

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CHARMAINE HAMER,)
)
) Petitioner,)
)
) v.) No. 16-658
)
) NEIGHBORHOOD HOUSING SERVICES)
)
) OF CHICAGO, et al.,)
)
) Respondents.)
)
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CHARMAINE HAMER,)

Petitioner,)

v.) No. 16-658

NEIGHBORHOOD HOUSING SERVICES)

OF CHICAGO, et al.,)

Respondents.)

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Washington, D.C.

Tuesday, October 10, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

JONATHAN A. HERSTOFF, New York, New York; on behalf of the Petitioner.

DAMIEN G. STEWART, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 16-658, Hamer versus Neighborhood Housing Services of Chicago.

Mr. Herstoff.

ORAL ARGUMENT OF JONATHAN A. HERSTOFF
ON BEHALF OF THE PETITIONER

MR. HERSTOFF: Mr. Chief Justice, and may it please the Court:

One of the fundamental tenets of our constitutional structure is that only Congress can set the jurisdiction of the lower courts.

Based on that fundamental principle, Federal Rule of Appellate Procedure 4(a)(5)(C) is non-jurisdictional. The plain language of 28 U.S.C. Section 2107(c) is unambiguous. The district court can extend the time to appeal as long as a motion is timely filed and there has been a showing of excusable neglect or good cause.

No maximum extension of time is set in the statute or in any other statute. And, therefore, Rule 4(a)(5)(C) does not constitute

1 a limitation on a court's jurisdiction.

2 Because of that, Rule 4(a)(5)(C) is
3 subject to forfeiture, waiver, and equitable
4 considerations. And here there have been
5 several acts of forfeiture and waiver. The
6 Respondents forfeited their right to rely on
7 4(a)(5)(C) by --

8 JUSTICE GINSBURG: Should we -- should
9 we reach that question, Counsel? I mean, the
10 Seventh Circuit typed this limitation as
11 jurisdictional, so they never went on to
12 consider any question of forfeiture or waiver.
13 So, are you suggesting that we should decide
14 those questions in the first instance?

15 MR. HERSTOFF: I submit that the
16 record is sufficiently clear that the Court can
17 -- can reach that issue here. Certainly, the
18 Court has discretion just to have it considered
19 on remand, but we do think that the forfeitures
20 and waivers are clear here.

21 CHIEF JUSTICE ROBERTS: The issues of
22 equitable considerations, special circumstances
23 that you talk about, are there limits to those?
24 I mean, let's say the issue comes up three
25 years later. Can the district court at that

1 point consider to extend the time to appeal?

2 MR. HERSTOFF: Well, certainly, the
3 equities would have to be weighed. Certainly,
4 the longer -- the longer the extension is,
5 perhaps the less reasonable it is for an
6 appellant to rely on the district court's
7 order, but assuming that a -- an order is
8 relied on in good faith by the appellant, there
9 has been no objection from the other side,
10 there has been no showing of bad faith, we
11 think that the equities should be considered.
12 And here it's undisputed that Ms. Hamer was
13 misled by the district court's order.

14 There's absolutely no showing of bad
15 faith here. The Seventh Circuit itself
16 recognized that Ms. Hamer was misled. And
17 under those circumstances, we think that
18 equitable considerations should require that
19 the appeal be decided on the merits.

20 JUSTICE SOTOMAYOR: But -- but who
21 misled her? Was it the court or was it her own
22 attorney?

23 MR. HERSTOFF: Well --

24 JUSTICE SOTOMAYOR: Was this
25 malpractice on the attorney's part for asking

1 for an extension that exceeded the Federal
2 Rules? Assuming it's non-jurisdictional, that
3 the statute is -- that you're right, that this
4 is a non-jurisdictional barrier, it would still
5 be a statutory barrier, a Federal Rules
6 barrier.

7 MR. HERSTOFF: Yes, and we -- we think
8 that Ms. Hamer was misled by the district
9 court's order. It's certainly true that she
10 may have also been misled by the attorney's
11 motion for the extension of time. But -- but
12 both of those factored in here, and the
13 equities should be considered.

14 There --

15 JUSTICE GINSBURG: That was an
16 attorney who simultaneously was asking to be
17 relieved from representing her, right?

18 MR. HERSTOFF: That's correct, Justice
19 Ginsburg, yes. And that -- this case is
20 directly analogous to Harris Truck Lines. In
21 Harris Truck Lines, the attorney asked for an
22 extension of time that was prohibited, both by
23 rule and by statute, and yet this Court held
24 that the -- the reliance on the extension of
25 time required that the equities be considered

1 and required that the appeal be decided on the
2 merits. And we submit here the same course
3 should be followed.

4 JUSTICE KENNEDY: As a matter of
5 custom and usage in the district courts, could
6 you just tell me -- suppose the verdict is
7 returned or the judge indicates it's what the
8 -- what the ruling will be -- can both sides
9 and do both sides sometimes say please don't
10 enter the judgment, Your Honor, so that we can
11 talk settlement? Does that happen?

12 MR. HERSTOFF: So -- do the parties
13 ask that the district court withhold --

14 JUSTICE KENNEDY: Yes, in other words,
15 both -- both parties tell -- in order to avoid
16 these problems, say please don't enter
17 judgment.

18 MR. HERSTOFF: Yeah, and that
19 certainly can happen. In this particular
20 case --

21 JUSTICE KENNEDY: Does it happen? I
22 was curious to know.

23 MR. HERSTOFF: I have certainly seen
24 some instances where a court comes out with a
25 decision and then asks the parties to submit a

1 proposed form of judgment. So, that could
2 certainly happen.

3 Here the judge -- the final judgment
4 was entered alongside the --

5 JUSTICE KENNEDY: My -- my question
6 was a little different. Could they say, Your
7 Honor, we're in settlement negotiations, could
8 you please withhold entry of judgment?

9 MR. HERSTOFF: I'm not sure that I've
10 seen that specific scenario, especially in the
11 summary judgment context where the motion was
12 pending. What I've seen is where summary
13 judgment motions are pending and the parties
14 ask the court not to issue a decision at all.

