No. 19-787

In The
Supreme Court of the United States

MICHAEL LYNN ROBERTSON

Petitioner,

v.

BANNER BANK, formerly doing business in Utah as AmericanWest Bank or Far West Bank,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

An appeal for a judgment of a bankruptcy court "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules." 28 U.S.C. § 158(c)(2). The Tenth Circuit holds that the time to file a notice of appeal from a bankruptcy court under Federal Rule of Bankruptcy Procedure 8002 is a jurisdictional requirement. Here, the United States Bankruptcy Appellate Panel of the Tenth Circuit dismissed the appeal of pro se litigant Michael Lynn Robertson *sua sponte* for lack of jurisdiction. The Bankruptcy Appellate Panel reasoned that a post-judgment motion Mr. Robertson filed under Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e) was untimely and therefore did not toll the time limit for filing his notice of appeal from the bankruptcy court's underlying judgment under Federal Rule of Bankruptcy Procedure 8002. The Tenth Circuit affirmed, finding that this panel is "bound by the precedent of prior panels absent *en banc* reconsideration or a *superseding* contrary decision by the Supreme Court." App. 11.

1. Whether the time prescription for filing an appeal under 28 U.S.C. § 158(c)(2) found only in Federal Rule of Bankruptcy Procedure 8002 contains the type of statutory time constraints that would limit a court's jurisdiction or whether Federal Rule of Bankruptcy Procedure 8002 is instead a non-jurisdictional claim-

processing rule because it is not derived from a statute or contain the type of statutory time constraints that would limit a court's jurisdiction.

2. Whether an untimely motion to alter or amend a judgment pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e), that a court appropriately entertains and decides on the merits, tolls the time for appeal as the U.S. Courts of Appeals for the 2nd, 6th, 8th, 9th, and D.C. Circuits have concluded or fails to do so as the U.S. Courts of Appeals for the 1st, 3rd, 4th, 5th, 7th, 11th and now 10th circuits have concluded.

PARTIES TO THE PROCEEDING

Petitioner is Michael Lynn Robertson, Mr. Robertson was the defendant/appellant below.

Respondent is Banner Bank. Banner Bank was the plaintiff/appellee below.

RELATED CASES

- *In Re Michael Lynn Robertson*, No. 14-20984, U.S. Bankruptcy Court, District of Utah. Judgment entered November 10, 2014.

- *In Re Michael Lynn Robertson*: *Banner Bank v. Michael Lynn Robertson,* No. 14-2189, U.S. Bankruptcy Court, District of Utah. Judgment entered March 30, 2017. Petition for rehearing denied July 2, 2017.

- *In Re Michael Lynn Robertson*: *Banner Bank v. Michael Lynn Robertson,* No. UT-17-034. U.S. Bankruptcy Appellant Panel of the Tenth Circuit. Judgment entered March 29, 2018. Petition for rehearing denied April 17, 2018.

- *In Re Michael Lynn Robertson*: *Banner Bank v. Michael Lynn Robertson,* No. 18-4060. U.S. Court of Appeals for the Tenth Circuit. Judgment entered May 29, 2019. Petition for rehearing denied July 26, 2019.

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Petitioner, Michael Lynn Robertson, ("Mr. Robertson") acting pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at *Banner Bank v. Robertson (In re Robertson)*, 774 F. App'x 453 (10th Cir. 2019) and reproduced at App. 1-31. The Tenth Circuit's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at App. 43-44.

The Bankruptcy Appellant Panel's opinion *Banner Bank v. Robertson (In re Robertson)*, No. UT-17-034 is not reported but is reproduced at App. 32-36. The Bankruptcy Appellant Panel's denial of petitioner's motion for reconsideration and rehearing is reproduced at App. 37-40.

The Bankruptcy Court's opinion is reported at *Banner Bank v. Robertson (In re Robertson)*, 570 B.R. 352, United States Bankruptcy Court, D. Utah. The Bankruptcy court's denial of petitioner's motion for reconsideration is reproduce at App. 41-42.

JURISDICTION

The judgment of the Tenth Circuit was entered on May 29, 2019. App. 1-31. The court denied a timely petition for rehearing and rehearing *en banc* on July 26, 2019. App. 43-43. On October 18, 2019, Justice Kagan extended the time for filing this petition to

December 23, 2019. Application No. 19A406. This Court has jurisdiction under 28 U.S.C.§ 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. § 158(c)(2)

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

Federal Rule of Bankruptcy Procedure 8002(a)(1) and (b)(1)

(a) In General.

(1) *Fourteen-Day Period.* Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(b) Effect of a Motion on the Time to Appeal.

(1) *In General.* If a party timely in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

Federal Rule of Bankruptcy Procedure 9023

9023. New Trials; Amendment of Judgments

Except as provided in this rule and Rule 3008, Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

Federal Rule of Appellant Procedure 4(a)(4)(A)

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

Federal Rule of Civil Procedure 59(e)

Rule 59. New Trial; Altering or Amending a Judgment

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be

filed no later than 28 days after the entry of the judgment.

STATEMENT OF THE CASE

I. Proceedings in the Bankruptcy Court of the Tenth Circuit

Through counsel, Mr. Robertson filed a Chapter 7 bankruptcy petition under 28 U.S.C. § 1334(a). Banner Bank (Bank) initiated an adversary proceeding seeking to except from discharge a deficiency judgment it had obtained against Mr. Robertson in Utah state court. After Mr. Robertson's counsel withdrew, Mr. Robertson proceeded pro se, and the parties filed cross-motions for summary judgment. On March 30, 2017, the bankruptcy court entered an order and judgment granting the Bank's motion and denying Mr. Robertson's motion. Fourteen days later, on April 13, 2017, Mr. Robertson mailed, postage prepaid, priority mail, a motion under Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e) to the bankruptcy court, asking the court to reconsider, alter, or amend the judgment. The motion was entered on the bankruptcy court's docket on April 14, 2017, which was 15 days after the judgment. The parties fully briefed the motion, and the Bank never complained that the motion was untimely. The bankruptcy court held a hearing on the motion and denied it on the merits, entering its decision on June 30, 2017.

