No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER,
PETITIONER,
v.

NEIGHBORHOOD HOUSING SERVICES
OF CHICAGO & FANNIE MAE,
RESPONDENTS

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the 30-day limit for an extension of time to file a notice of appeal set forth in Federal Rule of Appellate Procedure 4(a)(5)(C) is a jurisdictional rule, as opposed to a non-jurisdictional, claim-processing rule.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND SUMMARY

This case is a poor candidate for certiorari. Any conflict of authority on this issue is new and not well-developed, so there is no need for this Court to intervene. Further, this case would not be a good vehicle for resolving the Question Presented. In light of the unusual way in which this issue arose in the Seventh Circuit, neither party is in the best position to provide this Court with a full, adversarial exposition of the issue to be resolved. And in any event, a reversal would not make a difference in the ultimate outcome of this lawsuit.

Here are the basic facts: After losing on the merits of her discrimination claims, Petitioner parted ways with her appointed counsel. To allow time for her to make other arrangements, counsel successfully moved for an order extending the time for appeal by 60 days. Unfortunately, this violated Federal Rule of Appellate Procedure 4(a)(5)(C), which provides that an extension of time for appeal may not exceed *30* days. Acting *pro se*, Petitioner filed a notice of appeal within the time allowed by the court's order but not within the 30 days in Rule 4(a)(5)(C). Upon noticing this issue *sua sponte*, the Seventh Circuit asked Respondents to brief the question whether the 30-day limit in Rule 4(a)(5)(C) is jurisdictional.

Recognizing that Petitioner was an individual proceeding *pro se*, Respondents took a conservative approach. They examined *Bowles* v. *Russell*, 551 U.S. 205 (2007)—along with a published decision by the D.C. Circuit on the issue—and took the position that the 30-day limit in Rule 4(a)(5)(C) was likely *not* a jurisdictional barrier to Petitioner's appeal. The Sev-

enth Circuit ultimately disagreed and dismissed the appeal for lack of jurisdiction.

Despite this series of unfortunate events for Petitioner, there is no reason for this Court to intervene—and several reasons why it should not. *First*, only two courts of appeals have issued precedential decisions on this subject—the D.C. Circuit in 2011, and the Seventh Circuit in this case. Accordingly, any conflict of authority here is new and not well-developed. All the other decisions cited by Petitioner on this issue are unpublished, have no precedential value, and contain relatively cursory discussions of the issue presented in this case. *Second*, because of the unique manner in which the issue arose in this case and the positions taken below, it would be difficult for either Respondents or Petitioner to present a full exposition of the issues in this Court. *And third*, because there were and are other grounds to affirm the district court's judgment—including the mandatory nature of Rule 4(a)(5)(C), even if it is *not* jurisdictional—it is highly unlikely that a reversal of the Seventh Circuit's decision would alter the ultimate outcome of this case. We respectfully ask that this Court deny the Petition.

STATEMENT

A. Facts and District Court Proceedings

Respondent Neighborhood Housing Services of Chicago (NHS) is a nonprofit neighborhood revitalization organization that creates opportunities for people to live in affordable homes. Respondent Fannie Mae is a federally chartered private corporation that provides financial services to low and moderate income families to help them purchase homes. In partnership with NHS, Fannie Mae operates the

Fannie Mae Mortgage Help Center in Chicago. Petitioner worked at the Center for several years as an employee of NHS.

Petitioner's tenure was riddled with performance issues, including confrontational behavior and a repeated failure to come to work on time. Pet. App. 10–14. She applied for promotions but did not receive them, in light of her performance issues and the superior performance of the other candidates. *Id.* at 14–18. Over time, Petitioner's confrontational behavior became increasingly disruptive to the work environment, so in March 2012 she was relieved of her duties at the Mortgage Help Center. *Id.* at 20. NHS ultimately offered her another position, explaining that it was the only remaining position that would be appropriate for her. She declined that position—which would have resulted in lower pay—and thus voluntarily resigned. *Id.* at 21–22.

