No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER,
Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondents Neighborhood Housing Services of Chicago and Fannie Mae (collectively "Respondents") offer no response to several arguments that Petitioner Charmaine Hamer ("Ms. Hamer") makes in her opening brief.

First, other than alleging that Congress inadvertently omitted a 30-day limitation from 28 U.S.C. § 2107(c), Respondents offer no answer to Ms. Hamer's argument that the structure and history of the statute strongly demonstrate that no maximum extension was intended in the first part of that statute.

Second, Respondents offer no substantive response to Ms. Hamer's cited cases that explain why an appeal or a cross-appeal is needed to challenge a district court's extension of time to appeal. Nor do they substantively dispute that a reversal of a district court's extension of time lessens an appellant's rights (and, correspondingly, enlarges an appellee's rights).

Third, Respondents offer no response to Ms. Hamer's argument that the facts of this case fall squarely within the unique-circumstances doctrine as originally set forth in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and as expanded upon in *Thompson v. INS*, 375 U.S. 384 (1964). Nor do they respond to Ms. Hamer's argument that a failure to recognize equitable considerations would be inconsistent with § 2107(c), which invokes the equitable considerations of excusable neglect and good cause without setting a maximum extension.

Respondents' argument that Rule 4(a)(5)(C) is jurisdictional suffers from several fundamental flaws. First, Respondents erroneously assume—contrary to this Court's precedents and Article III of the Constitution—that a court-promulgated rule, separate from a statute, can have jurisdictional significance. Additionally, Respondents mistakenly argue that Rule 4(a)(5)(C) derives from a statute because the Rule's 30-day limit stems from a statutory time limitation that was repealed in 1991. Aside from the inherent flaws in relying on a repealed provision to impute congressional intent to set a jurisdictional limitation, Respondents' argument rests on a misunderstanding of the pre-1991 statute and the 1991 amendments that followed. A proper understanding of pre-1991 § 2107 and the 1991 addition of § 2107(c) shows that Rule 4(a)(5)(C) does not derive from a statute. Hence, Rule 4(a)(5)(C) is nonjurisdictional. This Court should reverse the Seventh Circuit's contrary holding.

Respondents' arguments against waiver, forfeiture, and the unique-circumstances doctrine fare no better. Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule and is subject to forfeiture and waiver by an appellee. Respondents here have forfeited and waived their right to invoke Rule 4(a)(5)(C). Moreover, recognition of equitable considerations such as the unique-circumstances doctrine is fully consistent with the Rules, pertinent statutes, and this Court's precedents, and the doctrine bars the dismissal of Ms. Hamer's appeal here. Therefore, this Court should instruct the Seventh Circuit to consider Ms. Hamer's appeal on the merits.

I. Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule

Respondents' argument that Rule 4(a)(5)(C) contains a jurisdictional time limitation is inconsistent with this Court's precedents and is based upon a misunderstanding of jurisdiction, a flawed interpretation of pre-1991 § 2107 and the 1991 amendments that followed, and a violation of fundamental principles of statutory interpretation.

A. Respondents' Arguments Are Premised on an Incorrect Understanding of Jurisdiction

1. Court-Promulgated Rules Do Not Have Jurisdictional Significance Apart from Statutes

Respondents' argument that Rule 4(a)(5)(C) is jurisdictional is largely—if not entirely—premised on the contention that the 1991 amendments to § 2107 should not be interpreted to "strip[] Rule 4(a)(5)(C) of its jurisdictional significance." Resp. Br. 2, 5-6, 8, 15, 17, 20, 23, 24. This premise is false because it wrongly assumes that the Rule ever had jurisdictional significance. Contrary to Respondents' suggestion, and as explained in detail in Ms. Hamer's opening brief (Pet. Br. 13-18), this Court has long held that court-promulgated rules do not have jurisdictional significance.