II. Proceedings in the Bankruptcy Appellant Panel of the Tenth Circuit

On July 14, 2017, 14 days after the bankruptcy court disposed of the Rule 9023 and 59(e) motion, Mr. Robertson filed a notice of appeal to the Bankruptcy Appellant Panel (BAP) under 28 U.S.C. §§ 158 and 1291. After the parties completed merits briefing—where the Bank did not dispute that the BAP had jurisdiction over the appeal nor complain of any timeliness issue—the BAP issued, *sua sponte*, an order to show cause why the appeal should not be dismissed for lack of jurisdiction because the notice of appeal appeared untimely. After considering the parties' responses to the show-cause order, the BAP determined that the notice of appeal was untimely. The BAP concluded that because Mr. Robertson's Rule 9023 motion was filed 15 days after entry of judgment, it was untimely and therefore did not toll the running of Rule 8002(a)(1)'s 14-day appeal period, which the BAP treated as jurisdictional. In reaching its conclusions, the BAP rejected Mr. Robertson's argument that mailing the motion on the fourteenth day after entry of the judgment was sufficient to render the motion timely filed, which the BAP said occurs only when "a document [is] received by the clerk," App. 34. The BAP also rejected his argument that by mailing the motion to the clerk, he had served the clerk, and that service is complete upon mailing. The BAP reasoned that Rule 9023 requires *filing* within 14 days, and service is not equivalent to filing. Accordingly, the BAP concluded that his notice of appeal was untimely and dismissed the appeal for lack of jurisdiction. Mr. Robertson timely filed a motion for rehearing or to alter or amend the BAP's

judgment, arguing that the time to file an appeal with the BAP was not jurisdictional, that Rule 9023 is a claim-processing rule and the Bank had forfeited any objection to the timeliness of his Rule 9023 motion, and that the BAP should not have considered the timeliness of that motion *sua sponte*. The BAP denied the motion for rehearing on April 17, 2017.

III. Proceedings in the Tenth Circuit Court of Appeals

On April 26, 2017, Mr. Robertson timely filed a notice of appeal to the Tenth Circuit court of appeals of the BAP's final order dismissing Mr. Robertson's appeal for lack of jurisdiction. After the parties completed merits briefing, the Tenth Circuit, issued its decision on May 29, 2019. Exercising jurisdiction under 28 U.S.C. § 158(d)(1), the court affirmed the findings of the BAP stating:

> We conclude that the Rule 9023 motion was untimely and reaffirm Tenth Circuit precedent that the time to file a notice of appeal from a bankruptcy court is jurisdictional. We also hold that an untimely Rule 9023 motion is ineffective to toll the time for filing a notice of appeal and that the BAP may raise the timeliness of a Rule 9023 motion sua sponte. App. 2.

The court also went on to say, "[T]his panel is 'bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.' *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000)" App. 11. Mr. Robertson

timely requested an extension of time to file a motion for rehearing on June 10, 2019 which was granted extending the time until July 12, 2019. On July 12, 2019 Mr. Robertson filed a Petition for rehearing and suggestion for rehearing en banc. On July 26, 2019 the Tenth Circuit issued its decision denying Mr. Robertson's petition for rehearing and petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

1. This Court Has Not Yet Considered the Jurisdictional Nature of the Appeal Filing Requirements of 28 U.S.C. § 158(c)(2) in a Bankruptcy Proceeding

Over the past 15 years, this Court has written extensively on the jurisdictional consequences of statutory filing requirements; however, it has not yet considered the important federal question of filing requirements contained in 28 U.S.C. § 158(c)(2) on an appeal from final judgments, orders or decrees from a bankruptcy court. All the circuits have concluded that the plain language of the statue, "and in the time provided by Rule 8002 of the Bankruptcy Rules" is a mandatory and jurisdictional time limitation. Their reasoning follows that an appeal from a bankruptcy court is essentially the same as an appeal from a civil proceeding, and thus should be treated the same.

> [W]e observed that in *Bowles v. Russell*, 551 U.S. 205 (2007), the Supreme Court had noted that "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well

> over a century." *Id.* at 210 n.2. Although *Bowles* concerned a civil appeal rather than a bankruptcy appeal, we did not "believe [that] distinction makes a difference" because "the Advisory Committee Notes accompanying Rule 8002(a) state that the rule is an adaptation of the same rule the Court addressed in *Bowles,* Federal Rule of Appellate Procedure 4(a)." *Emann v. Latture (In re Latture).* 605 F.3d 830, 837 (10th Cir. 2010) App. 10-11.

Only Congress may determine a lower federal court's subject-matter jurisdiction. U. S. Const., Art. III, §1. In a civil appeal, from one Article III court to another Article III court, Congress made that determination in 28 U.S.C. §§ 1291 and 2107. But in § 2107, Congress specifically exempted appeals in bankruptcy matters, stating; "This section shall not apply to bankruptcy matters or other proceedings under Title 11." 28 U.S.C. § 2107(d). Congress instead established Article I bankruptcy courts under Title 11 and granted the district courts original and exclusive jurisdiction of all cases under Title 11 in 28 U. S. C. §1334(a). Congress granted this Court power to make general rules for those courts under 28 U. S. C. § 2075. Congress authorized bankruptcy judges to hear and determine all cases under Title 11 in 28 U. S. C. §157, and prescribed review of decisions rendered under §157 in 28 U. S. C. §158. This shows Congress' clear intent that they are to be treated differently.

