No. 16-658

In The Supreme Court of the United States

CHARMAINE HAMER,

Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITIONER

CHARLES A. BIRD
Counsel of Record
DENTONS US LLP
4655 Executive Drive, Suite 700
San Diego, California 92121
(619) 236-1414
charles.bird@dentons.com

SUSAN M. FREEMAN
President, American Academy of Appellate Lawyers
LEWIS ROCA ROTHGERBER CHRISTIE
201 E. Washington Street, Suite 1200
Phoenix, Arizona 85004
(602) 262-5756
SFreeman@lrrc.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

RULES

TABLE OF AUTHORITIES – Continued

BRIEF OF AMICUS CURIAE THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITIONER

The American Academy of Appellate Lawyers submits this brief as amicus curiae in support of petitioner.[1]

INTEREST OF THE AMICUS CURIAE

The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts. The Academy is dedicated to the enhancement of the standards of appellate practice and the

[1] The parties to the action have consented in writing to the filing of amicus briefs pursuant to Rule 37.3(a) of the rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by Fellows of the Academy, and was produced and funded exclusively by the Academy or its counsel. No party or counsel for a party was involved in preparing this brief or made a monetary contribution intended to fund the preparation or submission. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation. Positions taken in amicus briefs state views determined by the Academy's internal process, were not specifically approved by individual Fellows, and should not be attributed to individual Fellows, their places of work, or their clients. Not all Fellows support amicus participation in principle.

administration of justice, and to the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only, and the Academy has 295 active members, known as Fellows. The activities of the Academy are supported entirely by the dues, program fees, and initiation fees paid by the Fellows.

By publishing newsletters and reports, conducting retreats and conferences, teaching appellate courses and seminars, and establishing a network of appellate practitioners and scholars, the Academy brings together the leading attorneys in the nation who devote their practices and teaching to appellate decisionmaking and the administration of justice on appeal. The Academy has submitted its views to Congress on legislative changes affecting appellate practice and has helped organize, chair, and administer a national conference on the functioning of the appellate courts. In pursuit of its mission, the Academy has submitted comments and testified to the Advisory Committee on Rules of Appellate Procedure, and has previously filed amicus curiae briefs in this Court.[2]

---

[2] Brief *Amicus Curiae* of the American Academy of Appellate Lawyers in Support of the Petition for a Writ of Certiorari, *Mountain Enterprises, Inc. v. Fitch*, 541 U.S. 989 (2004); Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting Petitioners, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); Brief of the Amicus Curiae on Behalf of the American Academy of Appellate Lawyers in Support of Petitioner, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

Matters of appellate jurisdiction are of almost daily concern to Fellows, who often advise clients and referring trial counsel about the extension rules at issue here. Also, Fellows observe the operation of the rules as part of the administration of justice in their own cases and as part of the study essential to maintaining professional ability and standing in appellate practice. Appellate justice and sustaining popular respect for the appellate process are prime concerns of the Academy as an institution and of its Fellows as officers of courts and as citizens.

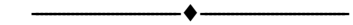
SUMMARY OF ARGUMENT

Parts 1 and 2 describe the environment in which the Academy hopes to help the Court navigate. When a district court receives a motion to extend the time to appeal in a civil case no later than 30 days after the initial deadline to appeal, 28 U.S.C. § 2107 does not limit the length of the extension the court may grant. Fed. R. App. P. 4(a)(5)(C) ("Rule 4(a)(5)(C)") limits the length of the extension to 30 days after the initial deadline or 14 days after the order granting it, whichever is longer.

In part 3, the Academy pools its collective experience to explain why the length limits in Rule 4(a)(5)(C) should not be held jurisdictional. First, forfeiting congressionally granted jurisdiction by rule would be a dangerous precedent for the Judicial Branch. Second, making the rule jurisdictional when Congress has not

done so would lay a trap for the unwary, a trap most likely to ensnare pro se litigants like Ms. Hamer. Third, properly treated as a mandatory claim-processing rule, Rule 4(a)(5)(C) achieves its underlying purpose of finality because district courts must follow it when appellees invoke it, and appellants could not tolerate the risk of dismissal incurred by relying on a district court's erroneous failure to follow it. Finally, dismissing an appeal when Congress, the appellee, and a district judge considered it timely offends the appearance of justice and invites disrespect of the judiciary. *See Offutt v. United States*, 348 U.S. 11, 14 (1954); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

Part 4 collects the history of the relevant statutes and rules, leading to two lessons of history. First, judicial precedent is a poor vehicle to reconsider the virtues of discretionary extensions of time to appeal. Discretionary extensions arise from *Hill v. Hawes*, 320 U.S. 520, 521 (1944). At first, they reflected sympathy for the litigant who received no notice of entry of a judgment at a time when court dockets could be difficult to access. Although the spur for them has dulled, discretionary extensions have thrived in both statute and rule. Case law should not thwart them. Second, the Rules Enabling Act of 1934, 28 U.S.C. § 2072, which authorizes Rule 4(a)(5)(C), does not address whether its length limits are or may be jurisdictional. That statute should not affect the Court's decision.