For instance, in *Bowles v. Russell*, 551 U.S. 205 (2007), the timing of the notice of appeal violated both § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6). In holding that the appeal was jurisdictionally

barred, this Court did not hold that Rule 4(a)(6) was itself a jurisdictional rule. Instead, the Court held that the ***statutory*** 14-day time period for reopening an appeal set forth in § 2107(c) was jurisdictional. *Bowles*, 551 U.S. at 213 (finding the time period jurisdictional "[b]ecause Congress specifically limited the amount of time" for which a district court could reopen the period to appeal). Indeed, the Court reaffirmed the longstanding principle that nonstatutory time periods are nonjurisdictional, noted "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress[,]" and recognized that the Court's Rule setting a 90-day period for petitioning for certiorari is jurisdictional only for civil cases because a statute sets the time limitation for civil cases, but not for criminal cases. *Id.* at 211-12. Under this reasoning, Rule 4(a)(6), separate from § 2107(c), is nonjurisdictional.

Here, in sharp contrast to *Bowles*, a violation of Rule 4(a)(5)(C) does not constitute a statutory violation. Indeed, § 2107(c) contains no limit on an extension's length if the motion for an extension of time is filed no later than 30 days after the expiration of the time otherwise set to appeal. Thus, the district court's extension of time in this case was fully compliant with § 2107(c). Respondents do not dispute this, and they make no argument—nor could they—that the timing of Ms. Hamer's notice of appeal violated any statute. Because Ms. Hamer's appeal was statutorily timely, any violation of Rule 4(a)(5)(C) does not deprive the Seventh Circuit of jurisdiction.

Respondents misplace reliance on *United States v. Robinson*, 361 U.S. 220 (1960) to argue that court-

promulgated rules can be jurisdictional. Although Respondents concede that this Court "has questioned some aspects of *Robinson* in recent years," Respondents ignore that the portions of *Robinson* upon which they base their arguments are the very aspects that this Court has questioned. Resp. Br. 9-10. Indeed, this Court subsequently recognized that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction[,]" and that nonstatutory rules promulgated by this Court "do not create or withdraw federal jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Because *Robinson* involved a nonstatutory deadline in a Rule of Criminal Procedure, that deadline cannot be jurisdictional. One year after *Kontrick*, the Court further clarified this point, explicitly stating that *Robinson* (as well as *United States v. Smith*, 331 U.S. 469 (1947)) "[did] not hold the limits of the Rules to be jurisdictional in the proper sense that *Kontrick* describes." *Eberhart v. United States*, 546 U.S. 12, 16 (2005). Because Rule 4(a)(5)(C) is nonstatutory, it is not jurisdictional "in the proper sense that *Kontrick* describes." *Robinson* is therefore of no assistance to Respondents.

Respondents further misplace reliance on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) to argue that Rule 4 is "jurisdictional in nature." Resp. Br. 11-12. *Torres*, however, found that Federal Rule of Appellate Procedure 3(c), as it then existed,[1] was "jurisdictional" only after determining that the Rule was "imposed by the legislature and not by the judicial process." *Torres*, 487 U.S. at 318 (citation omitted). In

[1] The Rule has since been amended to abrogate the Court's holding in *Torres*.

sharp contrast, Rule 4(a)(5)(C) is not imposed by the legislature. Therefore, even assuming *arguendo* that the jurisdictionality holding in *Torres* remains good law in light of this Court's more recent cases clarifying the distinction between jurisdictional and nonjurisdictional requirements, *Torres* does not support Respondents' argument that Rule 4(a)(5)(C) is jurisdictional.

2. Time Limitations that Set Boundaries Between Adjudicative Forums Are Not Necessarily Jurisdictional

Respondents' misunderstanding of jurisdiction is also evident from their apparent approval (Resp. Br. 13 n.3) of Professor Dodson's argument that a Rule or statute is jurisdictional when it "sets boundaries between adjudicative forums." Dodson Br. at 5.[2] This understanding of jurisdiction is incorrect because it is inconsistent with this Court's precedents and the Federal Rules. For example, under Professor Dodson's definition, a statute limiting the time to appeal from the Board of Veterans' Appeals to the Court of Appeals for Veterans' Claims would be jurisdictional because it sets boundaries between these two adjudicative forums. Yet this Court unanimously held that this time period