15 I'm not sure I've seen a situation
16 where a decision is out and the parties have
17 asked the court to --

18 JUSTICE KENNEDY: Could the parties in
19 the district court agree to withhold entry of
20 judgment for years and, therefore, prejudice
21 the Court of Appeals when ultimately it has a
22 case that -- that's old?

23 MR. HERSTOFF: For years, no, because
24 Rule 58 of the Rules of Civil Procedure says
25 that the judgment is considered to be entered

1 --

2 JUSTICE KENNEDY: It's 180 days or
3 something like that?

4 MR. HERSTOFF: It -- yes, Justice
5 Kennedy.

6 JUSTICE KENNEDY: Right.

7 MR. HERSTOFF: But outside of that, I
8 don't see any barrier to the parties asking the
9 Court to do that. Although I --

10 JUSTICE GINSBURG: We have one brief,
11 an amicus brief in this case, telling us that
12 we were wrong in drawing a distinction between
13 what's in a statute, jurisdictional, what's in
14 the rule, non-jurisdictional.

15 And instead, anything that shifts a
16 case from one court to the other, as notice of
17 appeal does, that should be considered
18 jurisdictional. This is Professor Dodson's
19 brief.

20 MR. HERSTOFF: Yes. And I
21 respectfully disagree with that for a couple of
22 reasons.

23 That formulation of jurisdiction is
24 inconsistent with this Court's case law and
25 also with the Rules of Civil Procedure.

1 For instance, under Professor Dodson's
2 formulation of jurisdiction, the time to -- to
3 appeal from the VA to the Court of Appeals for
4 veterans' claims would be jurisdictional
5 because it involves the transfer of
6 adjudicatory authority, yet this Court
7 unanimously held that that time period is
8 non-jurisdictional.

9 Similarly, the Federal Rules of Civil
10 Procedure, such as rules 54(b) and 23(f) would
11 be jurisdictional under Professor Dodson's
12 formulation, but we know from Rule 82 that the
13 Rules of Civil Procedure are
14 non-jurisdictional.

15 So, therefore, Professor Dodson's
16 formulation of jurisdiction is incorrect.

17 JUSTICE KAGAN: Do you think a rule
18 can ever be jurisdictional without being
19 codified in a statute?

20 MR. HERSTOFF: A rule that is not in a
21 statute, no. I think that it cannot be --

22 JUSTICE KAGAN: That's a flat rule,
23 there are no exceptions to it? But what if the
24 rule, for example, interpreted statutory
25 language?

1 MR. HERSTOFF: If the rule interpreted
2 statutory language, then perhaps under that
3 interpretation of the statute, the statute
4 could be jurisdictional. But the rule on its
5 own could never be jurisdictional.

6 JUSTICE ALITO: And why is that?

7 MR. HERSTOFF: It stems from a long
8 line of court cases, such as Kontrick, and it
9 also extends from Article III of the
10 Constitution, which says that it is for
11 Congress to establish the lower courts. So --

12 JUSTICE GINSBURG: We have drawn the
13 line, I think it was in Justice Thomas'
14 decision, between statute and rule pretty
15 clearly.

16 MR. HERSTOFF: Yes, Justice Ginsburg,
17 Bowles versus Russell establishes that and
18 Kontrick versus Ryan establishes it, and cases
19 as far back as the 1940s and perhaps even
20 earlier have also said that court-promulgated
21 rules cannot be jurisdictional. So, we think
22 that the same course should be followed here.

23 CHIEF JUSTICE ROBERTS: The -- the
24 rule by its terms, I suppose, it says you have
25 got to file the motion no later than 30 days

1 after the time proscribed under Rule 4(a),
2 right?

3 MR. HERSTOFF: That's right, Mr. Chief
4 Justice.

5 CHIEF JUSTICE ROBERTS: But then it's
6 quite clear that that is not jurisdictional,
7 right?

8 MR. HERSTOFF: Rule 4(a)(5)(C) is not
9 jurisdictional, yes, Your Honor.

10 CHIEF JUSTICE ROBERTS: No, I'm
11 talking about the time to file the motion for
12 an extension.

13 MR. HERSTOFF: Oh, I'm sorry, the time
14 to file, yes, under Bowles, that probably would
15 be jurisdictional because it is right in the
16 statute as well.

17 So the first sentence of Section
18 2107(c) sets the time to file the motion. So I
19 think under Bowles that would likely be
20 jurisdictional.

21 CHIEF JUSTICE ROBERTS: The motion for
22 an extension?

23 MR. HERSTOFF: The -- the time to file
24 the motion, yes, that would be jurisdictional,
25 whereas the length of the extension would not

1 be, and would, therefore, be subject to --

2 JUSTICE GINSBURG: What do you make of
3 the argument that at one time it was in the
4 statute and it was left out inadvertently?

5 MR. HERSTOFF: They respectfully
6 disagree with that. I think the plain language
7 of the statute is very clear, and this Court
8 presumes that Congress intends its amendments
9 to have effect.

10 And aside from that, the legislative
11 history shows that Congress knew exactly which
12 limitations it was incorporating into the
13 statute.

14 Specifically, the House report says
15 that it is incorporating the first sentence of
16 Rule 4(a)(5) into the statute, which -- which
17 is the time to file the motion and the
18 requirement that there be excusable neglect or
19 good cause.

20 That was being incorporated, whereas
21 the entirety of Rule 4(a)(6) was being
22 incorporated. So, certainly Congress made a
23 specific decision which parts to incorporate
24 and which parts not to incorporate.

25 CHIEF JUSTICE ROBERTS: Well, they

1 also said these were only technical changes,
2 right?

3 MR. HERSTOFF: That -- that was said.
4 However, a comparison between the old statute
5 and the new statute shows that very significant
6 changes were made. The older statute only
7 permitted an extension of time if there was
8 excusable neglect, plus a lack of notice.

9 Here there can be an extension of time
10 under the 1991 statute if there is any showing
11 of excusable neglect or if there is any showing
12 of good cause.

13 Additionally, the statute in the
14 second part of 2107(c) permits a reopening of
15 the appeal time if there is a showing of lack
16 of notice, even if there is no excusable
17 neglect.

18 JUSTICE GINSBURG: That's the part
19 that was carried over the time limit in the
20 case where the would be appellant didn't
21 receive timely -- didn't receive notice of the
22 judgment, that the judgment had been entered?

