No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER, PETITIONER

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO AND FANNIE MAE, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides that a notice of appeal in a civil case "must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Although the appellant may seek an extension of time, Rule 4(a)(5)(C) provides (in relevant part) that "[n]o extension * * * may exceed 30 days after the prescribed time." In this case, Petitioner's trial counsel sought and obtained a *60*-day extension, and Petitioner filed her appeal near the end of that period. The question presented is as follows:

Is a court of appeals barred from hearing an appeal filed after the 30-day extension period available under Rule 4(a)(5)(C), but within an extension of time granted by the district court, either because the 30-day limit on extensions is jurisdictional—as the Seventh Circuit correctly held in this case—or because it is a mandatory claim-processing rule not subject to equitable exceptions?

CORPORATE DISCLOSURE STATEMENT

Respondent Federal National Mortgage Association (Fannie Mae) is a private, federally chartered corporation. It does not have a parent corporation, and no publicly held company owns ten percent or more of its stock.

Respondent Neighborhood Housing Services of Chicago (NHS) is a nonprofit corporation incorporated in Illinois. It does not have a parent corporation, and no publicly held company owns ten percent or more of its stock.

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INTRODUCTION

For more than a century, American law has understood the rules surrounding notices of appeal to be "jurisdictional." As a result, they are not subject to waiver or forfeiture, and they do not allow equitable exceptions. Rule 4(a)(5)(C) of the Federal Rules of Appellate Procedure is just such a rule, providing (in relevant part) that no extension of the time for appeal may exceed 30 days from the original deadline.

In this case, Petitioner's counsel asked for—and received—an extension of time to appeal that was twice as long as the rule allows, and Petitioner waited until the end of that period to file her notice. This made the appeal untimely, so the Seventh Circuit dismissed it for lack of jurisdiction.

That result was correct—and is entirely consistent with this Court's cases. In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court held that a similar rule was "jurisdictional" because it had two characteristics. First, by its nature, the rule related to the movement of "adjudicatory authority" from one court to the next. And second, the rule had its roots in a statute enacted by Congress. Rule 4(a)(5)(C) shares both of these characteristics.

The crux of the disagreement between the parties has to do with the rule's statutory basis. In *Bowles*, the relevant time limit appeared both in Rule 4 and in 28 U.S.C. § 2107—the statute that corresponds to the rules relating to a timely notice of appeal. Here, while the 30-day limit appeared in § 2107 at the time of Rule 4(a)(5)(C)'s promulgation, that limit was omitted—without explanation, and probably inadvertently—from the replacement language inserted when Congress amended the statute in 1991. As discussed

below, however, there is no reason to interpret the 1991 amendment as stripping Rule 4(a)(5)(C) of its jurisdictional significance. The plain text of the amendment does not purport to make such a change, and Congress explained that it was passing the amendment merely to make technical corrections and to bring the statute into "conformity" with the rules.

Even if the rule were not jurisdictional, however, it is still mandatory and must be enforced. As this Court recognized just a few months ago in *Manrique* v. *United States*, 137 S. Ct. 1266 (2017), a mandatory claim-processing rule may not be set aside in the exercise of a court's discretion. *Id.* at 1274. Such a rule is not subject to harmless error analysis (*ibid.*), nor is it subject to equitable exceptions such as the "unique circumstances" doctrine (*infra* Part II.A). Thus, no matter how this Court resolves the jurisdictional question, the result would be the same: The 30-day limit on extensions for notices of appeal cannot be set aside based on considerations of equity, so it applies here and bars Petitioner's appeal. This Court may resolve this case either by answering the jurisdictional question itself, or—as in *Manrique*—by simply finding that the rule is mandatory and unalterable in any event.

STATEMENT

Respondent Federal National Mortgage Association (Fannie Mae) is a federally chartered corporation created to promote a vibrant secondary mortgage market and to make home ownership more accessible for low and middle-income Americans. Respondent Neighborhood Housing Services of Chicago (NHS) is a nonprofit neighborhood revitalization organization that creates opportunities for people to live in afford-

able homes. In partnership with NHS, Fannie Mae operated the Fannie Mae Mortgage Help Center in downtown Chicago.

Petitioner worked at the Center for several years. As the district court observed, however, her tenure was riddled with performance issues. Pet. App. 10–14. She applied for promotions but did not receive them, in light of these performance issues and the superior performance of the other candidates. *Id.* at 14–18. Ultimately, she was relieved of her duties and was offered a different position, which she declined. *Id.* at 20–22.

Petitioner filed a *pro se* complaint in the U.S. District Court for the Northern District of Illinois, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. At her request, the district court appointed counsel to represent her. A series of issues and conflicts led her first appointed counsel to withdraw—and the second, and the third—but each time, the district court promptly appointed new counsel so that Petitioner would be adequately represented. Pet. App. 22–23.

After the close of discovery, the district court granted summary judgment in Respondents' favor on all counts, entering final judgment on September 14, 2015. Petitioner's original deadline to file a notice of appeal was October 14, 2015.

Less than a week before the deadline to appeal—and without conferring in advance with Respondents—Petitioner's counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal," asking the court to "extend the deadline to file

any Notice of Appeal to December 14, 2015, pursuant to 28 U.S.C. 2107(c), to allow time for Movants to withdraw and for new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued." Pet. App. 58 ¶ 3. The district court granted the motion on the same day, without seeking or allowing time for a response by NHS or Fannie Mae. *Id.* at 60. Petitioner (then acting *pro se*) filed her notice of appeal on December 11, 2015—nearly three months after the entry of final judgment. *Id.* at 61.

When the case reached the Seventh Circuit, the court *sua sponte* asked Respondents to file a brief addressing the timeliness of the appeal. Relying on the current version of 28 U.S.C. § 2107(c) and Seventh Circuit authorities post-dating *Bowles*, Respondents' brief explained that "it appears to be the law in this Circuit" that the time limits in Rule 4(a)(5)(C) "are not jurisdictional." Pet. App. 77. Respondents also argued, however, that the 30-day limit is "mandatory, unless waived or forfeited," and not subject to equitable exceptions. *Id.* at 78.[1]

After merits briefing and oral argument, the Seventh Circuit took a different view than the parties and dismissed Petitioner's appeal for lack of jurisdiction, declining to reach any other issue. The court explained that "[l]ike Rule 4(a)(6) [at issue in *Bowles*], Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court's

[1] In seeking a writ of certiorari, Petitioner acknowledged that Respondents remain "free to argue to this Court that a violation of Rule 4(a)(5)(C) deprives a court of appeals of jurisdiction." Reply Br. of Pet. at 2.

authority to extend the notice of appeal filing deadline to no more than an additional 30 days." Pet. App. 4. As a result, the court held that the rule is jurisdictional and that Petitioner's appeal could not proceed. *Ibid.* For the reasons set forth below, the Seventh Circuit's decision was entirely correct.