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[2] Respondents, however, do not defend Professor Dodson's argument (Dodson Br. 7-8 n.2) that whether or not a time limitation is set forth in a statute is "irrelevant" to the jurisdictionality inquiry. Resp. Br. 8 (recognizing that a jurisdictional time limit must have a statutory basis). This is wise, because as explained *infra* and in Ms. Hamer's opening brief (Pet. Br. 13-18), this Court's longstanding precedents, as well as Article III, foreclose nonstatutory deadlines from implicating a court's jurisdiction.

is nonjurisdictional. *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011); *see also Schacht v. United States*, 398 U.S. 58, 63-64 (1970) (concluding that this Court's Rule concerning the deadline to petition for certiorari in a criminal case is nonjurisdictional because the deadline is nonstatutory). Additionally, under Professor Dodson's definition, Rule 54(b) would be jurisdictional because it gives district courts discretion to determine when to certify a subset of claims in a case as final and appealable, and thus to permit the transfer of adjudicatory authority from the district court to the court of appeals. Fed. R. Civ. P. 54(b). Similarly, Rule 23(f) would be jurisdictional under Professor Dodson's definition because this Rule gives a court of appeals discretion to permit an appeal of certain class-certification decisions that would otherwise not be appealable, and thus to transfer adjudicatory authority from the district court to the court of appeals. Fed. R. Civ. P. 23(f). Yet the Federal Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts[.]" Fed. R. Civ. P. 82. Professor Dodson's proposed definition of jurisdiction would label "jurisdictional" multiple provisions that this Court's precedents and the Federal Rules deem to be nonjurisdictional. His formulation of jurisdiction—which Respondents appear to endorse at least in part—is therefore incorrect.

Respondents' arguments are premised upon an incorrect understanding of jurisdiction. In contrast, Ms. Hamer, consistent with this Court's precedents, uses the term "jurisdiction" to refer only to subject-matter jurisdiction and personal jurisdiction. *E.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010).

B. Rule 4(a)(5)(C) Does Not Derive from pre-1991 § 2107 or from Any Other Statute

Respondents argue for the first time that the 30-day limit in Rule 4(a)(5)(C) derives from a statute. Resp. Br. 14-24. This argument is irreconcilable with Respondents' Brief in Opposition submitted to this Court, where Respondents admit that Rule 4(a)(5)(C) has no statutory basis. Opp. 5 (recognizing that Rule 4(a)(5)(C) is not "tied to a statutory time limitation"). It is also irreconcilable with their briefs to the Seventh Circuit, where Respondents extensively argued that Rule 4(a)(5)(C) is nonjurisdictional because it does not derive from a statute. Pet. App. 71-77. In any event, Respondents' revised argument is incorrect.

1. The History and Plain Text of the Relevant Rules and Statutes Confirm that Rule 4(a)(5)(C) Does Not Derive from Any Statute

Respondents are simply mistaken to argue that Rule 4(a)(5)(C) derives from the pre-1991 version of § 2107. As explained below, the 1991 amendments to § 2107 were designed, *inter alia*, to track: (i) part (but not all) of Rule 4(a)(5); and (ii) the 1991 addition of Rule 4(a)(6) in its entirety.

Before 1991, § 2107 provided, in relevant part, that "[t]he district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." 28 U.S.C. § 2107, ¶ 4 (1988). Therefore, this section provided

that an extension of time of no more than 30 days from the initial period was available ***only if***: (i) there has been a showing of excusable neglect; ***and*** (ii) the moving party failed to receive notice of the appealable judgment. As Respondents correctly note (Resp. Br. 15-16), this version of § 2107 had, in substance, been in effect since 1948. The version of the Federal Rules of Civil Procedure in effect at that time contained the same provision. Am. Acad. of Appellate Lawyers Br. 14.