ARGUMENT

1. 28 U.S.C. § 2107 Does Not Limit Extensions Granted When the Appellant Moves Within the Initial Period.

Principally in 28 U.S.C. §§ 1291 and 1295, Congress granted the courts of appeals subject matter jurisdiction over appeals from final decisions of district courts of the United States and certain territories. In 28 U.S.C. § 2107, Congress revoked jurisdiction over appeals in civil cases noticed outside the periods specified in that statute. Those periods are 30 days from entry of the appealable document in most cases, § 2107(a), and 60 days from entry of the appealable decision when the United States or certain of its agents are parties to the case, § 2107(b). These deadlines are copied in Fed. R. App. P. 4(a)(1) ("Rule 4(a)" substitutes for the full title hereafter).

In the first sentence of 28 U.S.C. § 2107(c), Congress granted district courts discretion to extend the deadlines of subsections (a) and (b) when a prospective appellant moves for an extension no later than 30 days after the applicable deadline. We refer to these extensions as "initial period" extensions. Congress did not limit the length of initial period extensions district courts may grant.

In the remainder of 28 U.S.C. § 2107(c), Congress granted district courts discretion to extend the 30-day and 60-day deadlines when a party was entitled to notice of entry of the appealable decision but did not receive that notice within 21 days of entry. We call these

extensions "notice failure" extensions. Congress enacted two time limits for notice failure extensions: (i) the prospective appellant must move for the extension within 180 days of entry of the appealable decision or 14 days of receiving notice of it, whichever is earlier; and (ii) the order may extend the deadline no more than 14 days from its own entry. The respective sentences for initial period extensions and notice failure extensions are self-contained. There can be no textual argument that the time limits for notice failure extensions apply to initial period extensions.

2. Rule 4(a)(5)(C) Imposes a Nonstatutory Limit on Initial Period Extensions, of Which Ms. Hamer Ran Afoul.

Rule 4(a)(5)(A) mimics 28 U.S.C. § 2107(c) in stating district courts' discretionary authority to grant initial period extensions. But Rule 4(a)(5)(C) limits the length of extensions to 30 days after the applicable deadline or 14 days after entry of the extension order, whichever is later. Neither 28 U.S.C. § 2107 nor any other statute limits district courts' power and discretion over the length of an initial period extension.

Here, the district court granted an initial period extension longer than allowed by Rule 4(a)(5)(C). Ms. Hamer filed her notice of appeal within the time allowed by the order but outside the time allowed by the rule. The appellee did not object and is not prejudiced by the delay. The issue is whether this rule violation by

the district court and Ms. Hamer deprives the court of appeals of jurisdiction.

3. Missing a Court-Rule Deadline Should Not Deprive an Appellate Court of Jurisdiction Unless the Rule Is Congruent with a Statute.

The Academy takes as a principle – and endorses the principle – that only Congress can limit the subject matter jurisdiction Congress granted to the courts of appeals. *Bowles v. Russell*, 551 U.S. 205, 211 (2007); *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004).

3.1 Federal Courts Should Not Forfeit Jurisdiction.

A federal court's error of refusing to exercise its jurisdiction is so serious that a court of appeals or this Court may issue a writ to compel the lower court to exercise its jurisdiction. *McClellan v. Carland*, 217 U.S. 268, 280 (1910). In *McClellan*, a court of appeals erred in allowing a trial court to abandon federal jurisdiction by staying the case in deference to state proceedings. *Id.* at 280-81. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012).

The Academy has found no precedent for the Judicial Branch to refuse wholesale to exercise jurisdiction over justiciable disputes within federal subject matter jurisdiction. Valuable doctrines can justify refusing on

a case-by-case basis to exercise jurisdiction; for example, separation of powers justifies declining to adjudicate abstract political questions. *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923); *see Zivotofsky v. Clinton*, 566 U.S. at 196-97 (question not political). But no doctrine justifies forfeiting statutory appellate jurisdiction. Forfeiture, even by making appellate jurisdiction depend on a party's compliance with a court rule, would set a precedent of unknowable hazard to the Judicial Branch.