Several months later, 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. She requested that counsel be appointed, and the district court granted her request. Just a few months later, however, counsel moved to withdraw. The district court granted this request and appointed a second counsel. That counsel withdrew as a result of a conflict, so the court appointed a third. After seven months, when the third counsel also moved to withdraw, the court made yet another appointment.

Following the close of discovery, Respondents NHS and Fannie Mae filed separate motions for summary judgment. Petitioner opposed the motions,

represented by her fourth court-appointed counsel. The district court granted summary judgment in Respondents' favor on all counts. Pet. App. 7 *et seq*. With respect to the discrimination claims, the court found that Petitioner had failed to establish that any of NHS's reasons for declining to promote her were a pretext for age or sex discrimination. With respect to her retaliation claims, the district court found that Petitioner had not been constructively discharged but instead had voluntarily resigned—and that she had failed to adduce evidence that there was a causal connection between any protected activity and her removal from her position at the Mortgage Help Center. The district court entered judgment on September 14, 2015. Thus, her original deadline to file her notice of appeal was October 14, 2015.

On October 8, 2015, Petitioner's fourth court-appointed counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal." Pet. App. 57–59. The motion requested that the district court "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, entering an order that stated, "The Court will give Plaintiff until December 14, 2015 to file a Notice of Appeal." *Id.* at 60. In apparent reliance on that order, Petitioner—acting *pro se*—filed her notice of appeal on December 11, 2015. *Id.* at 61.

B. Proceedings in the Court of Appeals

When the case reached the Seventh Circuit, that Court entered an Order *sua sponte* that instructed Respondents to file a brief "addressing the timeliness of this appeal." Pet. App. 66–67. In compliance with that order, Respondents filed their "Memorandum Addressing Timeliness of Appeal." *Id.* at 68 *et seq*. Sensitive to the fact that Petitioner was proceeding on her appeal *pro se*—as well as to the fact that the Seventh Circuit had directed its request for briefing to Respondents alone—Respondents effectively abandoned their fully adversarial posture for purposes of the submission and took pains to present the Seventh Circuit with a full and neutral exposition of the issue. Respondents' brief alerted the Seventh Circuit to all potential avenues and relevant authorities by which the court could, if it chose, relieve Ms. Hamer of the district court's violation of Rule 4(a)(5)(C) and allow her appeal to proceed to the merits. To that end, Respondents analyzed the *Bowles* decision in detail and ultimately concluded that it turned on the notion that Rule 4(a)(6)—the rule at issue in that case—is tied to a statutory time limitation. Pet. App. 71–71. Rule 4(a)(5)(C), on the other hand, is not. *Id.* at 74–75. This analysis led Respondents to conclude that the 30-day limitation in Rule 4(a)(5)(C) is "likely not jurisdictional under the reasoning of *Bowles*" and subsequent Seventh Circuit authority. *Id.* at 75–77.

The Seventh Circuit then ordered Petitioner—still *pro se*—to file a response memorandum addressing the timeliness of the appeal. Upon receiving this submission, the Seventh Circuit issued an order noting that "the issue of appellate jurisdiction is taken with the case" and further ordering that "the parties fully address in their respective briefs the issue of

appellate jurisdiction raised in the court's order of December 31, 2015" (emphasis in original).

In merits briefing, Respondents reiterated their position that "it does not appear to be the law in this Circuit that Hamer's failure to abide by Fed. R. App. P. 4(a)(5)(C) is a jurisdictional defect in the strict sense of the term." Respondents set forth other reasons for rejecting the appeal, however, both on the basis of untimeliness as well as on the merits.

C. The Court of Appeals' Decision

After hearing oral argument, the Seventh Circuit disagreed with the parties and held that "[l]ike Rule 4(a)(6) [the rule at issue in *Bowles*], Rule 4(a)(5)(C) is the vehicle by which [28 U.S.C.] 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days." On that basis, the court dismissed the appeal for lack of jurisdiction, without reaching either the merits of Petitioner's claims or the merits of Respondents' other, non-jurisdictional arguments.