Starting in 1966, however, the Federal Rules of Civil Procedure (and subsequently the Federal Rules of Appellate Procedure after their passage in 1967) began to diverge sharply from pre-1991 § 2107. Specifically, the Rules eliminated the requirement that excusable neglect stem from lack of notice, and permitted an extension of time to appeal, not to exceed 30 days from the initial period, simply upon a showing of excusable neglect. Am. Acad. of Appellate Lawyers Br. 15. In 1979, the Rules were amended to additionally permit an extension of time upon a showing of good cause. *Id.* at 16. Therefore, Appellate Rule 4(a)(5) provided that an extension of time could be granted if: (i) a motion is filed no later than 30 days after the expiration of the initial appeal period; and (ii) a showing of excusable neglect or good cause is made; and further provided that (iii) an extension cannot exceed the later of 30 days from the initial period or 10 days from the date of entry of the order granting the motion. *Id.* In contrast, the substance of § 2107 remained unchanged during this time, such that Rule 4(a)(5) was inconsistent with—and far less restrictive than—pre-1991 § 2107.

Although Respondents seek to downplay the 1991 amendments to § 2107, these amendments effected

major changes that greatly expanded the ability of parties to obtain additional time to appeal.

First, the 1991 amendments deleted the requirement that an extension of time could only be granted in lack-of-notice cases, and provided, in the first part of § 2107(c), for an extension of time so long as: (i) a motion for an extension is filed within 30 days of the expiration of the time otherwise allowed for appeal; and (ii) the movant shows excusable neglect or good cause. Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991). Therefore, a district court was given discretion to entertain a timely motion to extend the time to appeal upon ***any*** showing of: (i) excusable neglect (as the Federal Rules have permitted since 1966); ***or*** (ii) good cause (as the Federal Rules have permitted since 1979). Unlike pre-1991 § 2107, extensions of time were not limited only to instances where excusable neglect was coupled with lack of notice. Importantly, the first part of § 2107(c) contains ***no*** limitation whatsoever on the length of any extension, whereas the pre-1991 statute did.

Second, the 1991 amendments, in the second part of § 2107(c), separately provide that under certain conditions, the time to appeal may be reopened for 14 days if: (i) a motion to reopen is filed within 180 days of the expiration of the time otherwise set for appeal; and (ii) the movant did not receive proper notice of the appealable decision. *Id*.[3] Contrary to the pre-1991 statute, the second part of § 2107(c) ***does not*** require

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[3] Also in 1991, Federal Rule of Appellate Procedure 4(a) was amended to add Rule 4(a)(6), which contains the substance of the second part of § 2107(c).

a showing of excusable neglect. Additionally, the second part of § 2107(c) permits the time to appeal to be reopened for 14 days from the date of the district court's order granting the motion to reopen, unlike the pre-1991 statute, which did not permit the appeal period to be extended beyond 30 days from the initial deadline.

Although pre-1991 § 2107 and current Rule 4(a)(5)(C) both contain 30-day limits on extensions of time, the similarities end there. Indeed, the 1991 amendments granted statutory authorization to the more permissive extension-of-time requirements that had been added to the Rules between 1966 and 1979. Rule 4(a)(5)(C) therefore does not derive from pre-1991 § 2107, nor does any other provision of Rule 4(a)(5). Indeed, until 1991, no part of Rule 4(a)(5) was grounded in § 2107 or in any other statute. Today, only Rule 4(a)(5)(A) is grounded in a statute, specifically § 2107(c). The rest of Rule 4(a)(5) has no statutory roots.

2. The House Report Further Confirms that the Omission of Rule 4(a)(5)(C) from § 2107(c) Was Intentional

Although the text itself conclusively demonstrates that Rule 4(a)(5)(C) is not derived from pre-1991 § 2107, the House Report further illustrates this point. Specifically, the House Report states that the addition of § 2107(c) "uses language almost identical to that in ***the first sentence of current Rule 4(a)(5)***, Federal Rules of Appellate Procedure." H.R. Rep. No. 102-322, 1991 U.S.C.C.A.N. 1303, 1310 (1991) (emphasis added). In contrast, the House Report expresses an intent to adopt the entirety of Rule 4(a)(6) into § 2107(c),

explaining that "[t]he remainder of the language is almost identical to that found in proposed Rule 4(a)(6), Federal Rules of Appellate Procedure, which is scheduled to become effective on December 1, 1991." *Id.* At the time, Rule 4(a)(5) provided as follows:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