3.2 The Court Should Not Endorse a Trap for the Unwary.

A rule declaring a jurisdictional deadline not authorized by statute is a classic trap for the unwary. The Court has long condemned procedural traps. *Florentine v. Barton*, 69 U.S. (2 Wall.) 210, 216 (1864); *Crown Coat Front Co. v. United States*, 386 U.S. 503, 515 (1967); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346 (1971); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Lawyers who do not specialize in appellate practice, their clients, and self-represented parties are likely to believe they can trust district courts' orders. They reasonably rely on procedural directions given in those orders. District judges presented with unopposed procedural orders within the court's statutory power are likely to grant them with the best of intentions and without doing original research.

This trap disproportionately ensnares pro se plaintiffs. Ms. Hamer is an unsuccessful plaintiff

whose appointed lawyer withdrew when she lost a dispositive motion. Many plaintiffs with tort or statutory claims can engage counsel only by contingent fee agreements. Contingent fee agreements often exclude services related to appeals. When a contingent fee case miscarries, the plaintiff loses the case and representation at the same time. Lost contingent fee cases are difficult for appellate lawyers to undertake because the client cannot afford to pay cash, and generating cash from the claim requires some other lawyer to prevail at trial after the appellate lawyer gains a reversal of the initial defeat. These cases are neither more nor less likely than others to raise meritorious issues on appeal; the trap serves no legitimate governmental purpose.

This trap is worse than most because it encourages morally reprehensible behavior. As the court of appeals pointed out, neither forfeiture, waiver, nor estoppel can overcome a defect in subject matter jurisdiction. *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (waiver and forfeiture); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). So if the rule is jurisdictional, an appellee faced with a motion that asks for too long an extension optimizes the chance to avoid the appeal by remaining silent – even encouraging a grant – and hoping the deceived appellant misses the deadline.

3.3 As a Claim-Processing Rule, Rule 4(a)(5)(C) Carries Potent Force.

The Academy is unaware of any need served by treating Rule 4(a)(5)(C) as jurisdictional. It is rarely invoked; when it is, district judges normally set deadlines complying with its time limit. An appellee may easily object to an extension exceeding the rule's deadlines.

Rule 4(a)(5)(C) should be construed as a mandatory claim-processing rule. "Mandatory claim-processing rules 'seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017). "Unlike jurisdictional rules, mandatory claim-processing rules may be forfeited 'if the party asserting the rule waits too long to raise the point.'" *Id.*

Treated as a claim-processing rule, Rule 4(a)(5)(C) fully serves its underlying policy of finality. First, if the appellee raises it, the district court must enforce it. "If a party 'properly raise[s] [a mandatory claim-processing rule]'" it is "'unalterable.'" *Manrique*, 137 S. Ct. at 1272. Were a district court to ignore the rule after it is invoked, the rule would be self-enforcing. The courts of appeals unanimously hold the abuse of discretion standard applies to review of extension orders.[3]

---

[3] *Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 3-4 (1st Cir. 2001) (interpretation of rule is reviewed de novo; application is reviewed for abuse of discretion); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 362 (2d Cir. 2003); *McGarr v. United States*, 736 F.2d 912, 919

An appellant who files a notice of appeal after the invoked rule's deadline expires therefore faces sure dismissal because the district court by definition abused its discretion when it ordered an excessive extension. Appellants put on notice of the risk by appellees' objections will not take the risk, so the policy of finality is enforced.

When an appellee does not object to an extension, the policy's importance ebbs. Neither the federal courts nor appellees who acquiesce in extensions have an interest in finality that justifies infusing a claim-processing rule with jurisdictional strength.

3.4 When No Party Objected and the Appellant Relied on a Federal Judge's Order, Enforcing a Rule as Jurisdictional Is Unseemly.

When Congress, the presiding federal judge, and all parties to the case agree a party can have a 40-day extension of time, enforcing a judge-made rule to deprive a party of access to the appellate court invites disrespect of the judiciary. Ordinary citizens observing

---

(3d Cir. 1984); *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 820 (5th Cir. 2007); *Barnes v. Cavazos*, 966 F.2d 1056, 1061 (6th Cir. 1992); *Redfield v. Cont'l Cas. Corp.*, 818 F.2d 596, 602 (7th Cir. 1987); *Infante v. City of Hastings*, 668 F. App'x 687, 688 (8th Cir. 2016); *Nat'l Indus. Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1264 (9th Cir. 1982); *United States v. Torres*, 372 F.3d 1159, 1161 (10th Cir. 2004); *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1544 (11th Cir. 1990).

their justice system would not understand such a ruling. Ordinary citizens ejected from court reasonably could conclude lawyers and judges took advantage of them, and the rules are unfair. Treating the rule here as jurisdictional defies the need to deliver both justice and the appearance of justice. *See Offutt v. United States*, 348 U.S. at 14; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. at 1666.