SUMMARY OF ARGUMENT

I. As this Court observed in *Bowles*, "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." 551 U.S. at 209 n.2. Such rules are jurisdictional because (1) by their nature, they prescribe the classes of cases falling within a court's adjudicatory authority; and (2) they have their roots in an act of Congress, which is the branch of government that the Constitution charges with setting the bounds of the federal courts' power.

Under this analysis, the 30-day limit in Rule 4(a)(5)(C) is just as "jurisdictional" as the other aspects of Rule 4. By its nature, the rule operates as a time limit on the filing of a notice of appeal—an event that is quintessentially jurisdictional, as it marks the point when a case moves from one tribunal to another. It also has a statutory basis and the necessary congressional authorization. When Rule 4(a)(5)(C) was promulgated, the 30-day time limit on extensions appeared expressly in 28 U.S.C. § 2107. Indeed, even the predecessor to Rule 4(a)(5)(C)—Federal Rule of Civil Procedure 73(a)—was codified by Congress almost immediately after its adoption.

To be sure, the reference to the 30-day limit on extensions fell out of the statute when it was amended in 1991—but there is no reason to interpret that

amendment as stripping Rule 4(a)(5)(C) of its jurisdictional significance. As Congress explained, the purpose behind the 1991 amendment was to make "technical corrections" and to bring the statute into "conformity with [the] rules of appellate procedure," which had changed in other respects since their original promulgation in 1967. Pet. App. 4a–5a. To accomplish these changes, Congress replaced the relevant paragraph in § 2107 with a more detailed provision relating to the process for applying for extensions of time to appeal—the topics addressed in the newer rules. In doing so, Congress omitted—without explanation, and probably inadvertently—any reference to the 30-day limit on the length of such extensions. In context, that amendment did not and cannot have the legal effect that Petitioner suggests.

II. At a minimum, Rule 4(a)(5)(C) is "a mandatory claim-processing rule" that is not subject to equitable exceptions. See *Manrique*, 137 S. Ct. at 1271 (holding that Rule 4(b)'s time limits on filing notices of appeal in criminal cases are mandatory). Indeed, in *Manrique*, this Court declined to resolve a question about whether an appeal-related rule was jurisdictional because—as here—the answer would not make any difference: Either way, the rule is mandatory and "unalterable." *Ibid.*

Further, even if Rule 4(a)(5)(C) were otherwise open to equitable exceptions, the "unique circumstances" doctrine would not apply. To the extent that doctrine still exists at all, its function is to provide relief to a litigant who reasonably relies on a mistake of the district court. Here, however, the mistake did not originate with the district court; it began with Petitioner's own counsel. Before withdrawing, Petition-

er's counsel asked for—and received—an extension that was twice as long as what the rules allow. The court granted the relief counsel had (improperly) requested. The "unique circumstances" doctrine does not enable a litigant to reverse the consequences of her own lawyer's mistake.

Finally, if the 30-day limit in Rule 4(a)(5)(C) is non-jurisdictional (and thus is subject to waiver and forfeiture), there has been no waiver or forfeiture here. Respondents briefed the mandatory nature of Rule 4(a)(5)(C) extensively in the Seventh Circuit before taking up the merits of the appeal, which is all the law requires to preserve the issue.

In her brief in this Court, Petitioner argues that several specific acts or omissions by Respondents constitute waiver and forfeiture—for example, their assertions about jurisdiction in non-binding docketing statements filed in the Seventh Circuit, and the fact that they did not object to or appeal the order granting the extension in the district court. None of these arguments appears in Petitioner's briefs in the Seventh Circuit, so they all should be disregarded. And in any event, those arguments are incorrect. Under the Seventh Circuit's rules and precedents, Respondents did all that was required to preserve this point, arguing expressly that the rule is mandatory even if not jurisdictional. Nothing more was required.

ARGUMENT

I. Given both its nature and its statutory basis, the 30-day limit in Rule 4(a)(5)(C) must be considered a jurisdictional rule.

Under this Court's cases, the classification of a rule as jurisdictional depends on both the *nature of*

and *basis for* the rule. The term "jurisdictional" refers to a rule that by its nature prescribes "the classes of cases * * * falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). Further, a jurisdictional rule must have its basis in an act of Congress, because it is Congress that "decides what cases the federal courts have jurisdiction to consider" and "can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212–13.

Rule 4(a)(5)(C) is jurisdictional in both respects. By their nature, rules relating to the timeliness of a notice of appeal determine whether power over a case has shifted from one court to another, and thus they are necessarily "prescriptions delineating the classes of cases * * * falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455. Further, the 30-day time limit for extensions in Rule 4(a)(5)(C) was explicitly prescribed by statute and authorized by Congress. And while the congressional authorization is no longer expressly part of the statute, there is no reason to conclude that Congress intended the relevant amendment to strip the rule of its jurisdictional significance.

A. Time limits for notices of appeal are quintessentially jurisdictional because they define when one court's power ends and another's begins.

The essence of a "jurisdictional" rule is that it determines the power of the court over the case or person before it. As this Court explained in *Kontrick*, "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the clas-

ses of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S. at 455. As one court of appeals put it, "[t]he emergent distinction, so far as classification of deadlines as jurisdictional or not jurisdictional is concerned, is between those deadlines that govern the transition from one court (or other tribunal) to another, which are jurisdictional, and other deadlines, which are not." *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004).

Rules relating to the filing of an appeal are perhaps the clearest example. As this Court has explained, a timely notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam); accord *Manrique*, 137 S. Ct. at 1271. By definition, rules relating to the filing and timeliness of a notice of appeal determine whether a case falls within a particular court's "adjudicatory authority." *Kontrick*, 540 U.S. at 455.

It is no surprise, then, that "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles*, 551 U.S. at 209 n.2. Indeed, many decades ago this Court observed that "[e]very * * * decision" it had found "holds that the filing of a notice of appeal" within the time provided under the relevant rules "is mandatory and jurisdictional." *United States* v. *Robinson*, 361 U.S. 220, 224 (1960). The Court in *Robinson* was interpreting the Federal Rules of Criminal Procedure, which generally permit enlargements of time if the movant can show excusable neglect. Tellingly, however, those rules specifically provide that such en-

largements are *not* available for "taking an appeal." *Ibid.* (quoting Fed. R. Crim. P. 45(b), now Fed. R. App. P. 26(b)). The rules governing civil cases reflect the same sorts of limitations. Fed. R. App. P. 26(b)(1) ("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.").