See 650 Park Ave. Corp. v. McRae, 836 F.2d 764, 766 (2d Cir. 1988) (reproducing the version of Rule 4(a)(5) that was in effect at the time of the 1991 addition of § 2107(c)).[4] Consistent with the House Report, Congress adopted the "first sentence" of Rule 4(a)(5) into § 2107(c), but ***did not*** include a 30-day limit on extensions, which appeared in ***the last sentence*** of Rule 4(a)(5) as it then existed. This legislative history

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[4] The 1979 version of Rule 4(a)(5) is reproduced because the 1991 amendments had not yet taken effect at the time of the November 18, 1991 House Report. Although Rule 4 was amended effective December 1, 1991 to add Rule 4(a)(6), this amendment made no change to Rule 4(a)(5).

demonstrates that Respondents are incorrect to assume that Congress's omission of a 30-day maximum extension in § 2107(c) was simply the result of inadvertence. To the contrary, the House Report demonstrates that Congress consciously chose which parts of Rule 4(a)(5) to include in the statute and which parts to omit. When Congress desired to adopt entire provisions of Rule 4(a) wholesale, it did so explicitly, as evidenced by its adoption, in the 1991 addition of § 2107(c), of the entirety of newly added Rule 4(a)(6).

As evidenced by this history, Respondents are simply wrong to argue that the 30-day period in Rule 4(a)(5)(C) derives from pre-1991 § 2107. To the contrary, the 1991 amendments to § 2107—titled "Conformity with Rules of Appellate Procedure"—were designed to conform the statute in certain ways to Rule 4(a). Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991).

C. Even if Rule 4(a)(5)(C) Were Seen as Deriving from pre-1991 § 2107, the Rule Would Not Be Jurisdictional

Even assuming *arguendo* that Rule 4(a)(5)(C) has a statutory basis, this does not lead to the conclusion that Rule 4(a)(5)(C) is jurisdictional. To determine whether a time limitation is jurisdictional, this Court "inquire[s] whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). This Court has repeatedly recognized that "most time bars are nonjurisdictional[,]" and that a filing deadline

should generally be considered a "'quintessential claim-processing rule[]'" that "'seek[s] to promote the orderly progress of litigation,' but do[es] not deprive a court of authority to hear a case." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Henderson*, 562 U.S. at 435). Accordingly, this Court applies a "rebuttable presumption of equitable tolling" with respect to time bars. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

Respondents' arguments violate fundamental principles of statutory interpretation. *First*, Respondents turn this Court's presumption against jurisdictionality on its head. Instead of recognizing this presumption, Respondents ask this Court to: (i) presume that the 30-day limit on extensions of time has always been jurisdictional; and (ii) therefore assume that Congress could not have intended to repeal the 30-day time limitation in the 1991 amendments to § 2107. Congress's deletion in 1991 of any reference to a 30-day maximum extension of time strongly demonstrates that Congress intended no such maximum extension in § 2107(c), let alone a jurisdictional one. Respondents point to no evidence to the contrary, and they therefore conclusively fail to rebut the presumption against jurisdictionality.

Second, instead of grappling with Congress's elimination of any maximum extension of the initial period to appeal, Respondents simply assume—contrary to the plain text of § 2107(c) and at odds with the House Report that specifically articulates which portion of Rule 4(a)(5) was being adopted into the statute—that Congress's elimination of the maximum extension time was "inadvertent[]." Resp.

Br. 1, 6. Respondents' argument violates the principle that "[w]hen Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect." *Pierce Cty. v. Guillen*, 537 U.S. 129, 145 (2003) (first alteration in original) (citation omitted). Respondents offer no support for their contention that this omission was inadvertent, and indeed, as explained in detail above, the House Report belies Respondents' argument. This Court should therefore hold, consistent with fundamental principles of statutory interpretation, that Rule 4(a)(5)(C) is nonjurisdictional.