The Tenth Circuit stating, "this panel is 'bound by the precedent of prior panels absent *en banc* reconsideration or a *superseding* contrary decision by

the Supreme Court" (App. 11) has now invited this Court to examine this reasoning and clarify if Congress clearly attached the conditions that go with the jurisdictional label to 28 U.S.C. § 158(c)(2) and Rule 8002 or if that was Congress' clear intent, since the time prescription appears nowhere in a statute.

A. All Courts of Appeals Have Tripped Over the Statement in *Bowles* That the Taking of an Appeal in the Prescribed Time is Mandatory and Jurisdictional

In *Bowles*, the appellant ("*Bowles*") missed his deadline to file a notice of appeal and did not recognize the error until approximately sixty days after the expiration of the time to file a notice of appeal. See *Bowles*, 551 U.S. at 207. Accordingly, because he had not timely filed a motion to extend the time to appeal, Bowles was unable to avail himself of the first sentence of 28 U.S.C. § 2107(c), which allows a district court to extend the time for appeal "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal." 28 U.S.C. § 2107(c). Instead, because no motion was filed within 30 days of the expiration of the time to bring an appeal, Bowles' only remedy lay in the second part of 28 U.S.C. § 2107(c),which permits the district court, under certain circumstances, to "reopen the time for appeal for a period of 14 days from the entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c)(2). Consistent with the second part of 28 U.S.C. § 2107(c), Federal Rule of Appellate Procedure 4(a)(6) also provides that a district court, under certain circumstances, "may reopen the time to file an

appeal for a period of 14 days after the date when its order to reopen is entered[.]" Fed. R. App. P. 4(a)(6).

Despite the clear statutory mandate that a district court may only reopen the time to appeal for a period of 14 days under those circumstances, the district court "inexplicably gave Bowles 17 days . . . to file his notice of appeal." *Bowles*, 551 U.S. at 207. Bowles filed his notice of appeal within the time set by the district court, "but after the 14-day period allowed by Rule4(a)(6) and § 2107(c)." *Id.* at 207. This Court concluded that the Court of Appeals lacked jurisdiction over the appeal.

The decision of this Court was largely determined by two main points. One, Congress had specifically mandated a 30-day period to file a notice of appeal in a civil case in 28 U.S.C. § 2107(a) and district courts have limited authority to grant an extension of the 30-day time period. District courts also have statutory authority to grant motions to reopen the appeal period for a 14-day period under certain circumstances in § 2107(c). *Id.* at 208. Courts and litigants were duly instructed that Congress had mandated those times, and the court's lacked authority to make equitable exceptions. *Id.* at 215. And two, on stare decisis, this Court cited a long list of Supreme Court cases[1] going

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[1] *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) *(per curiam)*; *Hohn v. United States*, 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Browder v. Director, Department of Corrections*, 434 U.S., at 264, 98 S.Ct. 556; *Scarborough v. Pargoud*, 108 U.S. 567, 568, 2 S.Ct. 877, 27 L.Ed.

back to 1848, left undisturbed by Congress, holding that the taking of an appeal in civil cases within the prescribed time is "mandatory and jurisdictional." *Id.* at 209-210.

Neither of those two points apply in the present case. One, Congress did not set the time in 28 U.S.C. § 158(c)(2). Instead, Congress granted all authority to this Court to set the time and make any equitable exceptions by rule in 28 U.S.C. § 2075. That time limitation is contained only in Rule 8002. Rules do not convey or withdraw jurisdiction. And two, this Court has never issued a ruling on the appeal filing requirements for final judgments, orders or decrees from a bankruptcy court holing it jurisdictional.

Instead, courts and litigants are instructed that they should adhere to the precedent in *Kontrick v. Ryan*, 540 U.S. 443 (2004) because the time limitation at issue in *Kontrick*—although set forth in the Federal Rules of Bankruptcy Procedure—did not implicate a court's jurisdiction because it was not specifically set forth in a statute, but rather in a rule. Reiterating that point, this Court concluded that "the filing deadlines in the Bankruptcy Rules are 'procedural rules adopted by the Court for the orderly transaction of its business' that are 'not jurisdictional.'" *Id.* at 454. "it was improper for courts to use 'the term `jurisdictional' to describe emphatic time prescriptions in rules of court,'" *Bowles*, 551 U.S. at 211 (quoting *Kontrick*, 540 U.S. at 452, 454).

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824 (1883); *United States v. Curry*, 6 How. 106, 113, 12 L.Ed. 363 (1848)

To clarify the jurisdictional distinction between court-promulgated rules and limits enacted by Congress this Court cited its own Rule 13.1 governing certiorari jurisdiction, noting that the rule's 90 day filing period applies to both civil and criminal cases differently. See *Bowles*, 551 U.S. at 212 (holding that "the 90-day period for civil cases derives from both this Court's Rule 13.1 and 28 U.S.C. § 2101(c))" Concluding that this statute-based filing period is jurisdictional because Congress mandated 90 days in civil cases. "On the other hand, we have treated the rule-based time limit for criminal cases differently as 'procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional.'" (quoting *Schacht v. United States, 398 U.S. 58, 64, (1970))* *Bowles*, 551 U.S. at 212.