The Court's discussion of this issue in *Robinson* was consistent with the Court's treatment of the prior rules of court governing the taking of appeals, which were also considered jurisdictional. As the Court explained, Rule III of "[t]he first Criminal Appeals Rules" promulgated under the 1933 Rules Enabling Act "provided a 5-day time limit for the taking of an appeal from a judgment of conviction," and "[i]t was uniformly held that [the rule] was mandatory and jurisdictional, and appeals not taken within that time appear always to have been dismissed regardless of excuse." 361 U.S. at 226–27.

Although the Court has questioned some aspects of *Robinson* in recent years,[2] its decisions have still consistently recognized the basic proposition that appeal-related rules are jurisdictional. *See Bowles*, 551 U.S. at 209 n.2. The case of *Griggs* v. *Provident Consumer Discount Co.*, for example, concerned the por-

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[2] See, *e.g.*, *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (noting that "[t]he Seventh Circuit correctly identified our decisions in *Smith* and *Robinson* as the source of the confusion," but not overruling those cases); *Kontrick*, 540 U.S. at 454 (citing *Robinson* as an example of this Court being "less than meticulous" in its use of the term "jurisdictional").

tion of Rule 4 of the Federal Rules of Appellate Procedure relating to the impact of a motion to alter or amend the judgment still pending in the district court after the filing of a notice of appeal. 459 U.S. at 57. At the time, Federal Rule of Appellate Procedure 4(a)(4) provided that "[a] notice of appeal filed before the disposition of [such a motion] shall have no effect." *Ibid.* The Court explained that such a rule was jurisdictional because it determined when one court lost adjudicatory power and another gained it:

> Even before 1979, it was generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Id. at 58. "In short, [the filing of a premature notice] is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" *Id.* at 61 (quoting *Browder* v. *Dir., Dep't. of Corr. of Ill.*, 434 U.S. 257, 264 (1978)).

Similarly, in *Torres* v. *Oakland Scavenger Co.*, this Court held that the failure to list a party in a notice of appeal had jurisdictional implications. 487 U.S. 312, 314–15 (1988). As the Court explained, "the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not

named in the notice of appeal." *Id.* at 315. "Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." *Ibid.* "Because the Rules do not grant courts the latter power, * * * the Rules likewise withhold the former." *Ibid.*

Torres also underscores the "weight" to be given to the Advisory Committee's understanding of Rule 4 as jurisdictional in nature. See 487 U.S. at 316 (Advisory Committee notes "'of weight' in [the Court's] construction of the Rule") (citation omitted). According to the Advisory Committee:

> Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," compliance with the provisions of those rules is of the utmost importance.

Fed. R. App. P. 3 adv. comm. notes to 1967 amendment (quoting *Robinson*, 361 U.S. at 224). Critically, "[t]his admonition by the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a single jurisdictional threshold." *Torres*, 487 U.S. at 315.

The relationships between Rule 4 and other rules further illustrate this point. Rule 3(a)(2) states that "[a]n appellant's failure to take any step *other than the timely filing of a notice of appeal* does not affect

the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." Fed. R. App. P. 3(a)(2) (emphasis added). The corollary, of course, is that the failure to make a "timely filing of a notice of appeal" *does* affect the validity of the appeal. And as previously noted, Rule 26(b)(1) declares that no extensions shall be permitted except as specifically prescribed in Rule 4 itself: "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)(1). Both of these provisions assume that Rule 4(a)(5)(C) is jurisdictional and cannot be waived, forfeited, or expanded on the basis of any court's view of the equities.

There are important reasons for treating rules relating to notices of appeal so distinctly. It is these rules, after all, that ensure the finality of judgments. If courts were permitted to change these rules or forgive noncompliance for equitable reasons, the result would be that appeals—and thus finality—could be deferred "indefinitely." *Robinson*, 361 U.S. at 230; accord *Joshi*, 389 F.3d at 734; see *infra* II.A (discussing origins of the rule). And just as importantly, treating rules like Rule 4(a)(5)(C) as something other than "jurisdictional" in its traditional sense[3] would

[3] The amicus brief by Professor Scott Dodson agrees that Rule 4(a)(5)(C) is jurisdictional—because it "is part of the boundary dividing authority between the district courts and the courts of appeals." Amicus Br. of Professor Dodson at 7–8. The brief goes on to argue, however, that even a jurisdictional rule may be subject to "flexibility" and "judicial discretion." *Id.* at 8. This theory

allow the lower federal courts to expand their own power over a case—a power that the Constitution reserves for Congress. *Bowles*, 551 U.S. at 212–13 ("Congress decides what cases the federal courts have jurisdiction to consider" and "can also determine when, and under what conditions, federal courts can hear them."); *Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); *United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("The power to hear and determine a case like this is conferred upon the court by acts of Congress, and * * * we have no power to dispense with any of these provisions, nor to change or modify them."). The fact that such rules are limits on *adjudicatory authority* explains why they apply even when the consequences would be inequitable or harsh.[4]

B. Contrary to Petitioner's argument, the 30-day limit in Rule 4(a)(5)(C) *does* have a statutory basis.

In addition to their discussion of the *nature* of jurisdictional rules, this Court's cases also attribute ju-

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would require what *Bowles* called "the repudiation of a century's worth of precedent and practice in the American courts." 551 U.S. at 209 n.2. And even Professor Dodson agrees that such "flexibility" would exist only if there were something in the rule itself to allow it. Amicus Br. of Professor Dodson at 8. Here, there is not.

[4] *Bowles* itself illustrates this point with stunning clarity. In a footnote, the Court recounts a recent instance in which the Clerk refused to accept a petition for certiorari in a capital case because it had been filed one day late and thus fell outside the power of the Court to consider—and the petitioner was executed soon after. *Bowles*, 551 U.S. at 212 n.4. It is difficult to imagine a harsher result.

risdictional significance to the fact that a rule is contained or rooted in an act of Congress. *Bowles*, 551 U.S. at 212–13. This flows naturally from the basic structure set out in the Constitution, which provides that "only Congress may determine a lower federal court's subject matter jurisdiction." *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 454, and citing U.S. Const. art. III § 1).

This brings us to the nub of the parties' disagreement. Petitioner's principal argument is that "Rule 4(a)(5)(C) is nonjurisdictional because it is not grounded in a statute." Pet. Br. 13. That is simply not so. When this Court promulgated Rule 4(a)(5)(C), the 30-day limit on extensions *was* specifically prescribed by statute—and had been since 1948. Although that limitation was removed during an amendment process in 1991, neither the intention nor the legal effect of that amendment was to strip the rule of its jurisdictional force. In short, the 30-day limit in Rule 4(a)(5)(C) did—and does—have its roots in an act of Congress, which further supports the conclusion that it is "jurisdictional."