D. Interpreting the 30-day Limit in Rule 4(a)(5)(C) as Jurisdictional Would Be Inconsistent with the Rest of the Rule

A finding that the 30-day limit in Rule 4(a)(5)(C) is jurisdictional would be incongruous with the Rule as a whole, which permits extensions until the later of: (i) 30 days after the initial deadline to appeal; or (ii) 14 days after the district court enters the order granting an extension of time. Although Respondents now contend that the 30-day limit in Rule 4(a)(5)(C) has a statutory basis, Respondents do not argue that the 14-day limit has such a basis. Nor could they, because the 14-day limit first appeared in Rule 4(a)(5)(C) in 2009 and has never appeared in a statute.[5] Therefore, Respondents appear to concede that the 14-day limit is nonjurisdictional. Thus, if Respondents' view were adopted, parties like Ms. Hamer would be subject to a

[5] The second part of § 2107(c) provides for a 14-day period for a district court to reopen the time to appeal in lack-of-notice cases, but this provision corresponds to Rule 4(a)(6), not Rule 4(a)(5)(C).

30-day jurisdictional limitation simply because they filed their motion early and the district court promptly decided the motion. In sharp contrast, if: (i) the party seeking the extension waits until close to the statutory deadline (i.e., 30 days after the expiration of the initial time to appeal as per the first part of § 2107(c)) before filing the motion for an extension; or (ii) the district court does not promptly decide the motion for an extension, the movant would be subject to a 14-day *non*jurisdictional period to file a notice of appeal.

Nothing in the Rules (much less in any statute) offers any support for making the jurisdictionality of Rule 4(a)(5)(C) hinge upon the precise timing of the party's motion during the statutorily prescribed period for moving for an extension. Nor is there any support for the jurisdictionality determination depending upon the timing of the district court's order granting an extension. The inconsistency that would flow from the adoption of Respondents' position further shows that the 30-day period in Rule 4(a)(5)(C) is nonjurisdictional.

II. Respondents Forfeited and Waived the Right to Invoke Rule 4(a)(5)(C)

Respondents do not dispute that if Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, the Rule is subject to forfeiture and waiver by an appellee. However, they argue that neither forfeiture nor waiver occurred here. Resp. Br. 32-38. Respondents are incorrect.

Respondents (and the Seventh Circuit) recognize that Ms. Hamer alleged waiver and forfeiture to the Seventh Circuit. Resp. Br. 33; Pet. App. 3-4. However,

Respondents claim that Ms. Hamer failed to raise some of the specific waiver and forfeiture theories argued here, and should therefore be prohibited from alleging that Respondents committed any specific acts of waiver or forfeiture. Resp. Br. 33. Respondents' argument, which does not appear in their Brief in Opposition (*see* Sup. Ct. R. 15.2), lacks merit. Ms. Hamer appeared *pro se* at the Seventh Circuit, and it is well-established that "[a] document filed *pro se* is to be liberally construed[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks omitted). Moreover, this Court's "traditional rule is that [o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration in original) (internal quotation marks omitted). Because Ms. Hamer argued to the Seventh Circuit that Respondents waived and forfeited their right to seek dismissal based on Rule 4(a)(5)(C), her arguments here are entirely proper.

A. Respondents Committed Forfeiture by Failing to Raise Any Objection to the District Court

Respondents do not seriously dispute that a party is ordinarily prohibited from raising an issue on appeal without first raising it to the district court, or that during the two months that the case remained before the district court after the order granting the extension of time, they did not object to the extension. Rather, Respondents argue that there was no forfeiture because the Local Rules of the Northern District of Illinois do not deem the absence of a response to be a

waiver. Resp. Br. 33-34. But the Local Rules do not govern what constitutes forfeiture on appeal; rather, these Rules only govern proceedings in the district court. Fed. R. Civ. P. 83(a)(1) (providing that "a district court . . . may adopt and amend rules governing ***its*** practice") (emphasis added). The Local Rules do not purport to alter the longstanding rule of appellate practice—discussed in detail in Ms. Hamer's opening brief (Pet. Br. 21-22)—that on appeal a party may not inject new issues into a case for the first time.