4. History of the Law of Extensions Teaches Useful Lessons.

This part surveys the history of the relevant statutes and rules to help answer two questions. First, should the development of the current regime influence a view favorable to the Seventh Circuit's holding? It should not. Second, does the Rules Enabling Act of 1934, 28 U.S.C. § 2072, influence this case? It should not.

4.1 Historical Highlights.

By the original Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934), Congress authorized the Court "to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." On the effective date of a validly

adopted rule, "all laws in conflict therewith shall be of no further force or effect."[4]

Acting on that authority, the Court adopted the Federal Rules of Civil Procedure. Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 647, 653 ff. (1939). Among those rules, Fed. R. Civ. P. 73(a) provided: "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal." *Id.* at 749. Statutes prescribed many times. *See, e.g.*, 28 U.S.C. §§ 227 (1934) (30 days for interlocutory injunctions; 15 days for certain interlocutory admiralty orders), 227a (1934) (30 days for final patent infringement decrees), and 230 (1934) (three months for most final judgments and decrees).

Local rules for the District of Columbia required a civil appellant to commence an appeal within 20 days of entry of the appealable judgment. *Hill v. Hawes*, 320 U.S. at 521. Faced with an appellant who missed the deadline because the court clerk neglected to give notice of entry, a district judge vacated and reentered the judgment. *Id.* at 521-22. "It goes without saying that the District Court could not extend the period fixed by [the rule]." *Id.* at 523. But the Court endorsed the reentry procedure by analogy to relief under Fed. R. Civ. P. 60 from a judgment entered against a party

[4] The supersession sentence has remained in the Rules Enabling Act of 1934 except for a two-year period. Pub. L. No. 100-702, title IV, § 401(a), 102 Stat. 4648 (1988); Pub. L. No. 101-650, title III, §§ 315, 321(a)(1), 104 Stat. 5115, 5117 (1990).

through its mistake, inadvertence, surprise, or excusable neglect. *Id.* at 523-24. Finality of a civil judgment thus depended on a district judge's intelligent use of a power to reopen that might be limited only by analogy to Fed. R. Civ. P. 60.

The Court functionally overruled itself by rule amendments. Amendments to Fed. R. Civ. P., 329 U.S. 839, 866-67, 871-72 (1946); *see* Fed. R. Civ. P. 77, advisory committee's note to 1946 amendment. By amendment to Fed. R. Civ. P. 77(d), it provided that lack of notice of entry of a judgment did not relieve a party of failing to appeal timely, or authorize a court to do so, "except as permitted in Rule 73(a)." *Id.* at 872. In Rule 73, the Court promulgated the first general time limits to file appeals – the enduring 30/60-day regime. Amendments, 329 U.S. at 866-67.[5] As an exception to the deadlines, it perpetuated but limited the sympathetic response to the losing party who does not receive notice of entry: "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." Amendments, 329 U.S. at 867. Congress followed suit, adopting the 30/60-day regime and the limited power

[5] "When an appeal is permitted by law from a district court to a circuit court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry. . . ."

of extension when it revised the entire Judicial Code.[6] Pub. L. No. 80-773, 62 Stat. 869 (1948); 28 U.S.C. § 2107 (Supp. II 1948). The same legislation moved the Rules Enabling Act of 1934 to 28 U.S.C. § 2072 (Supp. II 1948), but retained the limit of authority to rules for district courts.[7]

In 1966, Congress amended the Rules Enabling Act of 1934 to authorize rules for the courts of appeals. Pub. L. No. 89-773 § 1, 80 Stat. 1323 (1966). The Court amended Fed. R. Civ. P. 73(a) to delete the requirement that excusable neglect be based on lack of notice of entry. Amendments to Rules of Civil Procedure, 383 U.S. 1029, 1059-60 (1966).[8]

The Federal Rules of Appellate Procedure arrived in 1967. Fed. R. App P., 389 U.S. 1063, 1067 (1967).

---

[6] "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."

[7] The preceding section authorized all courts "established pursuant to an Act of Congress" to make for themselves rules consistent with statute and "rules prescribed by the Supreme Court." 28 U.S.C. § 2071 (Supp. II 1948). That statute consolidated multiple former authorizations. Reviser's Note, 28 U.S.C. § 2071 (Supp. II 1948).

