

No. 06M7

IN THE SUPREME COURT OF THE UNITED STATES

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NORTHWEST AIRLINES, INC.,

Movant,

v.

SPIRIT AIRLINES, INC.,

Respondent.

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Sixth Circuit**

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**MOTION FOR LEAVE TO FILE BRIEF  
AS *AMICI CURIAE* AND BRIEF OF  
CHARLES FRIED AND SETH P. WAXMAN  
AS *AMICI CURIAE* IN SUPPORT OF MOTION  
TO DIRECT THE CLERK TO FILE A PETITION  
FOR A WRIT OF CERTIORARI OUT OF TIME OR,  
IN THE ALTERNATIVE, TO TREAT  
THE MOTION AS AN APPLICATION TO JUSTICE STEVENS,  
AS CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT,  
FOR AN EXTENSION OF TIME *NUNC PRO TUNC***

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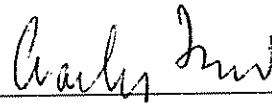
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**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

The undersigned members of the bar of this Court respectfully move for leave to file, on their own behalf, the accompanying brief as *amici curiae* in support of Northwest Airlines' pending motion. Rule 21 of the Rules of this Court, which governs motions, neither authorizes nor forbids the filing of *amicus* briefs in support of motions, and provides no guidance as to the timing of any such motions. *Amici*, whose interest is described in the brief, respectfully submit that the Court should accept an *amicus* brief if it would be of assistance to the Court and would not delay the Court's consideration of the motion. Here, the motion in question has been distributed for the conference of September 25, 2006. For those reasons, *amici* respectfully suggest that consideration of the attached brief would be appropriate, and requests that the Court grant leave to file it.

Respectfully submitted,



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August 17, 2006

**BRIEF OF CHARLES FRIED AND SETH P. WAXMAN AS *AMICI CURIAE*  
IN SUPPORT OF MOTION TO DIRECT THE CLERK  
TO FILE A PETITION FOR A WRIT OF CERTIORARI  
OUT OF TIME OR, IN THE ALTERNATIVE, TO TREAT  
THE MOTION AS AN APPLICATION TO JUSTICE STEVENS,  
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FOR AN EXTENSION OF TIME *NUNC PRO TUNC***

**INTEREST OF THE *AMICI CURIAE***

*Amici*, members of the bar of this Court, litigate regularly before this Court. It is in their interest and the interest of all those who practice in this Court that there be a clear and authoritative ruling by the Court, or at the very least by a Justice of this Court, on the question presented in the motion. Whether the Court is without jurisdiction to grant an extension after the statutory ninety days set out in 28 U.S.C. § 2101(c) but within the statutory one hundred and fifty days is a question that deserves an authoritative answer. Petitioner's claim for a favorable exercise of this Court's discretion admittedly is not as strong as that presented in other cases, cf. *Teague v. Regional Commissioner of Customs*, 394 U.S. 977 (1969) (unusually severe snowstorm caused delay in the mail), but neither is counsel's conduct an example of flagrant carelessness. Petitioner's counsel appears frequently in this Court and is an experienced and respected member of its bar. *Amici* suggest that counsel's error is the sort that might happen to anyone, and even if the motion should eventually be denied, the open question it raises should be resolved. A final interest of *amici* is the sentiment: "there but for the grace of God go I."<sup>1/</sup>

**ARGUMENT**

This Court has held many times that the statutory provisions regarding the time within which a petition for certiorari may be filed are jurisdictional and may not be waived for any reason,

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<sup>1/</sup> *Amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief.

however compelling. See *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1971); *Teague v. Regional Commissioner of Customs*, *supra*. Petitioner acknowledges as much and the motion does not argue for any such waiver. The question presented by the motion is rather what is the correct interpretation of those provisions, however strictly they are to be applied.

It is clear that 28 U.S.C. § 2101(c) mandates that a petition be filed within ninety days. It is equally clear that a Justice of this Court may enlarge that time for a further period up to sixty days. Thus it follows that under no circumstances may the Court entertain a petition more than one hundred and fifty days after the judgment sought to be reviewed has become final. The statute that fixes these rigorous limits is silent as to whether the motion to extend the time for filing beyond the first ninety days must itself be filed within that time. That Congress expressly imposed only two restrictions on the Court's power to extend the jurisdictional deadline implies that no other limitations apply on that power. Congress created the power in the Court to extend the deadlines, and then placed only those precise restraints on that power. Beyond those restraints, the power of the Court to "extend the time for applying for a writ of certiorari" can be exercised in its discretion and according to its own judgment. Because Congress did not specify a time (except implicitly through the 60-day outer limit for extensions of the deadline) within which the Court must exercise its power, there is no such time for jurisdictional purposes. On this interpretation, a Justice presumptively has power to "extend the time for applying for a writ of certiorari" at any time, so long as both statutory prerequisites are satisfied: (1) there must have been a showing of "good cause," and (2) the extension must not extend more than "sixty days" past the default deadline of 90 days after the final judgment below.