1. When Rule 4(a)(5)(C) was promulgated, the 30-day limit on extensions was an explicit statutory requirement.

As Petitioner recognizes, 28 U.S.C. § 2107 historically *did* contain a 30-day limit on extensions of time to file a notice of appeal. Pet. Br. 12. The Act of June 25, 1948—which created what is now § 2107—contained the following in its fourth paragraph: "The district court, in any such action, suit or proceeding, may extend the time for appeal *not exceeding thirty days* from the expiration of the original time herein prescribed, upon a showing of excusible [*sic*] neglect

based on failure of a party to learn of the entry of the judgment, order or decree." Pub. L. No. 80-773 (June 25, 1948) ch. 131 § 2107, 62 Stat. 963 (emphasis added). This provision stayed substantially the same until 1991. See U.S. Code v.12 Titles 27–29, at 406 (1988).[5]

With the creation of the Federal Rules of Appellate Procedure in 1967, this Court promulgated Rule 4(a)(5)(C), reflecting and incorporating § 2107's statutory 30-day limit on extensions. Fed. R. App. P. 4(a) (1967) ("Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."), *in* Moore's Fed. Practice § 304 App.01 (3d ed. 2016). At the time of its adoption, then, the rule's 30-day limit on extensions was solidly grounded in—and reflected—a limitation adopted by Congress.

Indeed, even Rule 4(a)(5)(C)'s predecessor in the Federal Rules of Civil Procedure carried the authori-

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[5] Over the years, § 2107 was amended twice, but neither amendment has any significance for present purposes. An amendment in 1949 eliminated the words "in any such action, suit or proceeding" as superfluous and corrected the typographical error. Pub. L. No. 81-72 (May 24, 1949) ch. 139 §§ 107, 108, 63 Stat. 104–05. Then, as part of the Bankruptcy Act of 1978, Congress also amended § 2107 to strike the final paragraph excluding the applicability of the section's provision to bankruptcy courts. Pub. L. No. 95-598 (Nov. 6, 1978) title II § 248, 92 Stat. 2672. Presumably because of this Court's ruling in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982)—which struck down the 1978 Act—the version of the statute that was in place as of the 1991 amendments did not reflect the 1978 amendment.

ty of Congress. The 30-day limit on extensions first appeared in Federal Rule of Civil Procedure 73(a), which took effect in January 1947.[6] But Congress quickly grounded the rule in statute by its Act of June 25, 1948, which enacted into law most of the revised Federal Rules of Civil Procedure—and adopted § 2107 itself. H.R. Rep. No. 308, 80th Cong., at A174 (1947). Thus, Congress specifically authorized the jurisdictional rule that is now Rule 4(a)(5)(C) and provided it with a statutory basis.

2. Congress's 1991 amendment did not have the legal effect of eliminating the rule's jurisdictional force.

Petitioner's argument comes down to a single premise: The 30-day limit in Rule 4(a)(5)(C) cannot be jurisdictional because it does not appear in the *current* version of § 2107. This ignores the text, context, and background principles of the 1991 amendment. Properly understood, that amendment did not have the legal effect of stripping away the congressional authorization and jurisdictional character of the 30-day limit in Rule 4(a)(5)(C).

Congress amended § 2107 in 1991 "to make certain technical corrections" and to bring the provision into "conformity with rules of appellate procedure" as

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[6] The Advisory Committee proposed its first revision to the modern Federal Rules of Civil Procedure in June 1946 and, per the Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064, that revision became effective at the beginning of Congress's next session. The rule that contains the language that would become 28 U.S.C. § 2107 and would carry over to Federal Rule of Appellate Procedure 4(a)(5)(C) thus first appears as Federal Rule of Civil Procedure 73(a) in the U.S. Code effective as of January 2, 1947. See U.S. Code v.3 Titles 27–42, at 3327 (1946).

they had evolved over time. Pub. L. No. 102-198 (Dec. 9, 1991), 105 Stat. 1627 (title and caption heading) (Pet. App. 2a). It did so following a decision by the Judicial Conference of the United States "to recommend that Congress amend 28 U.S.C. § 2107 to conform to the [1991] proposed amendment to Rule 4(a) of the Federal Rules of Appellate Procedure and to eliminate the inconsistency between that section and the current version of Appellate Rule 4." Rep. of Procedure of Judicial Conf. of the U.S. at 101–02 (Sept. 1990). The amendment necessarily focused on *other* aspects of Rule 4, however, as the specific 30-day limit relevant here had not changed since its promulgation and thus was already in "conformity" with the statute then in effect.

In implementing these changes, the drafters of the legislation struck two existing paragraphs in § 2107, including the paragraph that related to extensions of the time for appeal:

> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

28 U.S.C. § 2107 (1988) (Pet. Br. 1a); Pub. L. No. 102-198 (Dec. 9, 1991), 105 Stat. 1267. They replaced it with a longer paragraph providing details about extensions of time that would correspond to the changed aspects of Rule 4—and specifically, to the new provisions in Rules 4(a)(5) and 4(a)(6) concerning when the motion must be filed and what happens if

the party did not receive notice of the judgment.[7] The new provision reads as follows:

> (c) The district court may, upon motion filed no later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> > (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
> >
> > (2) that no party would be prejudiced,
>
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 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.

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[7] The original version of Rule 4(a)(5) had led to "considerable confusion" as to when a motion for extension of time could be filed. Fed. R. App. P. 4(a)(5) adv. comm. note to 1979 amendment. The rule was amended in the late 1970s to make clear that a motion for extension must be filed within the original 30 days for appeal. *Ibid.* Later, the Court adopted the new Rule 4(a)(6), relating to when and how long the time to appeal could be reopened if the appealing party had not been notified of the final judgment. Fed. R. App. P. 4 adv. comm. note to 1991 amendment. These were the time limits that were later at issue in *Bowles*. 551 U.S. at 207.

28 U.S.C. § 2107 (Pet. App. 50–56); see Pub. L. No. 102-198, 105 Stat. 1627.

In short, Congress inserted a longer and more detailed paragraph about extensions of time, in the place of a much shorter one. The House Report explains that the shorter one was then stricken "as no longer applicable." H.R. Rep. No. 322, 102d Cong. (1991) (cited at Pet. Br. 12, and reproduced at Pet. Br. 11a). In the process, though, Congress neglected to mention the still-effective 30-day limit on extensions of time contained in Rule 4(a)(5)(C).

There is no reason to interpret this omission as a choice by Congress to strip any part of Rule 4 of its jurisdictional significance. The plain language of the amendment certainly does not do so; it says nothing about Rule 4(a)(5)(C) or the 30-day limit at all. If Congress had intended to make a dramatic change in the nature of Rule 4(a)(5)(C) in 1991, surely it would have said so.