[8] "[U]pon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed. . . ."

They incorporated the former time limits and excusable neglect extension without material change.[9] Rule 4(a), *id.* at 1071.

In 1979, the Court restructured Rule 4(a) to have subdivisions and introduced the concept of good cause to district courts' discretion to extend the time to appeal. Amendments to Fed. R. App. P., 441 U.S. 969, 975 (1979). Rule 4(a)(5) then provided: "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)." Later, it addressed time: "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." *Id.* at 975.

Congress in 1991 restructured 28 U.S.C. § 2107 into its current form. Pub. L. No. 102-198 § 12, 105 Stat. 1627 (1991). Subsection (c) stated:

> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of

[9] "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. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

> 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.[10]

Parallel with the statutory change, the Court added new subdivision (6) to Rule 4(a), identical in material text to the second sentence of 28 U.S.C. § 2107(c). Amendments to Fed. R. App. P., 500 U.S. 1007, 1011 (1991).

In 1998, the Court introduced lower-level subdivisions to Rule 4(a)(5) without substantive change. Amendments to Fed. R. App. P., 523 U.S. 1147, 1159-60 (1998). A 2002 amendment to Rule 4(a)(5)(A)(ii) emphasized the former plain meaning of the text because case law reflected confusion and misunderstanding. Amendments to Fed. R. App. P., 535 U.S. 1123, 1128 (2002); Fed. R. App. P. 4, advisory committee's note to

---

[10] The phrase "within 7 days" later became "within 14 days." Pub. L. No. 111-16 § 6(3), 123 Stat. 1608 (2009). The only other amendment to the section did not affect subsection (c). Pub. L. No. 112-62 § 3, 125 Stat. 757 (2011).

1998 amendment to subdivision (a)(5)(A)(ii). A 2009 amendment changed "within 10 days" to "within 14 days." Amendments to Fed. R. App. P., 556 U.S. 1291, 1296 (2009).

4.2 Lessons of History.

Extensions of time for excusable neglect derive from a 1944 decision of this Court, *Hill v. Hawes*, 320 U.S. 520. As to process, the Court quickly overruled itself in its rule-making role, adopting better means to achieve the same result, Amendments, 329 U.S. at 866-67, 871-72.[11] Authority for extensions comes from a time when dockets were kept in pen and ink, and records could be reviewed only at the courthouse. But grounds for extensions expanded in 1979 when monitoring dockets was easier. Amendments, 441 U.S. at 975. And authority for extensions has persisted into the era of electronic filing and PACER. This history teaches that the Court's precedent should treat extensions to appeal with the same respect afforded them in rulemaking. The scope of discretionary extensions should not be humbled, eroded, or negated by case law making a rule of convenience jurisdictional. Legal scholarship should not be required to understand and comply with jurisdictional procedure.

---

[11] Not all courts understand the message. *See Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th Cir. 1988); *Washington v. Ryan*, 833 F.3d 1087, 1098 (9th Cir. 2016).

Some may ask whether the supersession clause of the Rules Enabling Act of 1934, 28 U.S.C. § 2072(c), should influence this case. It should not. If the question were whether Rule 4(a)(5)(C) validly provides a time limit when 28 U.S.C. § 2107 contains none, the Rules Enabling Act would answer it. But the question is whether the indubitably valid limit has jurisdictional effect or is a claim-processing rule, and the Act does not speak to that question. Assuming arguendo that Congress can delegate to the Judicial Branch rule-making authority to limit federal jurisdiction, the closest it seems to have approached such a delegation is the rule-making power to define when a judgment is final for purpose of appeal under 28 U.S.C. § 2072(c). By taking that small step while enacting nothing to authorize jurisdictional rules on the length of an extension to appeal, Congress showed that the Act's general terms were not intended to make such a delegation.

———♦———

CONCLUSION

To preserve both justice and the appearance of justice, the Court should reverse the decision of the Seventh Circuit and remand the case with directions to proceed to briefing on the merits.

Respectfully submitted,

SUSAN M. FREEMAN
President, American Academy of Appellate Lawyers
LEWIS ROCA ROTHGERBER CHRISTIE
201 E. Washington Street, Suite 1200
Phoenix, Arizona 85004
(602) 262-5756
SFreeman@lrrc.com

CHARLES A. BIRD
Counsel of Record
DENTONS US LLP
4655 Executive Drive, Suite 700
San Diego, California 92121
(619) 236-1414
charles.bird@dentons.com

Counsel for Amicus Curiae

Dated: May 19, 2017