23 MR. HERSTOFF: Yes, Your Honor, that's
24 right. But excusable neglect was not required
25 there, whereas it was under the old statute.

1 So certainly the 1991 statute was --
2 is much more permissive toward extensions of
3 time than the old statute and really the new
4 statute codified what had been in the federal
5 rules since the 1960s.

6 So, certainly the 1991 statute made
7 very significant changes.

8 JUSTICE ALITO: Do you think there is
9 anything that would bar the rules of appellate
10 procedure from altering doctrines like
11 forfeiture waiver and exceptional
12 circumstances?

13 MR. HERSTOFF: I think that certainly
14 is possible for the rules to do that. I don't
15 think it was done here, but -- but yes.

16 JUSTICE ALITO: Well, this is --
17 assuming it is not jurisdictional, it is a
18 mandatory claims processing rule.

19 MR. HERSTOFF: Yes, Your Honor.

20 JUSTICE ALITO: And it -- it comes --
21 it follows from a version of the statute that
22 did impose a hard time limit, did it not?

23 MR. HERSTOFF: I would --

24 JUSTICE ALITO: The prior version of
25 the statute had a time limit.

1 MR. HERSTOFF: It did, yes.

2 JUSTICE ALITO: And there is at least
3 some question whether Congress really intended
4 to eliminate that or whether it was done
5 inadvertently or whether it was done on the
6 assumption that a time limit in the rules would
7 also be jurisdictional, as this Court had
8 suggested in some earlier cases.

9 MR. HERSTOFF: Well --

10 JUSTICE ALITO: Is all of that -- is
11 any of that untrue?

12 MR. HERSTOFF: I would -- I would
13 disagree that there is any evidence that the
14 omission was -- was inadvertent. Although it
15 is true that the old statute did have a 30-day
16 time limit on the extensions, the conditions to
17 get that 30-day extension were much different
18 from the --

19 JUSTICE GINSBURG: Yeah, it --

20 MR. HERSTOFF: -- 1991 statute.

21 JUSTICE GINSBURG: -- that was the
22 requirement. You could get an extension if you
23 weren't notified of the entry of judgment. And
24 there was no provision for any extension, no
25 time period attached to any requests for

1 extension other than one where it didn't get
2 notice of the entry of judgment. Isn't that
3 so?

4 MR. HERSTOFF: Under the old statute,
5 there was a requirement that there be a lack of
6 notice, plus excusable neglect. So both of
7 those conditions had to be met in order for
8 there to be an extension of time, whereas here
9 there is a provision for an extension of time
10 where there is excusable neglect but no lack of
11 notice. There is a separate provision for an
12 extension where there is lack of notice, but no
13 excusable neglect.

14 So --

15 JUSTICE GINSBURG: And that's what's
16 new, that was not in the original?

17 MR. HERSTOFF: Yes, Your Honor, that's
18 correct.

19 JUSTICE ALITO: Well, given that this
20 is a mandatory claims processing rule, and you
21 said that you didn't think there was anything
22 that would prevent the rules from altering
23 doctrines like forfeiture and waiver, would it
24 be within the discretion of a Court of Appeals
25 to say that we are going to treat this rule,

1 even though it's not jurisdictional, in some
2 respects as if it were jurisdictional, so that,
3 for example, we will sua sponte raise the
4 question of timeliness under the rule?

5 MR. HERSTOFF: I think that would be
6 inconsistent with this Court's case law, which
7 says that -- that forfeited issues should not
8 be raised sua sponte unless there are
9 exceptional circumstances. "Extraordinary
10 circumstances," I think, was the terminology
11 that was used.

12 And then here there are no such
13 extraordinary circumstances that would -- that
14 would allow a Court of Appeals to address this
15 sua sponte.

16 JUSTICE ALITO: Well, how is that
17 consistent with your answer that first couple
18 of SCOTUS audio files are that doctrine could
19 be changed via a rule?

20 MR. HERSTOFF: Oh, no, I'm sorry,
21 maybe I misunderstood your question. My -- my
22 understanding of --

23 JUSTICE ALITO: Well, if the doctrine
24 could be changed by rule, could a court of
25 appeals interpret the rule as changing the

1 doctrine? After all, it is a mandatory
2 claims-processing rule. There has to be some
3 teeth in the concept of mandatory.

4 MR. HERSTOFF: I think there -- there
5 certainly are teeth here. If there's --

6 JUSTICE GINSBURG: It means if you
7 raise it, it's mandatory. But a mandatory
8 claim-processing rule can be waived, so that's
9 the difference. What's mandatory is if the
10 point is made, then the -- the mandatory rule
11 applies. But if a defendant doesn't or a
12 opposing party doesn't -- doesn't range --
13 raise it, it can be waived.

14 MR. HERSTOFF: Yes, Your Honor. That
15 -- that's my understanding. And what I -- what
16 I understood Justice Alito's question to be was
17 whether, by rule -- a federal rule could say
18 that -- that there's no forfeiture or waiver
19 allowed, that we don't consider forfeiture or
20 waiver. Certainly, that's possible, but that
21 -- that was not done here with Rule 4(a)(5)(C).

22 And certainly, this Court has long
23 interpreted the Federal Rules to facilitate
24 disposition of cases on their merits. For
25 example, in *Surowitz*, the Court said that. In

1 Foman versus Davis, the Court held that an
2 appeal had to proceed despite the fact that
3 there was a defect in the notice of appeal. So
4 there's been a long history of the Federal
5 Rules being interpreted to maximize the
6 resolution of cases on their merits, and we
7 submit that Rule 4(a)(5)(C) is no different.

8 JUSTICE GINSBURG: But -- but if a
9 court were by rule to say no waiver, no
10 forfeiture, then it would be the same thing, in
11 effect, as declaring the rule jurisdictional.

12 MR. HERSTOFF: It would have the same
13 effect, yes. It might not be a --

14 JUSTICE GINSBURG: And the rules are
15 not supposed to do that.

16 MR. HERSTOFF: They -- they generally
17 do not. They certainly haven't in the history
18 of the rules. My understanding of Justice
19 Alito's question was that hypothetically, if
20 the rules were changed to make that kind of
21 provision, whether that would be permissible.
22 We'd have to look certainly to see if that
23 would be consistent with the Rules Enabling
24 Act, which -- and whether such a no-forfeiture
25 rule would be consistent with that.