REASONS FOR DENYING THE PETITION

A. Any conflict of authority is new and should be allowed to develop more fully before this Court intervenes.

In essence, the Petition argues that the Seventh Circuit made a mistake in this case—namely, that it reached the wrong decision with respect to the jurisdictional impact of Rule 4(a)(5)(C). To the extent its decision creates a conflict of authority, however, that conflict is new, shallow, and undeveloped. Before this case, only one court of appeals—the D.C. Circuit—had issued a precedential ruling on the issue. The

other courts to weigh in on the subject have done so only in unpublished decisions and with relatively cursory reasoning.

As Petitioner notes, the D.C. Circuit has held that the 30-day time limit in Rule 4(a)(5)(C) is not jurisdictional. *Youkelsone* v. *Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011). The court based its decision on the notion that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," and the 30-day limit contained in Rule 4(a)(5)(C) does not derive from any statute. *Id.* at 475. Accordingly, the limitation is a claim-processing rule that may be—and was in that case—forfeited or waived. *Id.* at 475–76.

Petitioner contends that the Ninth Circuit has reached the same conclusion, but that court's discussion of the issue is dicta and unpublished, and it has never been cited in a subsequent case. See Pet. 9–10 (citing *Abel* v. *Sullivan*, 326 F. App'x 431 (9th Cir. 2009)); Ninth Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.") In the course of considering a late-filed notice of appeal, the Ninth Circuit included a single sentence stating that Rule 4(a)(5)(C)'s time limitation is not jurisdictional because it "is not derived from statute." *Abel*, 326 F. App'x at 32 (citing *Bowles*, 127 S. Ct. at 2364–65). But the court went on to find jurisdiction on an independent basis—namely, based on its conclusion that an earlier-filed and timely motion for extension of time served as the "functional equivalent" of a notice of appeal. *Id.* at 432–33. Accordingly, the Ninth Circuit's discussion of the issue is not only nonprecedential but dicta as well.

On the other side of the question, the Seventh Circuit—in the decision below—is the first and only court of appeals to adopt a precedential rule holding that the 30-day limit in Rule 4(a)(5)(C) is jurisdictional. Among the cases that Petitioner cites for the same proposition, none has precedential value:

- *Freidzon* v. *OAO LUKOIL*, 644 F. App'x 52 (2d. Cir. 2016), is an unpublished "summary order." Pursuant to the Second Circuit Local Rules, such summary orders "do not have precedential effect." See Second Cir. L.R. 32.1.1(a).
- *United States* v. *Hawkins*, 298 F. App'x 275 (4th Cir. 2008), is an unpublished *per curiam* opinion. The opinion notes, "Remanded by unpublished PER CURIAM opinion. Unpublished opinions are not binding precedent in this circuit." *Id*. Furthermore, the Fourth Circuit's comment in *Hawkins* that the time limit found in Rule 4(a)(5)(C) was jurisdictional is dicta in any event, as the scope of Rule 4(a)(5)(C) was not at issue in the case.
- *Peters* v. *Williams*, 353 F. App'x 136 (10th Cir. 2009), is also an unpublished *per curiam* opinion. Pursuant to the Tenth Circuit's local rules, "[u]npublished decisions are not precedential, but may be cited for their persuasive value." See Tenth Cir. R. 32.1(a).

As for the rest of the courts of appeals—the First, Third, Fifth, Sixth, Eighth, Eleventh, and Federal Circuits—those courts have not addressed the issue at all since *Bowles*.

In short, any conflict of authority on this issue is new and shallow. Only the D.C. and Seventh Circuits have issued published decisions on the issue. It

would be premature for this Court to intervene; the courts of appeals should be granted further time to consider the issue and develop a consensus on their own.

B. This case is a poor vehicle, as it would not provide this Court with an opportunity to hear and consider all the relevant arguments on both sides of the issue.