Indeed, we know what Congress intended to accomplish through the 1991 amendment—because Congress itself told us. Congress described the amendment as part of "[a]n Act to make certain *technical corrections* in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts." Pub. L. No. 102-198 (Dec. 9, 1991), 105 Stat. 1623 (title) (emphasis added) (Pet. App. 2a). Further, the caption explains that the changes were designed to bring the statute into "*conformity* with rules of appellate procedure" as they had evolved over time. 105 Stat. at 1627 (Pet. App. 2a) (emphasis added). To the extent the plain language and context of the statute leave any doubt, the caption and title of the amendment show that Congress intended it to *reinforce* all

the existing limitations in Federal Rule of Appellate Procedure 4(a), not undercut them.[8]

The omission's lack of significance is particularly clear in light of the "century's worth of precedent and practice in the American courts" that have treated time limits for filing notices of appeal "as jurisdictional." *Bowles*, 551 U.S. at 209 n.2. This Court presumes that Congress is aware of existing law when it enacts new legislation. *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 696–98 (1979). As Professors William Baude and Stephen Sachs have explained:

> Legislatures don't change the law in a vacuum. Like contracting parties, they act in a world already stuffed full of legal rules * * *. Even omnipotent legislatures, with the power to override any rule on the books, never use their power all at once. In our system, at least, new enactments are designed to take their place in an existing corpus juris, as new threads in a seamless web.

William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1098 (2017). In interpreting a legislative enactment, then, the Court should ask:

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[8] See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Trainmen* v. *Balt. & Ohio R. Co.*, 331 U.S. 519, 528–29 (1947)); see, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1083 (2015) (relying on the section caption and the act's title to aid the Court's interpretation of the statute's legal effect).

> How does it fit into the rest of the *corpus juris*? What do "the legal sources and authorities, taken all together, *establish*"? Questions like these presuppose some particular system of law, and their answers depend on the other legal rules in place. Language will of course be an input to the process, but law begins and ends the inquiry.

Id. at 1083 (internal footnote omitted).

This is precisely why this Court has hesitated to interpret technical amendments to statutes as making dramatic changes *sub silentio*. For example, in *Zuni Public School District No. 89* v. *Department of Education*, 550 U.S. 81, 84 (2007), the Court declined to interpret a new enactment as implicitly setting aside a long-established practice within the Department of Education. The Court explained:

> Congress adopted that language without comment or clarification. No one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed the view that this statutory language (which, after all, was supplied by the Secretary) was intended to require, or did require, the Secretary to change the Department's system of calculation, a system that the Department and school districts across the Nation had followed for nearly 20 years, without (as far as we are told) any adverse effect.

Id. at 91; see also, *e.g.*, *Dir. of Revenue of Mo.* v. *CoBank ACB*, 531 U.S. 316, 322 (2001) ("Nothing in the statute indicates a repeal of the previous express approval of state taxation[.]"); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2796 (2014) (Ginsburg, J., dissenting) ("Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation.").

When Congress amended § 2107 in 1991, the 30-day limit in Rule 4(a)(5)(C) had been in place for decades in both rule and statute—and thus it was plainly jurisdictional. Again, "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles*, 551 U.S. at 209 n.2. Nothing in the text of the amendment purports to strip the 30-day limit of its jurisdictional significance, making it the one aspect of the rules regarding notices of appeal that is *not* jurisdictional. The amendment simply said nothing on the issue at all. Accordingly, the background law as it existed at the time of the amendment—including the proposition that time limits relating to notices of appeal are jurisdictional—continues in effect.

In short, Rule 4(a)(5)(C) is jurisdictional in terms of both its nature and its statutory basis. The Court emphasized the issue of statutory basis in *Bowles* because "Congress decides what cases the federal courts have jurisdiction to consider" and "can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212–13. Here, Congress *did* make such a determination many decades ago, adopting various time limits for notices of appeal, including a 30-day limit on extensions. That

statutory basis existed when Rule 4(a)(5)(C) was promulgated—which eliminates any doubt that the 30-day limit is a jurisdictional rule authorized by Congress. There is no reason to interpret the 1991 amendment as stripping the rule of either its congressional authorization or its jurisdictional effect.

II. Even if the 30-day limit in Rule 4(a)(5)(C) is *not* jurisdictional, it must be enforced here.

In the end, however, the distinction between jurisdictional and non-jurisdictional rules does not make a difference in this case.[9] As discussed below, even if Rule 4(a)(5)(C) were not "jurisdictional," it would remain the type of mandatory claim-processing rule that is "unalterable" and immune to equitable exceptions. *Manrique*, 137 S. Ct. at 1271. On this basis, this Court could—and recently did—decline to address the question of jurisdictionality altogether. See *ibid.* And even if equitable exceptions were otherwise available, the "unique circumstances" doctrine—assuming it still exists—would not apply here.

The only remaining question, then, is whether Respondents waived or forfeited the application of Rule 4(a)(5)(C) as a mandatory claim-processing rule. As discussed below, the answer is no. Respondents raised the issue of Rule 4(a)(5)(C) in their first substantive filing before the Seventh Circuit. Under both the Federal Rules and the Seventh Circuit's Local Rules, this was more than sufficient.

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[9] Respondents included this point in their Brief in Opposition as a reason to deny certiorari. Br. in Opp. 6.

A. Rule 4(a)(5)(C) is mandatory and thus not subject to equitable exceptions.[10]

As this Court has repeatedly held, Rule 4 "establishes mandatory time limits for filing a notice of appeal." *Gonzalez* v. *Thaler*, 565 U.S. 134, 147 (2012).[11] Mandatory rules limiting an appeal are "unalterable," and thus "if a party properly raises them," it is "the court's duty to dismiss the appeal." *Manrique*, 137 S. Ct. at 1271–72. This Court held as much just a few months ago in *Manrique*—a case involving the application of Rule 4(b) following an order of restitution in a criminal case. *Ibid.* Indeed, the Court declined to decide whether the rule was jurisdictional, holding that the rule was "at least a mandatory claim-processing rule" and thus was not susceptible to exceptions in any event. *Id.* at 1271. And if Rule 4(b) is "at least a mandatory claim-processing rule," so too is Rule 4(a)(5)(C). *Ibid.*

The unambiguous text and structure of the rule confirm this characterization. Rule 4(a) allows 30 days for a notice of appeal in any civil case that does not involve the U.S. government. Because that strict

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[10] Petitioner's amicus agrees. The brief submitted by the American Academy of Appellate Lawyers contends that if Rule 4(a)(5)(C) is not jurisdictional, it still "should be construed as a mandatory claim-processing rule" that is "'unalterable'" and thus not subject to equitable exceptions. Amicus Br. of American Academy of Appellate Lawyers in Support of Petitioner at 10 (quoting *Manrique*, 137 S. Ct. at 1272).