1 JUSTICE ALITO: Well, for whose -- for
2 whose benefit do you think something like the
3 30-day rule was adopted? Solely for the
4 benefit of the -- of the appellee?

5 MR. HERSTOFF: For the -- it is for
6 the benefit of the appellee. It's also for the
7 benefit of the -- of the courts.

8 JUSTICE ALITO: Ah, well, if it's at
9 least partly for the benefit of the court, then
10 why is the court stuck with whatever the
11 appellee does on the issue of forfeiture?

12 If the appellee is asleep and this
13 rule was supposed at least in part to protect
14 the jurisdiction of the court of appeals, why
15 can't the court of appeals put some teeth in
16 this? Not by treating it as strictly
17 jurisdictional, but as having -- putting a
18 thumb certainly on the scale in -- in applying
19 the doctrines that you're relying on.

20 MR. HERSTOFF: Well, I think that's
21 where this Court's case law regarding
22 extraordinary circumstances comes in. Under
23 extraordinary circumstances, a court of appeals
24 can raise a violation sua sponte. My argument
25 --

1 JUSTICE KAGAN: What -- what would
2 those circumstances be?

3 MR. HERSTOFF: Generally, the Court
4 has found those kinds of circumstances in the
5 habeas corpus context where there are
6 federalism concerns. Certainly, although I
7 haven't seen a case like this, there could be a
8 situation where there's clearly bad faith on
9 the part of the appellant and for some reason
10 the appellee doesn't notice the error. And the
11 court of appeals can look past that and say
12 there's bad faith here and we're going to
13 enforce the rule. But, certainly, nothing like
14 that has happened here.

15 So because Rule 4(a)(5)(C) is
16 non-jurisdictional, we'd submit that it is
17 subject to forfeiture, waiver, and equitable
18 considerations based on this Court's case law,
19 based upon federal statutes, and based upon the
20 Federal Rules.

21 And if there are no further questions,
22 I'd like to reserve the balance of my time,
23 please.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Stewart.

2 ORAL ARGUMENT OF DAMIEN G. STEWART

3 ON BEHALF OF THE RESPONDENTS

4 MR. STEWART: Mr. Chief Justice, and
5 may it please the Court:

6 There's one fact that's undisputed in
7 this case, and that is that Ms. Hamer filed her
8 notice of appeal outside of the 30-day
9 limitation that's set forth within Rule 4.

10 And there are two approaches that the
11 Court can take in this situation. One, the
12 route taken by the Seventh Circuit below, which
13 held that Rule 4(a)(5)(C) is jurisdictional.
14 And, alternatively, the Court can do what it
15 did the last term in the Manrique case and
16 decline to rule on the jurisdictional issue and
17 instead find that, at minimum, this is a
18 mandatory claims-processing rule, that the
19 Respondents timely raised the issue in
20 pre-merits briefing to the Seventh Circuit, and
21 that the district court was --

22 JUSTICE GINSBURG: But it was not
23 raised in the district court. And that's the
24 problem. That is, the judge says, fine, I'll
25 give you 60 days because you have to find a new

1 counsel. The defendant is well aware of that
2 time extension and, if the defendant had read
3 the rules, would recognize that they say 30
4 days, not 60 days. But on your view, the
5 defendant could deliberately say nothing and
6 then, on appeal, when it's too late for the
7 district court to correct the error, say,
8 sorry, mandatory, and under your rules, Court
9 of Appeals, I don't waive anything.

10 It's -- it allows the defendant to
11 create a trap.

12 MR. STEWART: That certainly isn't
13 what happened in this case, Judge -- Justice
14 Ginsburg.

15 And what I think the Petitioner's
16 argument, that in -- in the question that
17 you're interposing, it -- it ignores sort of
18 the realities of litigation.

19 What -- there are certain occasions in
20 a litigation where -- generally, we're all
21 familiar with the rules, but there are certain
22 occasions in litigation where you focus more
23 clearly on the rules. And those instances
24 usually occur when there's something to do,
25 when there is something obligating us to do

1 something.

2 For instance, if we had to respond --
3 if Petitioner's counsel, former counsel, had
4 conferred with us, then we would have looked at
5 -- perhaps may have looked at the rule to
6 determine whether -- what is -- what is the
7 rule? What is the time frames that -- in that
8 case we may have been able to -- to do
9 something.

10 JUSTICE GINSBURG: But you would have
11 been able to if you got notice, even if you
12 were not --

13 MR. STEWART: Right.

14 JUSTICE GINSBURG: -- you didn't --
15 weren't consulted in advance. Once you know
16 that there has been a 60-day order issued, you
17 -- you are free to say: Judge, that was a
18 mistake; you can't do more than 30 days.

19 MR. STEWART: And, again, so we were
20 not -- we were not given the opportunity to --
21 to look at the rules. We didn't have an
22 opportunity to respond --

23 JUSTICE GINSBURG: You didn't have an
24 opportunity to look at the rules?

25 MR. STEWART: Well, there was no

1 occasion for us to do so. In other words, once
2 the motion was filed, usually you would have
3 had an opportunity to object or interpose a
4 response. That opportunity didn't come to
5 pass. So the -- the untimeliness --

6 JUSTICE SOTOMAYOR: Sorry, could you
7 slow down and tell me why not? You were served
8 with notice of the motion, weren't you?

9 MR. STEWART: We were. And the order
10 was entered hours after we received the motion.
11 So we didn't have the opportunity really to
12 look and then interpose an objection. But once
13 that order was filed, then we were in a
14 different place.

15 And there's no obligation, there's no
16 rule, there's no statute or any guidance that
17 suggests that once an order was filed, that we
18 would have had a -- an obligation to file
19 perhaps a motion for reconsideration, which is
20 what the Petitioner says --

21 JUSTICE GINSBURG: But you first --
22 you certainly, even in the court of appeals,
23 you said no jurisdictional problem here, Court;
24 we concede that the court of appeals has
25 jurisdiction.

1 So -- and that was long after you
2 could have looked at the rules. You said twice
3 in your docketing statement that the court of
4 appeals had jurisdiction. And it was only
5 Seventh Circuit, by raising the question, that
6 then you latched onto it.