B. Respondents Committed Forfeiture by Failing to Appeal or Cross-Appeal

Because Respondents seek a determination that the district court's extension of time was improper, an appeal or a cross-appeal is required to preserve the point. Respondents are wrong to suggest that: (i) they were not in a position to appeal the extension at the time it was granted (Resp. Br. 34), and (ii) a cross-appeal was not required because they were not attacking the district court's disposition of the underlying discrimination and retaliation claims (Resp. Br. 35). The first argument ignores that when the district court entered the order extending Ms. Hamer's time to appeal, Respondents had all of the information they needed to allege that this extension violated Rule 4(a)(5)(C). And the second argument ignores that it is the district court's extension, and not the summary-judgment order, that would form the basis for Respondents to appeal or cross-appeal. Therefore, Respondents were required to notice an appeal or a cross-appeal in order to challenge the district court's extension of time. Moreover, contrary to Respondents' argument (Resp. Br. 35 n.15), the cross-appeal rule

stems from this Court's precedents dating back nearly a century. Pet. Br. 23-24. Therefore, it is entirely proper for this Court to address whether, consistent with these precedents, a cross-appeal was required here.

C. Respondents Committed Forfeiture and Waiver Through Their Statements to the Seventh Circuit

Respondents make much of the fact that their statements that Ms. Hamer's appeal was timely were made in a docketing statement, and therefore Respondents conclude that these statements are meaningless and of no effect. Resp. Br. 35-38. But Respondents' cited authority stands for little more than the uncontroversial proposition that a party may generally raise issues on appeal even if those issues were not specifically included in the docketing statement. Respondents' statements, however, are not merely omissions; they are affirmative statements that the appeal was timely noticed. Pet. App. 63-64. Respondents are further incorrect to argue that these statements were merely made to address jurisdiction. Resp. Br. 36. Contrary to Respondents' suggestion, Respondents' second statement that the appeal was timely is not tied to jurisdiction at all. Pet. App. 64. In any event, Respondents unambiguously stated their view that the appeal was timely, and they therefore waived their right to argue otherwise. Indeed, Respondents' clear statements constitute "a judicial admission . . . [which] is conclusive in the case." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 678 (2010) (citation omitted).

III. Equitable Considerations Are Properly Taken Into Account, and They Preclude Dismissal of the Appeal Here

Although Respondents emphasize that the Rules circumscribe district courts' discretion to extend the time to appeal, Respondents miss the point. The question here is ***not*** whether it was proper for the district court to extend the time to appeal for the length of time that it did. Rather, the question is whether, assuming that the district court's extension contravened the Rules, equitable considerations can excuse the violation and permit the appeal to be decided on the merits. As discussed above, Respondents fail to rebut the presumption that Rule 4(a)(5)(C), as a time limitation, is a claim-processing rule that is subject to equitable considerations. Federal statutes and the Federal Rules are inconsistent with Respondents' argument that Rule 4(a)(5)(C) is insusceptible to equitable considerations.

A. Recognition of Equitable Considerations Is Consistent with Federal Statutes

Respondents argue that the Rule should be presumed not to allow equitable considerations based on this Court's past treatment of statutory time limits for notices of appeal. Resp. Br. 29. But Respondents ignore the most pertinent statute: the first part of § 2107(c), which was enacted in 1991. It permits an extension of time to appeal upon showing the equitable considerations of excusable neglect or good cause and does not set a maximum extension. A proper analysis must fully account for this statute, which significantly relaxes the former statute's hostility toward extensions of time to appeal. As Ms. Hamer argued (Pet. Br. 38),

a holding that equitable considerations cannot apply to Rule 4(a)(5)(C) would be inconsistent with the very equitable considerations that § 2107(c) invokes. Respondents do not answer this argument.

Respondents misunderstand Ms. Hamer's discussion (Pet. Br. 40) of the harmless-error statute and associated Federal Rule. Contrary to Respondents' suggestion (Resp. Br. 29), Ms. Hamer is not arguing that harmless error alone is sufficient to excuse noncompliance with Rule 4(a)(5)(C). Rather, Ms. Hamer merely notes that recognition of equitable considerations with respect to Rule 4(a)(5)(C) is consistent with the harmless-error statute, which precludes reversal of a district court's order where an error is harmless. 28 U.S.C. § 2111. Unlike the claim-processing rule at issue in *Manrique v. United States*, 137 S. Ct. 1266 (2017), an appellate court's enforcement of Rule 4(a)(5)(C) will necessarily result in a reversal of a district court's extension of time. Nothing in *Manrique* precludes looking to the harmless-error statute, or any other statute, to determine whether equitable considerations can be taken into account with respect to a particular claim-processing rule.