[11] See also *Torres*, 487 U.S. at 315 (noting the "mandatory nature of the time limits contained in Rule 4"); *Griggs*, 459 U.S. at 61 (observing that the timely filing of a notice of appeal is "mandatory"); *Robinson*, 361 U.S. at 224 (same); *Browder*, 434 U.S. at 264 (explaining that "Fed. Rule App. Proc. 4(a) and 28 U.S.C. § 2107" create strict, "mandatory" time limits).

limit might be too harsh, however, the rule allows several exceptions. If the litigant did not receive timely notice of the judgment, for example, the district court "may reopen the time to file an appeal" for a limited period. Fed. R. App. P. 4(a)(6). The rule also allows for extensions of time—and provides a more lenient timetable for litigants who can show "excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A)(ii). But even for an extension under that more lenient rule—that is, *even if a litigant has already shown "excusable neglect or good cause"*—Rule 4(a)(5)(C) still limits the available extension to 30 days. (Emphasis added.)

Nothing in the rule's text grants a district court or court of appeals the ability to allow additional time. Indeed, the fact that the rule already contains exceptions is sufficient by itself to prevent a court from grafting on additional ones. Cf. *United States* v. *Beggerly*, 524 U.S. 38, 48–49 (1998) ("[e]quitable tolling is not permissible where" the statute already provides for equitable exceptions); *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997) (statute's "explicit listing of exceptions" shows that its drafters did not intend courts to apply "other unmentioned, open-ended, 'equitable' exceptions"). And as noted above, Rule 26(b) instructs that "the court may not extend the time to file * * * a notice of appeal (except as authorized in Rule 4)." See *Torres*, 487 U.S. at 314–15 (noting that the "good cause" equitable exceptions in Rule 26(b) are specifically not available for the time limits under Rule 4). There is simply no room for additional exceptions.

And rightly so. Firm deadlines and limits on notices of appeal are essential to promote finality, to set

a definite point of time for the end of litigation, and to prevent the appeal of old and stale claims. *Browder*, 434 U.S. at 264 ("The purpose of the rule is clear: It is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands.") (quotation marks omitted). Indeed, this is exactly why the limits on extensions were adopted in the first place. See Fed. R. Civ. P. 73 adv. comm. notes to 1946 amendment (explaining that the 30-day limit "avoids the difficulty of indefinite lack of finality of the judgment, by providing that the extension of the time for appeal as the result of excusable neglect for failing to receive notice of it must be limited to an additional thirty days."). Even if the result in a particular case may seem inequitable, having firm rules of procedure is "a necessary part of an orderly system of justice." *Thompson* v. *INS*, 375 U.S. 384, 390 (1964) (per curiam) (Clark, J., dissenting). And if the inflexibility of a rule "has turned out to work hardship," the issue should be addressed "by the process of amendment, not by ad hoc relaxations" by the courts in particular cases. *Ibid.*; *Houston* v. *Lack*, 487 U.S. 266, 283 (1988) (Scalia, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J.) (citing the same).

Rule 4(a)(5)(C) is fundamentally different from the federal statutes of limitations and other rules on which Petitioner's argument relies. See Pet. Br. 36–37, 39–41. Petitioner argues that a time limit can only be interpreted as "mandating an automatic disposition of a claim or defense without regard to the circumstances" if it "says so explicitly." *Id.* at 39. If it does not, the time limit is subject to equitable excep-

tions. *Ibid.* But the Federal Rules of Appellate Procedure *do* contain explicit language tying untimeliness to an "automatic disposition" of the appeal. Rule 4(a)(5)(C) operates in conjunction with Rule 3, which provides that an appeal "may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Fed. R. App. P. 3(a)(1). Subsection (a)(2) of that rule provides that "[a]n Appellant's failure to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." (Emphasis added.) The text of Rule 3 thus demonstrates that an untimely notice undermines the appeal's "validity," which necessarily requires dismissing the appeal. See *Torres*, 487 U.S. at 314. This Court recognized as much in *Manrique*, explaining that without a proper notice of appeal, "'the court's duty to dismiss the appeal [is] mandatory,'" whether or not the defect is jurisdictional. 137 S. Ct. at 1272 (quoting *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005)).[12]

Indeed, the same reasoning that gives rise to a "'rebuttable presumption' in favor of 'equitable tolling'" for statutes of limitations (Pet. Br. 36) actually *undermines* any comparable presumption for Rule 4(a)(5)(C). As discussed above, statutes and rules are always adopted in the context of existing law. See *supra* I.B.2. For statutes of limitations, "'[i]t is horn-

[12] For the same reasons, the explicit terms of Rules 3 and 4 distinguish those rules from the rule at issue in *Schacht* v. *United States*, 398 U.S. 58 (1970), which "contain[ed] no language" that would have made a late filing fatal to the appeal. *Id.* at 63–64, quoted in Pet. Br. 34–35.

book law that limitations periods are customarily subject to equitable tolling.'" Pet Br. 36 (quoting *Young* v. *United States*, 535 U.S. 43, 49 (2002)). For that reason, statutes of limitations are presumed to *allow* equitable tolling, "unless tolling would be inconsistent with the text of the relevant statute." *Young*, 535 U.S. at 49. But a very different set of background principles applies with respect to time limits for notices of appeal, and those principles swing the "presumption" the other way. As discussed above, a century's worth of cases have regarded time limits relating to notices of appeal as "mandatory and jurisdictional." See *supra* I.A. Even if this particular limitation in Rule 4 somehow lacks "jurisdictional" significance, it must therefore be presumed "mandatory" and *not* subject to equitable exceptions.

Petitioner's reliance on the harmless error doctrine is particularly misplaced. According to Petitioner's brief, "[r]ecognition of equitable considerations with respect to Rule 4(a)(5)(C) is also consistent with other provisions that make clear that a district court's order should not be upset in the absence of harm to the parties." Pet. Br. 40 (citing 28 U.S.C. § 2111). This argument is flatly inconsistent with *Manrique*. The petitioner in that case had argued that his failure to file a separate notice of appeal from a subsequent district court order was "harmless" and should not result in dismissal. This Court rejected that argument, holding that "[b]y definition, mandatory claim-processing rules, although subject to forfeiture, are not subject to harmless-error analysis." 137 S. Ct. at 1274. The harmless error doctrine thus does not help Petitioner's argument. The rule is mandatory, and it is not subject to *any* exception other than the ones found within the rule itself.