7 MR. STEWART: Right. And so we made
8 those statements in a docketing statement,
9 which is a tool used by the Seventh Circuit for
10 administration of the courts. And, certainly,
11 there is a preliminary statement on
12 jurisdiction where we made the representations
13 to the court that we did.

14 That was a mistake. But there was no
15 consequence to that mistake. In other words,
16 the way the Seventh Circuit -- the Seventh
17 Circuit's practitioner's handbook, it gives an
18 opportunity for the appellees to correct any
19 mistakes that are contained in a docketing
20 statement. That is exactly what happened in
21 this case.

22 The very next day, the Seventh Circuit
23 required the Respondents to brief the issue of
24 jurisdiction. We responded seven or eight days
25 later, notified the Seventh Circuit that, at

1 minimum, this was a mandatory claims-
2 processing --

3 JUSTICE SOTOMAYOR: Just so we
4 understand the purpose of a docketing
5 statement, I think, unless the Seventh Circuit
6 is different than others, that its intent is
7 for the Court to be able to identify the legal
8 questions that will be implicated by the case,
9 correct?

10 MR. STEWART: Correct.

11 JUSTICE SOTOMAYOR: And that also
12 gives the Court the power to decide whether
13 some sort of mediation or some sort of
14 bifurcated briefing or whatever else is
15 necessary, so it serves a function, doesn't it?

16 MR. STEWART: It does. It does.

17 JUSTICE SOTOMAYOR: All right. So the
18 fact that you made these statements didn't
19 notify the Seventh Circuit that you had not
20 forfeited this claim, correct?

21 MR. STEWART: Correct.

22 JUSTICE SOTOMAYOR: So why didn't you
23 forfeit it by making the statement?

24 MR. STEWART: Because the Seventh
25 Circuits are not binding. In the Seventh --

1 the docketing statements are not binding.

2 They -- the rules, they specifically
3 spell out that if there are any inaccuracies,
4 any mistakes made in the docketing statement,
5 the Court will look at that docketing statement
6 and require the parties to correct it, which is
7 -- which is exactly what happened in this case.

8 JUSTICE SOTOMAYOR: I'm sorry, I don't
9 know that correction -- what correction means,
10 when that may be a reason for us to remand this
11 issue to the circuit.

12 MR. STEWART: Right, right.

13 JUSTICE SOTOMAYOR: But I take
14 correction to mean there's an error in the
15 record, not an error in my concessions.

16 MR. STEWART: So there was -- we made
17 -- we -- we made a mistake in describing that
18 the Petitioner had filed their notice of appeal
19 in a timely manner. She didn't.

20 The Seventh Circuit required us to
21 brief that issue. We did in the -- in our
22 initial -- in our pre-merits briefing to the
23 Seventh Circuit. We corrected it and notified
24 the Court that there was a problem with the
25 timeliness of her notice of appeal, that this

1 was a violation of a mandatory claims
2 processing.

3 JUSTICE GINSBURG: Well, the Second --
4 the Seventh Circuit said -- tipped you off to
5 this. You didn't tell the -- that you suddenly
6 discovered this. The Seventh Circuit
7 interjected it into the case.

8 But if the rule is mandatory, but not
9 jurisdictional, then the Seventh Circuit had no
10 business tipping you off. We follow the
11 principle of party presentation, and it was up
12 to you to raise it, not up to the Court of
13 Appeals to tell you.

14 MR. STEWART: So this Court's
15 jurisprudence from Kontrick, Eberhart and
16 especially in Manrique, the issue of raising
17 the -- the issue that the violation of a
18 mandatory claims processing rule is timely when
19 it's raised at the initial brief in the Circuit
20 Court, we did better than that here. We raised
21 it in pre-merits briefing to the circuit.

22 JUSTICE GINSBURG: And where -- I know
23 that's a Seventh Circuit rule that you can
24 raise it before the brief -- anytime before the
25 briefing on the merits, but where else is it

1 the rule?

2 MR. STEWART: In -- in the Manrique
3 case. In Manrique, the government raised the
4 issue of the timeliness of the notice -- of the
5 untimeliness of the notice of appeal in merits
6 briefing before the 11th Circuit.

7 JUSTICE KAGAN: Mr. Stewart, do I
8 understand you to no longer be relying on the
9 argument that this is a jurisdictional rule?

10 MR. STEWART: No, we do believe that
11 this is a jurisdictional rule.

12 JUSTICE KAGAN: Because you've been
13 standing up there for a while now making
14 arguments that would be true if it weren't a
15 jurisdictional rule.

16 MR. STEWART: Yes. Right.

17 JUSTICE KAGAN: I mean, so which is
18 it? Do you think that this is a jurisdictional
19 -- that this is a jurisdictional rule or that
20 it wasn't but still we should accept what the
21 Seventh Circuit did?

22 MR. STEWART: So our argument is that
23 this is -- this is a jurisdictional rule. And
24 because of that, you don't consider any of the
25 equities.

1 But in the alternative, if this Court
2 declines to determine that this rule is still
3 jurisdictional, at minimum, it is a mandatory
4 claims processing rule and that the petition
5 should be dismissed on that basis.

6 JUSTICE KAGAN: But I think what
7 Justice Ginsburg said a while ago is that when
8 we have used that term in the past, what we've
9 meant is that it's -- it's a-- it's a mandatory
10 claims processing rule that you have to follow
11 unless the party, the other party forfeits the
12 issue --

13 MR. STEWART: There was no --

14 JUSTICE KAGAN: -- or unless there's a
15 very good reason, you know, there's some kind
16 of extra special excuse that you have.

17 MR. STEWART: Right.

18 JUSTICE KAGAN: But, you know, where
19 there is a forfeiture and where the -- that's
20 the end of the matter, you can call it a
21 mandatory claims processing rule or not, but
22 you forfeited it.

23 MR. STEWART: So this -- we believe
24 that the rule is jurisdictional because it has
25 a statutory basis. Rule 4(a)(5)(C), the 30-day

1 limitation that is contained in Rule 4(a)(5)(C)
2 was present in the rule and the statute when
3 the rule was promulgated.