This distinction is significant since the language of Congress in 28 U.S.C. § 158(c)(2) is virtually identical to the language in 28 U.S.C. § 2101(d) governing criminal cases that this Court holds as non-jurisdictional. "An appeal ... shall be taken... in the time provided by Rule 8002 of the Bankruptcy Rules." § 158(c)(2), compared to "The time for appeal or application for a writ of certiorari ... shall be as prescribed by rules of the Supreme Court." § 2101(d). The only difference being one refers to a specific rule and the other to general rules prescribed by the Supreme Court, but in both cases, it is the Court that sets the time prescription and any equitable exceptions, not Congress.

The resolution of this Court in *Bowles* followed the natural reasoning that since Congress mandated the initial 30-day period for filing a notice of appeal and

the 14-day limit on how long a district court may reopen that period as set forth in 28 U.S.C. § 2107(c), a court had no authority to alter that time. *See Bowles*, 551 U.S. at 213 ("Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'") Thus, the terms "mandatory and jurisdictional" applied to the time limits in *Bowles.*

In contrast, it is the court that sets the time to file an appeal in bankruptcy matters under Federal Rule of Bankruptcy Procedure 8002 for the orderly transaction of its business and the court is free to change that time or add equitable exceptions at its discretion. In fact, in 2009 the Court did so, changing the 10-day previous filing period to the current 14-day filing period.

This is similar to the issue this Court recently resolved in *Hamer v. Neighborhood Housing Services*, 138 S. Ct. 13, (2017) in which this Court emphasized that several Courts of Appeals had tripped over the statement in *Bowles* that "the taking of an appeal within the prescribed time is `mandatory and jurisdictional.'" *Id.* at 21. (quoting *Bowles* at 209) There, the issue was over Federal Rule of Appellant Procedure 4(a)(5)(c)'s time limit for appeal which appeared nowhere in U.S. Code. This Court reiterated that the terms "mandatory and jurisdictional" were correct in *Bowles* where the time prescription in question was contained in U.S. Code, but was not in *Hamer* where the time prescription was only contained in Rule 4(a)(5)(c) and is not jurisdictional. See *Hamer* at 21. Similarly, the fourteen-day time

prescription at issue here is only contained in Rule 8002(a) and appears nowhere in the U.S. Code and should also be held as non-jurisdictional.

B. The Tenth Circuit's Decision Conflicts with This Court's Precedents

This Court recently addressed the distinction that Federal Rules of Bankruptcy Procedure are mandatory claim-processing rules that neither create or withdraw federal jurisdiction in the landmark case of *Kontrick v. Ryan*, 540 U.S. 443 (2004):

> The time constraints applicable to objections to discharge are contained in Bankruptcy Rules prescribed by this Court for "the practice and procedure in cases under title 11." 28 U. S. C. §2075; cf. §2072 (similarly providing for Court-prescribed "rules of practice and procedure" for cases in the federal district courts and courts of appeals). "[I]t is axiomatic" that such rules "do not create or withdraw federal jurisdiction." *Owen Equipment & Erection Co.* v. *Kroger,* 437 U. S. 365, 370 (1978). As Bankruptcy Rule 9030 states, the Bankruptcy Rules "shall not be construed to extend or limit the jurisdiction of the courts." *Kontrick* at 453.

Despite this clear declaration that such rules do not create or withdraw jurisdiction, the Tenth Circuit erroneously reasoned:

> Rule 8002(a) defines the statutory time period for filing an appeal under Section 158(c)(2), rather

> than the reverse. [T]reating Rule 8002(a) as jurisdictional arguably conflicts with the principle espoused in Rule 9030 because doing so allows a bankruptcy rule to set the time within in which a party must file an appeal and, thereby, allows a bankruptcy rule to affect the subject-matter jurisdiction of a federal court. But, ultimately this argument fails. It is true that bankruptcy rules *alone* cannot create or withdraw jurisdiction. Here, however, it is Section 158(c)(2) that is determining jurisdiction by incorporating the time limits prescribed in Rule 8002(a). *In re Latture,* 605 F.3d., at 837.

Applying the Tenth Circuit's flawed reasoning contained in *Latture* could make all court rules referred to by statue and containing a time limit jurisdictional in nature. This Court rejected that type of reasoning and instead created a readily administrable bright line where courts and litigants would be duly instructed and will not be left to wrestle with the issue of jurisdiction on a statutory limitation. In *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S. Ct. 1235, 163 L.Ed.2d 1097 (2006), this Court has clarified that it would:

> "leave the ball in Congress' court"; If the Legislature clearly states that a [prescription] count[s] as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue[;] [b]ut when Congress does not rank a [prescription] as jurisdictional, courts should treat the restriction as nonjurisdictional in

character. *Arbaugh,* 546 U. S., at 515-516 (footnote and citation omitted).

A time limit not prescribed by Congress ranks as a mandatory claim-processing rule, serving "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S. Ct. 1197, 179 L.Ed.2d 159 (2011). Nothing in the language of 28 U.S.C. § 158(c)(2) is of the jurisdictional cast or speaks in jurisdictional terms, nor does Congress set the time. Again, this Court clarified this distinction in *Hamer,* 138 S. Ct. 13, 16-17, (2017):

> This case presents a question of time, specifically, time to file a notice of appeal from a district court's judgment. In *Bowles v. Russell,* 551 U.S. 205, 210-213, 127 S. Ct. 2360, 168 L.Ed.2d 96 (2007), this Court clarified that an appeal filing deadline prescribed by statute will be regarded as "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal. But a time limit prescribed only in a court-made rule, *Bowles* acknowledged, is not jurisdictional; it is, instead, a mandatory claim-processing rule subject to forfeiture if not properly raised by the appellee. *Ibid.*; *Kontrick v. Ryan,* 540 U.S. 443, 456, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004). Because the Court of Appeals held jurisdictional a time limit specified in a rule, not in a statute, ... we vacate that court's judgment dismissing the appeal.