B. Even if Rule 4(a)(5)(C) *were* subject to equitable exceptions, the unique circumstances doctrine would not apply here.

Even if Rule 4(a)(5)(C) were somehow alterable based on equitable considerations, the "unique circumstances" doctrine would not help Petitioner's case. This is a narrow, long-dormant doctrine designed to address the hardship of a litigant who reasonably relies on a mistake by the district court relating to the time for appeal. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 215–16 (1962) (per curiam); see also *Thompson*, 375 U.S. at 387. On the facts of this case, the doctrine would not apply.

As an initial matter, it is far from clear whether the unique circumstances doctrine is alive and well.[13] The only case since *Harris Truck* and *Thompson* in which the Court actually applied the unique circumstances doctrine was a summary reversal more than 50 years ago. See *Wolfsohn* v. *Hankin*, 376 U.S. 203, 203 (1964) (per curiam). In *Bowles*, this Court specifically declined an invitation to revive the doctrine, "see[ing] no compelling reason to resurrect [it] from its 40-year [now 50-year] slumber." 551 U.S. at 214.

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[13] See *Bowles*, 551 U.S. at 214 (acknowledging that the doctrine's "continuing validity" is "rightly questioned"); *Hollins* v. *Dep't of Corr.*, 191 F.3d 1324, 1327 (11th Cir. 1999) (remarking on "the Supreme Court's shaky support for the [unique circumstances] doctrine"); *In re Home & Family, Inc.*, 85 F.3d 478, 481 (10th Cir. 1996) (calling unique circumstances "a disfavored doctrine that is to be applied only in 'carefully limited circumstances'") (citation omitted); *Kraus* v. *Consol. Rail Corp.*, 899 F.2d 1360, 1364–65 (3d Cir. 1990) (stating that "the scope of the 'unique circumstances' rule remains murky" and suggesting its "foundations" are "tenuous").

And, critically, in the *Manrique* decision last term, the Court observed that even a *non*-jurisdictional rule relating to notices of appeal is mandatory and thus "'unalterable.'" 137 S. Ct. at 1272 (citation omitted). These recent precedents defeat any remaining notion that a court may simply forgive noncompliance with rules relating to notices of appeal in light of "unique circumstances."

In any event, this doctrine would not apply here. As an initial matter, there is no ambiguity in Rule 4(a)(5)(C) that would allow room for the doctrine to operate. See *Props. Unlimited Inc. Realtors* v. *Cendant Mobility Servs.*, 384 F.3d 917, 922 (7th Cir. 2004) (doctrine is not available unless there is "genuine ambiguity in the rules"). And moreover, the error in this case was introduced by *Petitioner's own counsel*, who specifically asked the district court to enter an extension of time that would last 60 days—30 days longer than Rule 4(a)(5)(C) would allow. See Pet. Br. 41–42. As a matter of law, then, Petitioner cannot claim that she was the victim of a court-created error on which she reasonably relied—a basic requirement for the unique circumstances doctrine.[14] As one court explained, "a party cannot reasonably rely on a district court's improper extension of time where the party requests relief that, as a plain reading of the Rules would show, is beyond the court's authority." *Panhorst* v. *United States*, 241 F.3d 367, 373 (4th Cir. 2001) (agreeing with the "Second, Third, Tenth, and

[14] In this respect, the facts here are materially different from those that the dissent in *Bowles* concluded would justify application of the unique circumstances doctrine. 551 U.S. at 221–22 (Souter, J., dissenting) (emphasizing that the error in *Bowles* originated with the district court, not with counsel).

Eleventh Circuits" on this point); see also *Allender* v. *Raytheon Aircraft Co.*, 439 F.3d 1236, 1241 (10th Cir. 2006) (holding that a party's reliance on "an extension that is prohibited by the federal rules" does not justify application of the unique circumstances doctrine when the party asked for the extension and thus invited the error).

In short, the error here lies with Petitioner's last appointed counsel, who asked for (and received) an extension twice as long as what the rules allow. Nothing in the rules allows a litigant to reverse the consequences of a late filing—whether jurisdictional or not—on the ground that her lawyer made a mistake.

C. Respondents did not waive or forfeit their ability to invoke Rule 4(a)(C)(5) as a mandatory claim-processing rule.

For all the reasons discussed above, the only possible significance to the "jurisdictional" question in this case would be if Respondents had waived or forfeited any reliance on Rule 4(a)(5)(C). If the rule is jurisdictional, waiver and forfeiture would not apply. But "[u]nlike jurisdictional rules, mandatory claim-processing rules may be forfeited if the party asserting the rule waits too long to raise the point." *Manrique*, 137 S. Ct. at 1272 (citation omitted).

Here, however, there was no waiver or forfeiture. Respondents briefed the timeliness defect before merits briefing in the Seventh Circuit. Indeed, Respondents' pre-merits briefing specifically addressed the impact of Rule 4(a)(5)(C)—*including the argument that the rule is mandatory and must be enforced even if it is not jurisdictional.* Under the Seventh Circuit's precedents, because Respondents asserted the un-

timeliness defense before addressing the merits of the appeal, they did not forfeit the defense. See *Trepanier* v. *City of Blue Island*, 364 F. App'x 260, 262–63 (7th Cir. 2010) (citing *United States* v. *Singletary*, 471 F.3d 193, 196 (D.C. Cir. 2006), for the proposition that a litigant preserves an untimeliness argument as long as it asserts the contention before addressing the merits of the appeal); see also *Manrique*, 137 S. Ct. at 1272 (holding that respondent timely raised an untimeliness defense by raising it concurrently with the merits in the court of appeals).

Petitioner's various arguments for waiver and forfeiture are inappropriate and should be disregarded. In the Seventh Circuit, Petitioner referenced waiver and forfeiture in only one respect: She argued that Respondents waived and forfeited any reliance on the rule because they "acknowledge[d]" they were not aware of the timeliness problem until the Seventh Circuit asked for briefing on the issue. Hamer Reply Br. 6. Petitioner did not argue that any specific action or omission by Respondents—like submitting a docketing statement or failing to file a cross-appeal—constituted waiver or forfeiture. She should not be permitted to raise such arguments now.

In any event, there was no waiver or forfeiture here. In the district court, for example, Respondents had no obligation to object to Petitioner's request for an overlength extension or to correct the error by her counsel under Rule 4(a)(5)(C). See Pet. Br. 23–24 (arguing forfeiture on this basis). Petitioner's counsel filed a motion requesting a 60-day extension, and the district court granted the motion the same day. Petitioner's counsel did not confer with Respondents about the extension before filing the motion, and the

court did not seek or wait for Respondents' position before ruling. Under the governing local rules, "the absence of a response is not deemed to waive any objection to a postjudgment motion." *Trepanier*, 364 F. App'x at 263 (citing N.D. Ill. Loc. R. 78.3).