4 And although the 30-day, the specific
5 limiting language of 30 days is no longer in
6 the statute, we do not believe that there was
7 any intention by Congress to strip the rule of
8 the jurisdictional nature that it enjoyed for
9 decades.

10 JUSTICE GINSBURG: But it was never in
11 the statute with respect to a case like this.
12 The only provision in the statute was when
13 there was a failure to get notice of the entry
14 of judgment.

15 There was nothing in the statute
16 covering a case where there was a reason other
17 than failure -- just the statute was blank on
18 that.

19 It's no longer blank. It gives
20 permission for an extension.

21 MR. STEWART: But the way the pre-1991
22 statute read, it provided the district court's
23 authority to extend the time to file a notice
24 of appeal upon a showing of excusable neglect.

25 Now, it's true, there was only one

1 condition that Congress deemed to constitute
2 excusable neglect in the prior-1991 statute,
3 and that was if a party did not receive notice.

4 But the idea and the concept that the
5 30-day -- that a 30-day limitation was premised
6 on a showing of excusable neglect still remains
7 in the statute today.

8 JUSTICE GINSBURG: Did excusable --
9 well, what was the text of the statute? I
10 thought it was clear that it only applied in
11 the case of a failure to receive notice of the
12 entry of judgment.

13 MR. STEWART: I'll read the text to
14 you, Your Honor. "The district court may
15 extend the time for appeal not exceeding 30
16 days from the expiration of the original time
17 herein proscribed upon a showing of excusable
18 neglect, based upon a failure of a party to
19 learn of the entry of the judgment."

20 JUSTICE GINSBURG: So it was based
21 upon. So that was the only condition.

22 MR. STEWART: That was the only
23 condition. But the idea and the concept was
24 you had to demonstrate excusable neglect.

25 Now, certainly in the rule, you know,

1 the rule did morph over time and evolve to take
2 into account other things, good cause, for
3 instance, and eventually Rule 4(a)(6) came into
4 being, which is what the 1991 amendments were
5 conforming thereto.

6 But there is no evidence that any
7 member of Congress ever criticized the 30-day
8 limitation in Rule 4(a) -- 4(a)(5) --

9 JUSTICE GINSBURG: So you disagree
10 with the D.C. -- when this issue was before the
11 D.C. Circuit, the D.C. Circuit says the 30-day
12 limit on extension appears nowhere in the U.S.
13 Code. And that is true. It doesn't appear in
14 the U.S. Code.

15 MR. STEWART: The -- the limiting 30
16 days is no longer in the -- in the U.S. Code,
17 that is correct. We believe that it was
18 inadvertently omitted in the 1991 amendments.
19 That's our position.

20 JUSTICE SOTOMAYOR: Tell me --

21 MR. STEWART: I didn't hear you.

22 JUSTICE SOTOMAYOR: Is there any
23 direct legislative history saying that it was
24 inadvertent?

25 MR. STEWART: No, it is not. And I

1 think the issue that we have is the silence now
2 informs -- the silence is informed by --

3 JUSTICE SOTOMAYOR: So where else have
4 we ever -- give me your best authority for us
5 reading into a statute omitted language.

6 MR. STEWART: Your Honor, I can't give
7 you a precise case that comes up with a
8 situation like this. But I think the history
9 of this rule, going back nearly a century, that
10 note that deadlines regarding notices of
11 appeals have been treated as jurisdictional in
12 American courts for a century.

13 If Congress intended to change the
14 jurisdictional nature of the rule, it would
15 have said so. And there's nothing in this
16 legislative history that suggests Congress
17 intended to do that.

18 JUSTICE SOTOMAYOR: Well, there is a
19 problem with that because it did change the
20 rule fundamentally when it permitted the
21 opening of a judgment for six months, if you
22 didn't receive notice of it. That's a fairly
23 radical change from the norm.

24 And so why would it be inappropriate
25 to assume that Congress intended for a district

1 court to exercise its discretion and judgment
2 in deciding how much was a reasonable time for
3 excusable neglect or for good cause?

4 MR. STEWART: So you look at the
5 inconsistency that was established then, right?
6 If a party -- a district court could extend the
7 time up to 14 days once a party, who never
8 received notice of the final order, the
9 district court could extend the time to file
10 that notice of appeal for 14 days.

11 Under the Petitioner's theory, if the
12 30-day limitation was removed, the district
13 court would have the authority to extend the
14 time to file a notice of appeal, as the Chief
15 Justice articulated, up to three years, a year.

16 There is no limitation. There's no
17 limitation in the statute. That inconsistency
18 is why we believe Congress never intended to
19 remove it.

20 JUSTICE SOTOMAYOR: Well, there is a
21 limitation. It has to be for good cause.

22 MR. STEWART: Right, for good cause.

23 JUSTICE SOTOMAYOR: It has teeth. So
24 it's self-limiting in -- in that way.

25 MR. STEWART: It -- it is, Your Honor,

1 but it is -- it is at best, it is ambiguous.
2 And that's why we believe that history can
3 inform this.

4 JUSTICE KAGAN: So suppose there is a
5 congressional statute which does set forth a
6 jurisdictional rule, and Congress wakes up one
7 day and decides, you know what, we don't think
8 that this rule should be jurisdictional
9 anymore.

10 How does it change that?

11 MR. STEWART: Through legislation
12 Congress can change any -- any statute.

13 JUSTICE KAGAN: Yes. So Congress
14 would presumably pass a piece of legislation
15 which no longer included the rule, right?

16 MR. STEWART: They could, but you
17 would think that they would have done so,
18 especially in a situation like this where --

19 JUSTICE KAGAN: But that's what
20 Congress did here, I guess. I mean, what else
21 do you expect Congress to do if it changes its
22 mind?

23 MR. STEWART: I would expect them,
24 given the history of the deadlines regarding
25 notice of appeal to at least said that that's

1 what they were going to do.

2 JUSTICE KAGAN: Like --

3 MR. STEWART: There was not --

4 JUSTICE KAGAN: -- we're taking away
5 this jurisdictional rule and we really mean it?

6 MR. STEWART: There was no -- in this
7 instance there was no mention of Rule
8 4(a)(5)(C), and there was no mention of the
9 30-day limitation. But at the end of the day,
10 we get to the same place.