The Court's case law has not come close to addressing this question.<sup>2f</sup> In *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990), Respondents had insisted that "the Eighth Circuit cannot, *post hoc*, amend its order to make it appear that it took an action which it never took." The Court agreed that "the Court of Appeals of course cannot make the record what it is not. The time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time." And in that case the Court ruled that the court below had indeed amended its order for legitimate reasons that allowed the petition to proceed. The motion presented in this case does not ask that a Justice of the Court to "make the record what it is not," but to exercise an undoubted discretion that the statute does not in terms preclude.

It is the case that rules of this Court, S. Ct. R. 13.5 and S. Ct. R. 30.2, require that a request to extend the ninety-day limit be filed no later than ten days before the expiration of that period and that any application to extend time "must be filed within the period sought to be extended." But the very fact that it is rules of this Court and not the statute itself that addresses the question when a motion for an extension beyond the first statutory period should be filed would further argue that the statute does not provide the definitive answer. Moreover, Rule 13.5 does in terms allow for exceptions in extraordinary cases, and Rule 30.2, however stringently stated and severely applied, is only a "procedural rule[] adopted by the Court for the orderly transaction of its business." *Schacht v. United States*, 398 U.S. 58, 64 (1970). The Court squarely held in *Schacht* that, when a petition

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<sup>2f</sup> In his dissent from the denial of certiorari in *Teague*, Justice Black noted that "[i]n recent years this Court has on occasion granted certiorari and decided on the merits civil cases that had been filed after the 90-day period, without making any mention of the time question." 394 U.S. at 982. Justice Black was joined by Justice Douglas, and Justice Harlan noted that he would also grant certiorari but defer a decision on the jurisdictional question to a consideration of the merits. The case cited by Justice Black in support of this proposition, *Pierson v. Ray*, 386 U.S. 547 (1967), involved an out-of-time cross-petition for certiorari. See *Deal*, 402 U.S. at 963 & n.2. Of course, the denial neither disputed this history nor indicated that it was based on a jurisdictional bar.

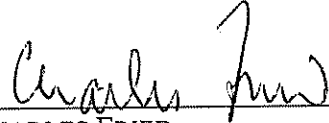
is filed in non-conformity with the rules governing timeliness but not in violation of any statute limiting the Court's jurisdiction, the rule "can be relaxed by the Court in the exercise of its discretion." *Ibid.* More recently, in *Hibbs v. Winn*, 542 U.S. 88, 98-99 (2004), the Court held that 28 U.S.C. § 2101(c) "takes priority over the 'procedural rules adopted by the Court for the orderly transaction of its business'" (quoting *Schacht*) and that statutory purposes take priority over court-created rules "[w]hen court-created rules fail to anticipate unusual circumstances that fit securely within a federal statute's compass." Although *Hibbs v. Winn* addressed unusual action by a court of appeals, not an error by counsel, its basic point that the Court always has discretion in the application of its rules, as long as there is no violation of a jurisdiction-limiting statute, applies here. The Court may choose to exercise its discretion differently in different circumstances, but it is incorrect to suppose that no discretion exists.

*Amici* respectfully submit that, in light of the silence of the statute and the explicit grant of discretion in Rule 13.5, there is a genuine question whether 28 U.S.C. § 2101(c) should be interpreted to preclude the granting of a motion to extend the time for filing a petition beyond the first period of ninety days in a case where the motion is presented after that initial period but within the statutory one hundred and fifty days. *Amici* are unaware of any case that has addressed that specific question and just because it is crucial that in matters such as this "men must turn square corners," *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.), it is crucial that they know where those corners are. And *amici* further submit that just because this unresolved technical question addresses the limits of this Court's jurisdiction, it should be resolved by the Court itself, or at least by the Circuit Justice to whom the motion is presented.

**CONCLUSION**

The clerk should allow the motion to be directed to the Honorable John Paul Stevens, Circuit Justice for the Sixth Circuit, for such disposition as Justice Stevens deems appropriate.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

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I, Charles Fried, a member of the Bar of this Court, certify that on this 17th day of August, 2006, I caused to be sent by Federal Express a copy of the MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF CHARLES FRIED AND SETH P. WAXMAN AS *AMICI CURIAE* IN SUPPORT OF MOTION TO DIRECT THE CLERK TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME OR, IN THE ALTERNATIVE, TO TREAT THE MOTION AS AN APPLICATION TO JUSTICE STEVENS, AS CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT, FOR AN EXTENSION OF TIME *NUNC PRO TUNC* in the above-captioned case on:

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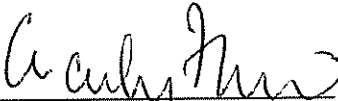
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I further certify that all parties required to be served have been served.

  
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Charles Fried