Using traditional tools of statutory construction, which must plainly show that Congress imbued a procedural bar with jurisdictional consequences, the time limitations and equitable exceptions here only appears in Rule 8002, a time not set by Congress but instead set by this Court for the orderly transaction of its business with full authority granted by Congress to do so.

Contrary to these precedents, the Tenth Circuit's decision attaches jurisdictional significance to Federal Rule of Bankruptcy Procedure 8002(a)—a court-promulgated rule—despite the fact that the time prescription in this Rule has no statutory counterpart.

This Court should find that 28 U.S.C. § 158(c)(2) and Rule 8002(a) are not jurisdictional.

2. The Courts of Appeal Are Divided on Whether an Untimely Motion to Alter or Amend a Judgment Tolls the Time for Appeal

Since this Court's decisions in *Kontrick*, *Eberhart*,[2] and *Bowles*, the courts of appeals have reached different conclusions on whether an untimely motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e), that a court appropriately entertains, tolls the time for appeal as provided by Federal Rule of Appellate Procedure

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[2] *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)

4(a)(4)(A). This Court's review is needed to resolve the circuit split on this important federal question.

While this case concerns parallel Federal Rules of Bankruptcy Procedure 9023 and 8002(b)(1)(B), there are no case laws pertaining to these rules and the Tenth Circuit resorted to analogous tolling rules to resolve this issue. The Tenth Circuit first compared Rule 9023 to Federal Rule of Civil Procedure 59(e) stating:

> Analogizing from Rule 59(e) is proper because (1) Rule 9023 expressly states that... "Rule 59 . . . applies in cases under the [Bankruptcy] Code" Fed. R. Bankr. P. 9023; and (2) like Rule 9023, Rule 59(e) concerns the time limit for filing a motion to alter or amend a judgment. And all circuits that have considered the nature of Rule 59(e) in the wake of *Kontrick*, *Eberhart*, and *Bowles* have held that it is a claim-processing rule because it is untethered to any jurisdictional statute.[3] App. 19.

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[3] *See Suber v. Lowes Home Ctrs., Inc.*,609 F. App'x 615, 616 (11th Cir. 2015) (per curiam) ("Th[e] time limit for filing a Rule 59(e) motion is a claims-processing rule, not a jurisdictional rule, because it is not grounded in a statutory requirement." (internal quotation marks omitted)); *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 584 (7th Cir. 2012)(concluding that Rule 59(e) is a "nonjurisdictional procedural rule[]" because it was "promulgated by the Supreme Court under the Rules Enabling Act, 28 U.S.C.§§ 2071–2077, and therefore 'do[es] not create or withdraw federal jurisdiction'"(quoting *Kontrick*, 540 U.S. at 453)); *Lizardo v. United States*, 619 F.3d 273, 277(3d Cir. 2010) (same); *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 475(6th Cir. 2007) (same); *First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.)*, 439 F.3d 558, 562 1140, 1146 n.11 (D.C. Cir. (9th Cir. 2006) (concluding that "Rule 59 is . . . a claim-processing rule"); *cf. Wilburn v. Robinson*, 480 F.3d 2007)

Furthermore, the motion in question in this case was made pursuant to both Rule 9023 and 59(e). App. 42.

And second, the Tenth Circuit compared Rule 8002(b) to Rule 4(a)(4) stating:

> As an Advisory Committee's note states, Rule 8002 "is an adaptation of [Appellate] Rule 4(a)," and Rule 8002(b) "is essentially the same as [Appellate] Rule 4(a)(4)." Fed. R. Bankr.P. 8002 advisory committee's note. App. 22.

At least three circuits that have considered the nature of Rule 4(a)(4)(A) since *Kontrick* have held that it is also a claim-processing rule.[4]

Thus, the proper interpretation of these important analogous tolling rules, as they apply to finality of judgments, needs to be resolved for their proper application throughout all the circuits. In this case, Mr. Robertson would have prevailed in the Second,

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(rejecting dissent's argument that Rule 60(b) is jurisdictional because parallel Rule 59(e) is jurisdictional).

[4]*Wilburn v. Robinson*, 480 F.3d 1107, 1145 D.C, Cir. (2007) (holding that Fed. R.App. P. 4(a)(4)'s tolling provision for "timely file[d]" post-judgment motions is a claim-processing rule). *Weitzner v. Cynosure, Inc.*, 802 F. 3d 307, 312 - Court, 2nd Cir. 2015 (We conclude for the reasons explained above that FRAP Rule 4(a)(4)(A)(vi)'s 28-day time limit should be deemed a claim-processing rule that allows for equitable exceptions.) *Demaree v. Pederson*, 887 F. 3d 870,876, 9th Cir. 2018 (Rule 4(a)(4) is not jurisdictional; instead, Rule 4(a)(4) is a mandatory claim-processing rule.)

Sixth, Eighth, Ninth or D.C. Circuits, but did not do so in the Tenth Circuit. This Court, as the final arbitrator, should insure that all citizens should have the promise of equal justice under the law.

A. The Second, Sixth, Eighth, Ninth, and D.C. Circuit have Concluded That an Untimely Post-Judgment Motion Can Toll the Appeal Period Under Appellate Rule 4(a)(4)(A)

Since this Court's decisions in *Kontrick*, *Eberhart,* and *Bowles,* and the emergence of the "jurisdictional" versus "claims-processing" divide delineated in *Bowles,* there is no basis to draw a distinction between Rule 59(e), a rule not dictated by statute, and Appellate Rule 4(a)(4)(A), another rule not dictated by statute as anything other than claim-processing rules, and a defense under these rules may be waived or forfeited.