11 If the Court is not inclined to rule
12 that Rule 4(a)(5)(C) is jurisdictional, at
13 minimum, it is a mandatory claims processing
14 rule.

15 CHIEF JUSTICE ROBERTS: In what -- in
16 what way has your client been prejudiced by the
17 Seventh Circuit's decision, I mean, other than
18 not enforcing the -- the rule? Is there any
19 way, you know, witnesses, documents, anything
20 else that is different in the appeal on the --
21 on the merits in light of the fact that they
22 got this extension?

23 MR. STEWART: No, Your Honor. I can't
24 say that we have. Right.

25 JUSTICE GORSUCH: And, Mr. Stewart, if

1 it isn't jurisdictional, one of the questions
2 raised is whether you would have needed to file
3 a cross-appeal.

4 MR. STEWART: Sure.

5 JUSTICE GORSUCH: And there's another
6 Circuit split on that question in two very fine
7 opinions, one by Judge Hartz and another by
8 Judge Sutton disagreeing over that.

9 Can you tell me why you don't think
10 you needed to file an appeal yourself if you
11 wished to challenge it, a district court
12 order --

13 MR. STEWART: Sure.

14 JUSTICE GORSUCH: -- given that's the
15 normal course?

16 MR. STEWART: Sure, Judge Gorsuch.

17 This Court, in the Jennings case,
18 described the instances where an appellee would
19 be required to file a cross-appeal, and there
20 are two instances.

21 One, if the appellee is seeking to
22 enlarge its own rights. We weren't doing that
23 here because we won the case at summary
24 judgment.

25 The other instance would be if you're

1 seeking to lessen the rights of the appellant,
2 and we were not doing that either. To the
3 extent Ms. Hamer --

4 JUSTICE GORSUCH: Well, isn't that
5 exactly what you wanted to do, is lessen the
6 rights of the appellant by kicking the
7 appellant out of court?

8 MR. STEWART: To the extent Ms. Hamer
9 had any right, it was limited to the initial 30
10 days under Rule 4(a)(1). She would have filed
11 her notice to proceed.

12 JUSTICE GORSUCH: She would argue, I
13 think, just to put her argument in the best
14 light and let you respond to it is I -- I
15 obtained this additional right from the
16 district court of an extension of time, which
17 allowed me to pursue this appeal in -- in the
18 Court of Appeals.

19 And Judge Sutton would say that is an
20 extension of a new right by the district court
21 that you wish to extinguish and, therefore,
22 need a notice of appeal. That's the line of
23 reasoning he follows.

24 What's -- what's wrong with that?

25 MR. STEWART: So the problem with that

1 reasoning is that the district court providing
2 the additional time gave her some right. The
3 district court didn't have the authority in the
4 first place to give that time. And that's
5 because of Rule 4 and Rule 26.

6 Rule 4 says that a party has 30 days
7 to file a notice of appeal. Rule 4(a)(5)(C)
8 allows the district court to extend that period
9 to an additional 30 days but no more. And Rule
10 26 says that courts have the authority to
11 extend the time to comply with the rules, with
12 the exception of Rule 4.

13 So there was no opportunity for the
14 district court to provide any further days,
15 other than what is set forth in Rule 4. So the
16 Court didn't have the authority to give her the
17 time that it did. Ms. Hamer didn't have a
18 right to file the notice of appeal when she
19 did. That's why it's mandatory.

20 If there are no further questions.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Counsel.

23 Mr. Herstoff, 10 minutes.

24

25

1 REBUTTAL ARGUMENT OF JONATHAN A. HERSTOFF
2 ON BEHALF OF THE PETITIONER

3 MR. HERSTOFF: Thank you. Just a
4 couple of quick points.

5 Regarding, on the Kontrick and the
6 argument that there's no forfeiture if the
7 issue is raised in the merits brief, that
8 argument rests on a misreading of Kontrick.

9 Kontrick held that there was a
10 forfeiture where, among other things, the issue
11 had not been raised in the brief. Kontrick did
12 not say that anytime it is raised in the merits
13 brief, then there's no forfeiture.

14 Similarly, in Manrique, there was --
15 it was held that there was no forfeiture, but
16 there the first possible opportunity to address
17 the -- the issue was in the merits brief
18 because the appellee there had no idea what the
19 appellant was going to raise in their opening
20 brief.

21 JUSTICE ALITO: At what point in time
22 do you think the issue was -- was waived?

23 MR. HERSTOFF: I think the issue was
24 -- was waived when -- when they said in the
25 docketing statement twice that the appeal was

1 timely. I think --

2 JUSTICE ALITO: So not before that?

3 Nothing that occurred in the district court
4 waived the --

5 MR. HERSTOFF: For -- for affirmative
6 waiver, no. There was certainly forfeiture,
7 though.

8 JUSTICE ALITO: When was it -- when
9 was it forfeited?

10 MR. HERSTOFF: It was forfeited no
11 later than 30 days after the district court
12 granted the extension of time.

13 JUSTICE ALITO: So it wasn't forfeited
14 on the day when the district court entered the
15 order.

16 MR. HERSTOFF: No, no, no, Your Honor,
17 I'm not arguing that.

18 JUSTICE ALITO: It was -- because you
19 -- the order didn't preclude the filing of the
20 notice of appeal prior to the expiration of the
21 time in the order.

22 MR. HERSTOFF: That's right. And
23 we're certainly not arguing that there was a
24 forfeiture based upon the -- the one-day -- the
25 one-day period between the filing of the motion

1 and the granting of the motion.

2 JUSTICE ALITO: So you -- so you think
3 that the appellee had on pain of forfeiture,
4 they had an obligation to inform the other side
5 and the court just prior to the running out of
6 the time, you know, you're going to run --
7 you're going to have a problem here under the
8 rule if you don't file your notice of appeal
9 right away? They had that obligation to do
10 that?

11 MR. HERSTOFF: They did have an
12 obligation to do that if they wanted Rule
13 4(a)(5)(C) to be enforced. They also forfeited
14 by not appealing or cross-appealing and
15 didn't -- just wanted to address --

16 JUSTICE ALITO: How is that consistent
17 with the adversary system? I mean, this isn't
18 the other side -- the -- did she have an
19 attorney at that point?