Nor did Respondents have any obligation to file a notice of appeal from the entry of the 60-day extension. Respondents were not aggrieved by the extension itself; if counsel's error in seeking that extension ultimately led to confusion about the proper time for appeal, that would be a problem for Petitioner and her counsel, not for Respondents. Further, any appeal from the extension order would have been due 30 days later—on November 9, 2015. Pet. Br. 26. But the original deadline for Petitioner's appeal was October 14, and Rule 4(a)(5)(C) would have allowed an extension until November 14. On November 9, therefore, Respondents were not in a position to know whether Petitioner intended to appeal at all, much less whether she would file her notice of appeal before or after November 14, the proper deadline. Respondents also did not know until much later that Petitioner would ultimately proceed *pro se*, rather than with "new counsel," as the motion had suggested. As noted above, the purpose of the extension was "to allow new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued." Pet. App. 58 ¶ 3.

Similarly, no cross-appeal was required—nor would it even have been proper under the circumstances. Under *Jennings* v. *Stephens*, 135 S. Ct. 793 (2015), a cross-appeal is appropriate and necessary if the appellee wishes to "attack the [district court's] decree with a view either to enlarging his own rights

thereunder or [to] lessening the rights of his adversary." *Id.* at 798 (citations omitted). Here, however, Respondents have never attacked the district court's "decree"—a judgment that resolved the case in Respondents' favor in all respects. Nor have they sought to "enlarge" their own rights in respect to the judgment. By invoking the time limits in Rule 4, Respondents simply sought to have the appeal dismissed, which would mean that the rights of both Respondents and Petitioner would remain exactly where the district court's judgment left them. The Tenth Circuit analyzed the issue as follows:

> [W]e believe that it was not necessary for the [appellee] to file a cross-appeal from the district court's order granting an extension of time to appeal. In moving for dismissal of the appeal, the [appellee] was not seeking alteration of the judgment below in its favor.

United States v. *Madrid*, 633 F.3d 1222, 1225 (10th Cir. 2011).[15]

Petitioner's final argument is that Respondents "committed both waiver and forfeiture" when they filed a docketing statement in the Seventh Circuit stating that Petitioner "'filed a timely Notice of Ap-

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[15] Although the federal courts of appeals are not in agreement on these issues (see Pet. Br. 24), the cross-appeal rule is a rule of practice in the federal courts, and this Court has generally left the application of the rule to the courts of appeals themselves. *Greenlaw* v. *United States*, 554 U.S. 237, 255 (2008) (Breyer, J., concurring) (citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951)). If there is any uncertainty about how the cross-appeal rule should apply here, the matter should be left to the Seventh Circuit to resolve in the first instance.

peal.'" Pet. Br. 28. This argument ignores the context of the assertions themselves, as well as the nature of docketing statements in the Seventh Circuit and elsewhere.

First and foremost, the assertions Petitioner cites were about the Seventh Circuit's *jurisdiction*, not about any violation of a non-jurisdictional claim-processing rule.[16] Obviously, waiver and forfeiture are relevant here only to the extent that the 30-day limit in Rule 4(a)(5)(C) is *not* jurisdictional. By definition, Respondents' assertion that the Seventh Circuit had *jurisdiction* over the appeal was not an "intentional relinquishment or abandonment of a known right" to demand the proper application of a *non-jurisdictional* but mandatory claim-processing rule. *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (defining "waiver").

More fundamentally, a docketing statement is a creature of a court's local rules, and Petitioner cites no authority for the proposition that the Seventh Circuit would consider an assertion in a docketing statement as a waiver or forfeiture. Rule 3(c)(1) of the Seventh Circuit's rules requires that an appellant file and serve a docketing statement within seven days of filing the notice of appeal. 7th Cir. R. 3(c)(1). If the docketing statement is not complete and correct, the appellee must provide a complete one 14

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[16] Pet. App. 63 ("The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, in that on December 11, 2015, Plaintiff-Appellant filed a timely Notice of Appeal."); see also Pet. App. 64 (again stating that "Plaintiff-Appellant timely filed a Notice of Appeal," in the sense that the notice fell within the extension that the district court had granted).

days later. *Id.* The docketing statement is designed for use by the Clerk—to confirm the caption and relevant counsel, to identify related cases, and to provide information relevant to the court's jurisdiction. 7th Cir. R. 3(c)(1) (basic requirements); 7th Cir. R. 28(a) (jurisdictional information). According to the Seventh Circuit's Handbook, "[o]bjections to the jurisdiction of either the district court or appellate court should be noted in the docketing statement at the outset of the appeal." Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, § VI.B at 21 (2017). Yet there is no requirement that appellees identify any other, non-jurisdictional defects or issues in that document.

Moreover, similar docketing statements are in use in other circuits, and those courts have consistently reiterated that they are non-binding. See, *e.g.*, *United States* v. *Pogue*, 19 F.3d 663, 666 (D.C. Cir. 1994) ("The docketing statement is used principally to aid the court in its initial screening of a case; it does not irrevocably define the limits of the scope of an appeal."); see also *St. John's United Church of Christ* v. *City of Chicago*, 401 F. Supp. 2d 887, 903 (N.D. Ill. 2005) (noting that a D.C. Circuit docketing statement was "non-binding"), *aff'd*, 502 F.3d 616 (7th Cir. 2007); see also, *e.g.*, Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit, § III.A, at 24 (2017) ("[O]mission of an issue from the docketing statement does not preclude argument on that issue in appellant's brief."); 1st Cir. R. 3.0(a) ("[E]rrors or omissions in this separate statement alone shall not otherwise affect the appeal if the notice of appeal itself complies with this rule"); 4th Cir. R. 3(b) ("Although a party will not be precluded from raising additional issues, counsel should make every

effort to include in the docketing statement all of the issues that will be presented to the Court.").

To the extent there is any doubt about the significance of docketing statements in the Seventh Circuit, this Court should leave that question for the Seventh Circuit to resolve in the first instance. But the Seventh Circuit's docketing statements are similar in function and design to those in its sister circuits, and there is no reason to think that it would treat assertions in its own docketing statements any differently. As long as Respondents raised the issue before merits briefing—and we did—the issue has been sufficiently preserved.

CONCLUSION

The judgment should be affirmed, either on the ground that the 30-day limit in Rule 4(a)(5)(C) is jurisdictional in its nature and basis, or on the ground that it is at least a mandatory claim-processing rule that does not allow equitable exceptions.

Respectfully submitted.

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