In a factual scenario strikingly similar to that in the present case, the Sixth Circuit in *National Ecological Foundation v. Alexander*, 496 F. 3d 466, 6th Cir. (2007) held that "where a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion "timely" for the purpose of Rule 4(a)(4)(A)(iv)." *Id.* at 476.

The D.C. Circuit reached a similar conclusion in *Obaydullah v. Obama*, 688 F. 3d 784, D.C. Cir. (2012). There, the D.C. Circuit, relying on its precedent in *Wilburn v. Robinson*, 480 F.3d 1107, D.C, Cir. (2007), held that Obaydullah's late filed Rule 59(e) motion tolled the time to appeal because the tolling language

of Rule 4(a)(4)(A)(iv) fits this Court's description of a claim-processing rule. *Obaydullah* 688 F. 3d at 789. Because of the government's waiver of any timeliness objection, the court held that they had jurisdiction to hear Obaydullah's appeal.

Additionally, the Second Circuit in *Weitzner v. Cynosure, Inc.*, 802 F. 3d 307, 2nd Cir, (2015) found that Federal Rule of Appellate Procedure 4(a)(4)(A)(vi)'s 28-day time limit should be deemed a claim-processing rule that allows for equitable exceptions. *Id.* at 312.

The Eighth Circuit, while not ruling specifically on these rules has found that similar Federal Rules of Civil Procedure 6(b)(2) and 50(b) are non-jurisdictional claim-processing rules allowing for equitable exceptions. *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 619 (8th Cir. 2008)

The Ninth Circuit, on the other hand, had previously considered Appellate Rule 4(a)(4) as jurisdictional in nature, "holding that *all* timeliness problems in notices of appeal were jurisdictional, whether directly traceable to a statutory requirement or not" as applying this Court's decision in *Bowles. See US v. Comprehensive Drug Testing, Inc.*, 513 F. 3d 1085, 1100, 9th Cir. (2008). But more recently, in *Demaree v. Pederson,* 887 F. 3d 870, 9th Cir. (2018) (per curiam), the Ninth Circuit considered this Court's recent ruling in *Hamer,* 138 S. Ct. 13, (2017) where this Court found "[b]ecause Rule 4(a)(5)(C), not § 2107, limits the length of the extension granted here, the time prescription is not jurisdictional" *Id.* at 21. The Ninth Circuit then concluded that, "[u]nder *Hamer,*

Rule 4(a)(4) is not jurisdictional; instead, Rule 4(a)(4) is a mandatory claim-processing rule" *Demaree,* 887 F. 3d at 876, thus subject to equitable exceptions.

B. The First, Third, Fourth, Fifth, Seventh, and Eleventh Circuits–Like the Tenth Circuit in This Case--Have Found That an Untimely Motion to Alter or Amend a Judgment That a Court Appropriately Entertains Does Not Toll the Time to Appeal

Contrary to the Second, Sixth, Eighth, Ninth and D.C. Circuits, the First, Third, Fourth, Fifth, Seventh, and Eleventh Circuits have concluded—as did the Tenth Circuit in this case—that Federal Rule of Appellate Procedure 4(a)(4)(A) is a jurisdictional constraint on the courts of appeals. Rather than recognizing that *Bowles* applies only to statutory deadlines, these courts appear to view all timeliness problems in notices of appeal as jurisdictional in nature, whether directly traceable to a statutory deadline or not.

In this case, the Tenth circuit reached the conclusion that an untimely Rule 59(e) motion to Alter or Amend a Judgment does not toll the time to appeal stating:

> We start with *Browder v. Director, Department of Corrections*, where the Supreme Court held that an untimely post-judgment motion filed under either Civil Rule 52(b) or Rule 59 'could not toll the running of time to appeal under Rule 4(a)' and

> therefore the circuit court 'lacked jurisdiction to review the[underlying order granting habeas relief].' 434 U.S. 257, 265 (1978). App. 23-24.

They also considered the decisions of the First, Third, Fourth, Fifth, and Seventh circuits which have also relied heavily on this Court's decision in *Browder*.[5] App. 24. These circuits have seized upon the statement in *Browder* that the court "lacked jurisdiction to review the [underlying order}" when a party missed a deadline provided only in court-made Rules 52(b) and 59 because those time limits were

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[5] *Garcia-Velazquez v. Frito Lay Snacks Caribbean*, 358 F.3d 6, 8–11 (1st Cir. 2004) (concluding that under *Browder*, an untimely Rule 59(e) motion did not toll the appeal period even though the district court had denied it on the merits); *Lizardo v. United States*, 619 F.3d 273 (3d Cir. 2010) ("[a]n *untimely* Rule 59(e) motion does not toll the time for filing an appeal under Rule 4(a)(4)(A). This is true even if the party opposing the motion did not object to the motion's untimeliness and the district court considered the motion on the merits." see *Browder)*; *Panhorst v. United States*, 241 F.3d 367, 369–70 (4th Cir. 2001) (relying on *Browder* to hold that "[a]n *untimely* Rule 59(e) motion does not defer the time for filing an appeal, which continues to run from the entry of the initial judgment order," where district court had granted motion to consider untimely Rule 59(e) motion then denied that motion); *Overstreet v. Joint Facilities Mgmt., L.L.C. (In re Crescent Res., L.L.C.)*, 496 F. App'x 421, 424 (5th Cir. 2012) (per curiam) (holding that an untimely Rule 59(e) motion "will not toll the notice of appeal period, even if the district court addressed the late-filed motion on the merits" See *Browder)*; *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582–85 (7th Cir. 2012) (concluding that, where opposing party had not objected to an impermissible extension of the deadline to file a post-trial motion, the district court had jurisdiction to hear those motions but they "did not toll the time [appellant] had to file its Notice of Appeal". See *Browder* and *Lizardo)* .

