally construed so as to ensure that individuals are not denied their day in court based on technical errors or procedural traps. *See Smith v. Barry*, 502 U.S. 244, 248 (1992) (courts should "liberally construe the requirements of [Federal Appellate] Rule 3"); *see also Becker v. Montgomery*, 532 U.S. 757, 767 (2001) (identifying opinions of this Court that are "in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court").

The decision of the court below is at odds with the Federal Appellate Rule it purports to apply, as well as with this Court's precedent. Its decision undermines the function of our appellate courts and Article III's goal of ensuring that where there is a legal right, there is a legal remedy for violation of that right. This Court should grant certiorari and hold that where surrounding context makes clear the order from which an appellant meant to appeal, the omission of that order from the notice of appeal does not deprive the court of appeals of jurisdiction.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT FEDERAL APPELLATE COURTS HAVE JURISDICTION WHERE CONTEXT, INCLUDING THE BRIEFS, MAKES CLEAR THE ORDER AT ISSUE ON APPEAL

A. The Framers Wrote Article III To Ensure That Where There Is a Legal Right, There Is a Remedy for Infringement of that Right

Article III of the Constitution broadly extends the "judicial Power" to nine categories of cases and controversies, including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power to the newly created federal courts was a direct response to the infirmities of the Articles of Confederation, which established a single branch of the federal government and no independent court system. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional government established by the Articles of Confedera-

tion, individuals could not go to court to enforce federal legal protections, prompting Alexander Hamilton to observe that "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, at 118 (Hamilton) (Clinton Rossiter ed., 1961).

When the Framers gathered in Philadelphia in 1787 to create a new national charter, they took pains to ensure that the federal courts would have the power to enforce federal legal protections and to safeguard the Constitution. The Framers recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions," *The Federalist No. 80, supra*, at 443 (Hamilton), and thus provided for an expansive federal judicial power vested in an independent judiciary. *See generally* U.S. Const. art. III (establishing an independent judiciary whose members "shall hold their Offices during good Behaviour"); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 705-73 (1998) (explaining that the Framers gave the federal courts the power to enforce the Constitution's guarantees and ensure the supremacy of federal law in adjudicating cases that came before them).

The Framers thus wanted to endow the federal courts with these broad powers in part because they saw the harms caused by the absence of a strong, independent federal judiciary under the government established by the Articles of Confederation. They also wanted to ensure the federal courts would have these powers because, consistent with English common law traditions, they recognized that legal rights were meaningless without the ability of individuals to go to court to obtain a legal remedy when those rights

were violated. In other words, they understood that for courts to play their essential role of expounding the law and vindicating individual rights, rights and remedies had to go hand in hand. As William Blackstone had written, it was a "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 Blackstone, *supra*, at *23. "[I]n vain would rights be declared, in vain directed to be observed," Blackstone declared, "if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law." 1 *id.* at *55-56.

Anti-Federalists complained bitterly about Article III's broad sweep, insisting that "[t]he jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude." 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 565 (Jonathan Elliot ed., 1836) (Grayson). But these arguments did not carry the day. Rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, the American people ratified the Constitution, giving the newly created federal courts broad judicial power to ensure that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *id.* at 160 (Davie); 3 *id.* at 554 (Marshall) ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.").

In *Marbury v. Madison*, Chief Justice Marshall reaffirmed the fundamental rule-of-law principles that the U.S. Constitution secured, explaining that,

under Article III, a broad understanding of an individual's right to go to court to redress violations of personal rights was necessary to ensure "[t]he very essence of civil liberty" and realize our Constitution's promise of a "government of laws, and not of men." *Marbury*, 5 U.S. (1 Cranch) at 163. Marshall also invoked Blackstone's discussion of common law principles that ensure that "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Id.* (quoting 3 Blackstone, *supra*, at *109). Thus, he concluded, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816) (rejecting a construction of Article III that "would, in many cases," result in "rights without corresponding remedies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (explaining that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

Thus, Article III confers on the federal courts a broad "judicial power" capacious enough to ensure that the federal courts can, in fact, provide legal remedies to redress legal wrongs. The federal appellate courts, although not mandated in the Constitution itself, now play a critical role in our federal court structure, and the Federal Rules of Appellate Procedure were designed to be interpreted in a manner that enables them to play that critical role, as the next Section discusses.

B. The Federal Rules of Appellate Procedure Should Be Interpreted To Ensure that the Federal Appellate Courts Can Play Their Proper Role in Our Article III System

The federal courts of appeals play a fundamental role in fulfilling Article III's purpose, ensuring that litigants have at least one level of review of trial court decisions. *See* Harlon Leigh Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 Yale L.J. 62, 62 (1985) ("the right [to appeal] has become, in a word, sacrosanct"); *id.* at 66 ("'The right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country.'" (quoting Am. Bar Ass'ns Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 commentary at 12 (1977))). Indeed, Congress established the federal appellate courts in 1891 in part because it wanted to constrain the "kingly power" of federal court trial judges who were then too numerous to be corrected by one Supreme Court. 21 Cong. Rec. 3404 (1890) (statement of Rep. Culberson). As Congressman Culberson, the sponsor of the 1891 Act, explained, "[t]he right to review the judgments of a trial court upon the record before another tribunal is as dear to freemen as liberty itself, and in a free country should not be denied or seriously abridged." *Id.*

Consistent with the constitutional commitment to broad access to the courts, and the long-standing recognition of the importance of the appellate courts to our Article III judicial system, the Federal Rules of Appellate Procedure were designed to facilitate, not impede, access to the appellate court system. Significantly, the Federal Rules of Appellate Procedure, as

originally adopted in 1968, were heavily influenced by the Federal Rules of Civil Procedure, *see* Fed. R. App. P. 3 advisory committee's 1967 notes ("the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules"); *id.* ("This subdivision [Rule 3(c)] is identical with corresponding provisions in FRCP 73(b) and FRCrP 37(a)(1)."), which "embodied a justice-seeking ethos," Miller, *supra*, at 288.