In light of the unique manner in which this case presented itself in the Seventh Circuit, it does not present a good vehicle in which to resolve the Question Presented. Neither the Petitioner nor the Respondents are in the best position to present this Court with the most fulsome exposition of the issue.

For her part, Petitioner briefed and presented oral argument in the Seventh Circuit *pro se*, and she did not make all available arguments. For example, she did not affirmatively argue that her appeal was timely on the ground that her appointed counsel's motion for withdrawal and extension of time—filed within 30 days of the original judgment—was the "functional equivalent" of a notice of appeal. *Smith* v. *Barry*, 502 U.S. 244, 248–49 (1992).[1] That is the argument the Ninth Circuit relied upon in *Abel* in finding an alternative basis upon which to exercise jurisdiction. 326

[1] Respondents' submissions in the Seventh Circuit explained the idea of a functional equivalent but argued that the motion filed by Petitioner's withdrawing counsel would not have met that test. Although Petitioner did offer some responses to those points—in her response to the jurisdictional submission, and in her reply brief on the merits—the Seventh Circuit apparently did not understand her to be making an affirmative argument that her motion for extension of time was the functional equivalent of a timely notice of appeal. If she *had* made that argument, presumably the Seventh Circuit would have addressed it.

F. App'x 431. The Court's consideration of the full implications of the Question Presented would be incomplete without that argument, which Petitioner would not be in the best position to make.

As for Respondents, their ability to defend the Seventh Circuit's reasoning before this Court would be impaired by the fact that they took the opposite position below. The Seventh Circuit raised the jurisdictional issue *sua sponte*, before either side had filed a merits brief. It instructed Respondents (and only Respondents) to file a brief addressing the timeliness of the appeal. In preparing their brief, Respondents were cognizant of both Petitioner's *pro se* status and the fact the Seventh Circuit was, at that time, relying upon Respondents alone to inform the Court about the issue. In light of this dynamic, Respondents took particular care to present the issue in a non-adversarial and neutral way, ultimately taking the view that the time limit at issue here "does not appear to be jurisdictional according to the law of this Circuit." Pet. App. 71 *et seq.*

If this Court were to grant certiorari in this case, Respondents would be called upon to defend the Seventh Circuit's position. In the briefing, however, Petitioner would presumably attempt to undermine Respondents' presentation with the contents of their own submissions and arguments before the Seventh Circuit. This is far from ideal. To the extent this Court's intervention is warranted at all, it should wait for a case in which the issue was—and can be before this Court—the subject of a thorough and unimpaired adversarial process.

C. There are multiple other grounds to affirm the district court's judgment.

Certiorari would also be inappropriate here given that the jurisdictional issue is unlikely to make a difference in the ultimate outcome of the case. As the district court's thorough opinion demonstrates (Pet. App. 7–47), Petitioner's claims for discrimination and retaliation are exceedingly weak on their merits. After extensive discovery (throughout which Petitioner was represented by counsel), the district court granted summary judgment on multiple grounds, finding, among other things, that she had voluntarily resigned her employment with Respondent NHS and had not suffered an involuntary termination.

Moreover, the untimeliness of Ms. Hamer's appeal may be fatal even if the 30-day limitation in Rule 4(a)(5)(C) is *not* jurisdictional. At a minimum, the 30-day limitation is a claim-processing rule, which—in the Seventh Circuit at least—must be observed if not forfeited or waived. *Asher* v. *Baxter International Inc.*, 505 F.3d 736, 741 (7th Cir. 2007); *Peterson* v. *Somers Dublin Ltd.*, 729 F.3d 741, 746 (7th Cir. 2013). Respondents argued below that they neither forfeited nor waived the argument that Petitioner's appeal violated a mandatory claim-processing rule, having raised that issue before merits briefing.

In other words, even if this Court were to reverse the decision of the Seventh Circuit, it is highly likely that the Seventh Circuit will affirm dismissal on one or more alternative grounds. To the extent the Question Presented in this case ultimately requires this Court's attention, this Court should grant review in a case where its decision will make a difference in the outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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