"mandatory and jurisdictional." *See Browder* 434 U.S. at 265, 271-272.

In *Browder,* 434 U.S. 257, after unsuccessful efforts to overturn his state court conviction, the petitioner sought a writ of habeas corpus in a Federal District Court. On October 21, 1975, he successfully received an order directing his release from respondent Corrections Director's custody unless the State retried him within 60 days. *Id.* at 260. Twenty-eight days after entry of that order, respondent moved for a "stay of the conditional release order and for an evidentiary hearing." The District Court granted the stay of execution on December 8, and, on December 12, set a date for an evidentiary hearing on the issue of probable cause.

Petitioner moved immediately to vacate the order granting a stay and an evidentiary hearing on the basis that the court lacked jurisdiction to enter it, explaining that, the period of time prescribed by the Federal Rules of Civil Procedure for a motion for a new trial or to alter or amend a judgment had elapsed and therefore the District Court no longer had jurisdiction to alter or amend its final order of October 21, 1975. *Id.* at 261-262.

The evidentiary hearing was held on January 7, 1976, and the court ruled, on January 26, 1976, that the writ of habeas corpus was properly issued. Respondent immediately filed a notice of appeal seeking review of both the October 21 and January 26 orders. The Court of Appeals reversed without any discussion as to their jurisdiction. *Id.* at 261-262. This Court granted Certiorari.

The petitioner argued that Federal Rule App. Proc. 4(a) and 28 U.S.C. § 2107 require that a notice of appeal in a civil case be filed within 30 days of entry of the judgment or order from which the appeal is taken, but, under Rule 4(a)(4)(A), the running of time for filing an appeal may be tolled by a timely motion filed in the district court pursuant to Fed. Rule Civ. Proc. 52(b) or 59.

The respondent answered that Rules 52 (b) and 59 do not apply because the order of October 21 was not final and, in any event, the Federal Rules of Civil Procedure did not apply in habeas corpus proceedings. *Id.* at 265.

Rules 52(b) and 59 all required a motion to be made within 10 days[6] of the order and the respondent's motion was filed 28 days after the order and the petitioner objected to its timeliness. *Id.* at 261 n. 5. This Court concluded that the October 21 order was indeed a final order and that Federal Rules of Civil Procedure did in fact apply. *Id.* at 267, 270. Based on those findings, this Court stated:

> Application of the strict time limits of Rules 52 (b) and 59 to motions for reconsideration of rulings on habeas corpus petitions, then, is thoroughly consistent with the spirit of the habeas corpus statutes. Because respondent failed to comply with these '*mandatory and jurisdictional*' time limits,

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[6] Federal Rules of Civil Procedure 52(b) and 59 at the time of this filing were limited to 10 days. Current rules allow for a 28-day filing period.

> the judgment of the Court of Appeals must be *Reversed. Id.* at 271-272. (emphasis added)

The term "mandatory and jurisdictional' is a characterization left over from days when this Court was "less than meticulous" in using the term "jurisdictional," to describe emphatic time prescriptions in rules of the court. See *Kontrick* 540 U.S at 454. "[*Browder*] is correct not because the District Court lacked *subject-matter jurisdiction,* but because district courts must observe the clear limits of the Rules of [Civil] Procedure when they are properly invoked." See *Eberhart*, 546 U.S. at 17.

The *Browder* opinion contains no analysis of the issue of jurisdiction. The petitioner properly invoked the timeliness issue and thus did not waive or forfeit that issue. That procedural posture is sufficiently different from the case now before this Court. As stated in *Hamer,* "Several Courts of Appeals ... have tripped over [the] statement in *Bowles* that 'the taking of an appeal within the prescribed time is `mandatory and jurisdictional.'" *Hamer*, 138 S. Ct. at 21. The Tenth Circuit certainly has applied the jurisdictional term in this case, tripping over the distinction between court made rules and jurisdictional statutory deadlines, being misled by the language use in the *Browder* decision.

This Court has questioned the validity of *Browder* after *Eberhart* in *Bowles*:

> The jurisdictional character of the 30- (or 60)-day time limit for filing notices of appeal under the

> present § 2107(a) was first pronounced by this Court in *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). But in that respect *Browder* was undercut by *Eberhart v. United States,* 546 U.S. 12, 126 S. Ct. 403, 163 L.ED.2d 14 (2005), decided after *Kontrick. Eberhart* cited *Browder* ...as an example of the basic error of confusing mandatory time limits with jurisdictional limitations, a confusion for which *United States v. Robinson,* 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), was responsible. *See Bowles* 551 U.S.at 217 n. 3.

Those circuits, including the Tenth Circuit, who have relied on *Browder*, have applied jurisdictional significance to the mandatory, court made, claim-processing Rules 59(e) and 4(a)(4)(A) in contradiction to this Court's rulings since *Kontrick.* The Tenth Circuit's decision is squarely at odds with this Court's precedents, which have repeatedly recognized that court-promulgated rules of procedure that lack a statutory basis do not constitute a limitation on a court's jurisdiction. Therefore, a motion to alter or amend that a court appropriately entertains, because the opposing party has waived or forfeited a timeliness defense, should toll the time to appeal.