As Arthur Miller has explained, the Federal Rules of Civil Procedure were drafted by individuals who "believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation." *Id.*; *see id.* (rules were designed to "promot[e] discretion, flexibility of judicial application, and simplicity of operation"). Charles Clark, one of the lead drafters of the Rules, noted that they "subordinat[ed] . . . civil procedure to the ends of substantive justice." Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U. L.Q. 297, 297 (1938); *id.* ("'the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case'" (quoting *In re Coles* [1907] 1 KB 1, 4)); *see also Val Marine Corp. v. Costas*, 256 F.2d 911, 916 (2d Cir. 1958) (noting that Rule 73(b), later replicated in Appellate Rule 3(c), "provides for designation of 'the judgment or part thereof appealed from' as a means of identification, and not as a step in appellate pleading. For assignments of error and other paraphernalia of ancient appellate procedure are done away with." (citing, *inter alia*, Advisory Committee Note to Rule 73(b))).

Indeed, this Court has previously recognized that "'[t]he Federal Rules reject the approach that plead-

ing is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *see id.* at 181 ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities.").

The drafting history of the federal appellate rules—including Rule 3, which governs the filing, content, and service of a notice of appeal—reflects that the Rules' drafters did not want technicalities or mistakes in form to prevent individuals from being able to access the federal courts of appeals. With respect to Rule 3(a), for example, which governs the manner of filing a notice of appeal, the Committee first considered including in the proposed rule "provisions which would persuade the courts of appeals to treat the 'good faith' attempt to appeal as an appeal itself." Meeting Minutes of the Advisory Comm. on Rules of Appellate Procedure 2 (May 1965). Although the Committee did not ultimately include those provisions in the Rule itself, it did adopt a general Note citing decisions that took that approach, in order to make the same point. *See id.*; Fed. R. App. P. 3 advisory committee's 1967 notes ("decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules").

The specific drafting history of Rule 3(c) also reflects this approach. In 1979, the Rule was amended to make clear that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal."

Fed. R. App. P. 3(c)(4). The Committee's advisory notes explained that

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

Fed. R. App. P. 3 advisory committee's 1979 notes.

In 1993, the Rule was amended again in response to this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which held that "[t]he failure to name a party in a notice of appeal . . . constitutes a failure of that party to appeal," *id.* at 314. Rejecting this Court's strict interpretation of Rule 3, the Committee amended the Rule to make clear that an appeal should not be dismissed "for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4); *see* Fed. R. App. P. 3 advisory committee's 1993 notes ("Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward."). As one member of the Committee explained during deliberations, "as between court convenience and a party's right to bring a case before the court, the right to appeal should prevail. The aim of the rule amendment should be to keep appellants from falling between the cracks." Meeting Minutes of the Advisory Comm. on Rules of Appellate Procedure 11 (Dec. 1991) (statement of Judge Danny Boggs).

These amendments to Rule 3 are consistent with other parts of the federal appellate rules that reflect the drafters' intent that the Rules facilitate, and not impede, access to the appellate courts and the pursuit of justice. *See, e.g.*, Fed. R. App. P. 2 advisory committee's 1967 notes ("The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result."). Indeed, other provisions of the federal appellate rules have been repeatedly amended in order to ensure they do not impede access to the courts. For example, in 1991, Rule 4(a) was amended to "[allow] a district judge to reopen the time for appeal upon a finding that (a) notice of entry of judgment was not timely received and (b) no party would be prejudiced by the reopening." Report of the Advisory Comm. on Rules of Appellate Procedure 2 (June 1989); *see* Fed. R. App. P. 4(a). The next year, Rule 4 was again amended to eliminate a "trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending." Report of the Advisory Comm. on Rules of Appellate Procedure 12-13 (June 1992). And in 1998, Rule 15, which governs appellate review of an agency order, was amended to again "eliminate a procedural trap." Meeting Minutes of the Advisory Comm. on Rules of Appellate Procedure 5 (Oct. 1998).

This drafting history reflects what this Court has previously recognized: courts should "liberally construe the requirements of Rule 3." *Smith*, 502 U.S. at 248. Thus, as this Court explained, "when papers are 'technically at variance with the letter of [Rule 3], a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.'" *Id.* (quoting *Torres*, 487 U.S. at 316-17); *see id.* at 248-49

("If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal."). Indeed, as this Court has recognized, there are opinions of the Court that are "in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Becker*, 532 U.S. at 767.

This Court should grant certiorari to resolve the split in the circuits on the application of Rule 3 in cases, like this one, where the notice of appeal did not specify the proper order, but the surrounding context left no genuine doubt about the order that was the subject of the appeal. The Court should hold that the strict interpretation of Federal Rule of Appellate Procedure 3 adopted by the court below is at odds with the Rule and this Court's precedent applying it, and that this rigid interpretation also undermines the appellate courts' important role in fulfilling Article III's promise of broad access to the courts.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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