20 MR. HERSTOFF: No, she was pro se then
21 at the time that the district court granted the
22 motion for extension of time because the
23 district court granted that along with the
24 motion for withdrawal, so Ms. Hamer proceeded
25 pro se from then on.

1 And so the appellees, the Respondents
2 here, forfeited their right to rely on Rule
3 4(a)(5)(C) by not objecting to the extension.
4 They also, to go to Justice Gorsuch's point,
5 forfeited by failing to appeal or cross-appeal.

6 The Respondents argued that -- that
7 their -- their rights were not being enlarged
8 because they got everything that they wanted
9 from the district court summary judgment order.
10 However, that focuses on the wrong order from
11 the district court.

12 The order granting the extension of
13 time said that she had two months to extend --
14 to file the notice of appeal, two months extra.
15 And here the Respondents are seeking, in
16 essence, a reversal of the district court's
17 order granting the extension of time and an
18 order, or decision saying that she was not
19 entitled to that extension of time.

20 That is --

21 JUSTICE ALITO: Order from which the
22 appeal -- the order from which the appeal had
23 to be taken was summary judgment for the
24 defendant. That's the judgment, right?

25 MR. HERSTOFF: That's the district

1 court's judgment on the merits, yes.

2 JUSTICE ALITO: And the appellee wants
3 an affirmance of that judgment?

4 MR. HERSTOFF: Yeah. Yes, they do.
5 But by --

6 JUSTICE ALITO: And that could be
7 affirmed on the grounds that summary judgment
8 was proper. It could also be affirmed on the
9 ground that the -- the notice of appeal was
10 untimely.

11 MR. HERSTOFF: Well, I respectfully
12 submit that in the latter case it would not be
13 an affirmance. It would just be a dismissal of
14 the appeal. So what the -- what the
15 Respondents are seeking is not an affirmance.

16 They're seeking an order and judgment
17 from the appellate court saying that the
18 district court's judgment is completely
19 insulated from appellate review.

20 And in order for the appellate court
21 to do that, they would need to reverse the
22 district court's order granting the extension
23 of time, so --

24 CHIEF JUSTICE ROBERTS: Well, that --
25 that doesn't seem right to me. I mean, the

1 relief they want is that they can't be sued,
2 right, or they win. To say that the ground on
3 which they get to that objective makes --
4 requires a cross-appeal, I don't think that's
5 right.

6 MR. HERSTOFF: Well, I respectfully
7 submit that the -- what the Respondents are
8 seeking to do is to dismiss the appeal. So
9 what they're seeking from the Seventh Circuit
10 is not any kind of decision at all about
11 whether the district court's judgment was
12 correct.

13 CHIEF JUSTICE ROBERTS: Well, I don't
14 think they care whether they -- the Seventh
15 Circuit says you win or they say that your
16 opponent's appeal is dismissed.

17 MR. HERSTOFF: They certainly might
18 not -- might not care, I agree. I agree with
19 that. However, if they're trying to get the
20 appeal dismissed, that's lessening Ms. Hamer's
21 rights because without -- without the
22 Respondents' objecting to the extension of
23 time, Ms. Hamer's granted the right to
24 appellate review, which is usually what any
25 appellant has, is the right to appeal a

1 district court's judgment.

2 The Respondents --

3 JUSTICE ALITO: Every time the party
4 that wins in the district court wins on the
5 merits in the district court, also thinks that
6 it has a jurisdictional argument, they have to
7 file a cross-appeal.

8 MR. HERSTOFF: A jurisdictional
9 argument, no, because the jurisdiction can be
10 raised --

11 JUSTICE ALITO: All right.

12 MR HERSTOFF: -- at any --

13 JUSTICE ALITO: A -- a -- a mandatory
14 claims processing argument, they have to file a
15 cross-appeal?

16 MR. HERSTOFF: If they're -- yeah,
17 they're seeking to alter what the district
18 court did, in other words, if they're trying to
19 get the appellate court to rule that the
20 district court was wrong in -- in the way that
21 they applied the claim processing rule, then --
22 then, yes, an appeal -- cross-appeal would be
23 required.

24 If there are no further questions. We
25 respectfully request that the Court reverse the

1 Seventh Circuit's judgment and remand for
2 consideration of Ms. Hamer's appeal on the
3 merits. Thank you.

4 CHIEF JUSTICE ROBERTS: The case is
5 submitted. Thank you, counsel.

6 (Whereupon, at 10:51 a.m., the case
7 was submitted.)

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Official - Subject to Final Review

<p style="text-align: center;">1</p> <p>10 [2] 1:11 42:23 10:05 [2] 1:15 3:2 10:51 [1] 50:6 11th [1] 31:6 14 [2] 37:7,10 16-658 [1] 3:4 180 [1] 9:2 1940s [1] 11:19 1960s [1] 15:5 1991 [6] 14:10 15:1,6 16:20 35:4,18</p> <hr/> <p style="text-align: center;">2</p> <p>2017 [1] 1:11 2107(c) [3] 3:18 12:18 14:14 23 [1] 2:7 23(f) [1] 10:10 26 [2] 42:5,10 28 [1] 3:18</p> <hr/> <p style="text-align: center;">3</p> <p>3 [1] 2:4 30 [10] 11:25 24:3 25:18 33:5 34:15 35:15 41:9 42:6,9 44:11 30-day [12] 16:15,17 21:3 23:8 32:25 33:4 34:5,5 35:7,11 37:12 39:9</p> <hr/> <p style="text-align: center;">4</p> <p>4 [5] 23:9 42:5,6,12,15 4(a) [2] 12:1 35:8 4(a)(1) [1] 41:10 4(a)(5) [2] 13:16 35:8 4(a)(5)(c) [16] 3:16,25 4:2,7 12:8 19:21 20:7 22:15 23:13 32:25 33:1 39:8,12 42:7 45:13 46:3 4(a)(6) [2] 13:21 35:3 43 [1] 2:10</p> <hr/> <p style="text-align: center;">5</p> <p>54(b) [1] 10:10 58 [1] 8:24</p> <hr/> <p style="text-align: center;">6</p> <p>60 [2] 23:25 24:4 60-day [1] 25:16</p> <hr/> <p 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