B. Recognition of Equitable Considerations Is Consistent with the Federal Rules

Respondents' arguments that the Rules of Appellate Procedure preclude equitable considerations are incorrect.

First, Respondents wrongly reason that because Rule 3(a)(2) states that failures other than the timely filing of a notice of appeal do not affect the validity of

the appeal, then failing to file a notice of appeal necessarily ***does*** affect the validity of the appeal. Resp. Br. 12-13. As an initial matter, this argument commits an error of logic: It affirms the consequent. Nothing in Rule 3(a)(2) suggests that a violation of a nonstatutory time limitation automatically affects the validity of an appeal. Additionally, nothing else that Respondents cite supports a holding that Rule 4(a)(5)(C) is insusceptible to equitable considerations. For instance, this Court held that a statutory time limitation was subject to equitable tolling even though the limitation stated that an untimely action would be "forever barred." *Wong*, 135 S. Ct. at 1629. If such an emphatic time limitation is subject to equitable considerations, then surely the portions of the Rules that Respondents cite do not rebut the presumption that equitable considerations should be taken into account.

Second, this Court's cases demonstrate that the Federal Rules do not preclude equitable considerations. For instance, although Rule 3 requires a "notice of appeal" in order to seek appellate review of a district-court decision and sets forth specific requirements for the notice, this Court held that a document that does not strictly comply with Rule 3 (such as a brief filed in lieu of a proper notice of appeal) can sometimes suffice. *Smith v. Barry*, 502 U.S. 244, 248-50 (1992); *see also Becker v. Montgomery*, 532 U.S. 757, 768 (2001) (concluding that an appellant's failure, in violation of the Rules, to sign a notice of appeal was not fatal to the appeal, and that the court of appeals should have accepted the corrected notice of appeal).

Third, relying on *Manrique*, Respondents incorrectly allege that the time limitation in Rule

4(a)(5)(C) is insusceptible to equitable considerations because the Rule is "unalterable." Resp. Br. 25. But this language is taken from *Kontrick*, which specifically leaves open the possibility that claim-processing rules "could be softened on equitable grounds." *Kontrick*, 540 U.S. at 456-57.[6] Therefore, this language does not suggest that claim-processing rules are automatically insusceptible to equitable considerations.

C. The Unique-Circumstances Doctrine Precludes the Dismissal of Ms. Hamer's Appeal

Respondents do not dispute that the facts of this case fall squarely within the unique-circumstances doctrine as originally set forth in *Harris Truck Lines* and *Thompson*. Nor do Respondents ask the Court to overrule these cases as applied to nonjurisdictional rules. Instead, they cite to some court-of-appeals cases that hold, contrary to this Court's precedents, that the unique-circumstances doctrine only applies to ambiguous timing provisions. Resp. Br. 31-32. But Respondents' cited cases are flatly inconsistent with this Court's cases that have applied the doctrine. For instance, the Court in *Harris Truck Lines* applied the unique-circumstances doctrine where the statute and Rule unambiguously only permitted an extension of time upon a showing of excusable neglect coupled with lack of notice, and the appellant: (i) received proper notice of the underlying decision; yet (ii) through its counsel, sought an extension of time that was

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[6] Because the Court in *Kontrick* determined that forfeiture had occurred, the Court had no occasion to determine the applicability of equitable considerations to the rule in question. *Id.*

prohibited by Rule and by statute. Pet. Br. 30-31. Similarly, the Court in *Thompson* applied the doctrine despite a violation of an unambiguous Rule setting the deadline for filing post-trial motions. *Thompson*, 375 U.S. at 386. Here, Ms. Hamer's counsel successfully sought an extension in the context of seeking to withdraw from the representation. Pet. App. 57-59. And the Seventh Circuit recognized that Ms. Hamer was misled by the district court's order. Pet. App. 4. The Court therefore should follow its longstanding precedents and conclude that the unique-circumstances doctrine bars the dismissal of Ms. Hamer's appeal.

CONCLUSION

The judgment of the Seventh Circuit should be reversed, and the case should be remanded to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

Respectfully submitted,

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