C. Congress Intended That A Motion to Alter or Amend That a Court Appropriately Entertains Suspends the Finality of That Judgment

The First, Third, Fourth, Fifth, Seventh, Tenth and Eleventh Circuits have failed to grasp Congress' intent when interpreting these rules. Authority was

granted to courts of appeals in 28 U. S. C. §1291, "The courts of appeals... shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States[.]" (emphasis added) Congress granted this Court the power to prescribe general rules of practice and procedure in district courts and courts of appeals under 28 U. S. C. §2072. A key provision is §2072(c), "Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." Federal Rule of Appellate Procedure 4(a)(4)(A) is one such rule and defines the effects of what various motions will have on the finality of a district court ruling. The purpose of this rule is to "make an exception in cases in which a post trial motion has destroyed the finality of the judgment." See Rule 4 (Notes of Advisory Committee on Rules—1979 Amendment.) It has long been a settled practice that when a court appropriately entertains any motion to alter or amend a judgment, that motion suspends the finality of the judgment. See *Department of Banking* v. *Pink,* 317 U. S. 264, 266 (1942) (A timely petition for rehearing tolls the running of the [appeal] period because it operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.)

This Court recently emphasized that argument in *Hibbs v. Winn,* 542 US 88 – S.C. (2004):

> A timely rehearing petition, *a court's appropriate decision to entertain an untimely rehearing petition,* and a court's direction, on its own initiative, that the parties address whether

> rehearing should be ordered share this key characteristic: *All three raise the question whether the court will modify the judgment and alter the parties' rights.* (emphasis added)
>
> In other words, "while [a] petition for rehearing is pending," or while the court is considering, on its own initiative, whether rehearing should be ordered, "there is no `judgment' to be reviewed. Quoting *Missouri* v. *Jenkins,* 495 U. S. 33, 46 (1990) See *Hibbs,* 542 US at 98.

Since Federal Rule of Civil Procedure 59(e) is a claim-processing rule, a court may appropriately entertain an untimely rehearing petition if the opposing party does not object. Entertainment by the court renders the previous judgment sought to be reviewed as non-final pending the courts determination of whether the court will modify the judgment and the rights of the parties. Since only final orders may be appealed, the running of the time to appeal may only begin after the disposition of that motion as provided in Federal Rule of Appellate Procedure 4(a)(4)(A).

This distinction is made clear in this Court's own Rules concerning certiorari review in Rule 13.3:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, *or if the lower court appropriately entertains an*

> *untimely petition for rehearing* or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment. (emphasis added)

Since Congress gave authority for courts to determine when a judgment is final, there should be no question that if a court appropriately entertains any rehearing motions, which may alter or amend a previous entered judgment, it renders that judgment non-final until after the disposition of any such motions. To reach any other conclusion defies logic and many years of this Court's precedent.

3. This Case Is the Proper Vehicle for the Court to Address These Critical Issues.

This case is an ideal vehicle for the Court to address these issues. Each issue is of significant federal importance and the Court may resolve both issues with a single opinion.

The United States Bankruptcy Appellate Panel of the Tenth Circuit explicitly stated that "This Court treats 'the timely filing of a notice of appeal pursuant to [28 U.S.C.] § 158(c)(2) and Rule 8002 [as] a jurisdictional requirement that cannot be waived.' Therefore, the Court lacks jurisdiction to consider this appeal." (Footnote citations omitted) App. 36.

The Tenth Circuit, exercising jurisdiction under 28 U.S.C. § 158(d)(1), affirmed, stating:

> We conclude that the Rule 9023 motion was untimely and reaffirm Tenth Circuit precedent that the time to file a notice of appeal from a bankruptcy court is jurisdictional. We also hold that an untimely Rule 9023 motion is ineffective to toll the time for filing a notice of appeal and that the BAP may raise the timeliness of a Rule 9023 motion sua sponte. App. 2.

The Bankruptcy court, in its order denying Appellant's motion to reconsider, alter or amend explicitly stated, "[t]he Defendant subsequently filed a motion pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e) requesting that the Court reconsider, alter, or amend the portion of its Order and Judgment that granted the Plaintiff's motion for summary judgment." App. 42.

Accordingly, the question of 28 U.S.C. § 158(c)(2) and Rule 8002's jurisdictionality are cleanly presented here.

Similarly, the question of whether an untimely motion to alter or amend a judgment pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e), that a court appropriately entertains and decides on the merits, tolls the time for appeal is also cleanly presented.

The question of 28 U.S.C. § 158(c)(2) and Rule 8002's jurisdictionality is important. As this Court has recognized, the question of whether a timing requirement is jurisdictional "is not merely semantic but one of considerable practical importance for

judges and litigants." *Henderson* 562 U.S. 428, 434 (2011). This is because a jurisdictional rule can be raised at any time by any party and can even be raised sua sponte by a court. *Id.*at 434-35. Moreover, jurisdictional requirements are not subject to equitable considerations such as forfeiture, or waiver. *Bowles*, 551 U.S. at 213-14. In sharp contrast, non-jurisdictional claim-processing rules can "be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456.

Because the issue of jurisdictionality is important, this Court—both before and after *Bowles*—has repeatedly intervened to determine whether particular requirements are jurisdictional in nature. See, e.g., *Fort Bend County v. Davis,* 586 U. S. ___ (2019)(determining whether Title VII's charge-filing requirement is jurisdictional); *Hamer,* 138 S. Ct. 13, 16 (2017)(whether Federal Rule of Appellate Procedure 4(a)(5)(C) is jurisdictional); *Henderson*, 562 U.S. 428 (addressing jurisdictionality of the deadline to appeal from the Board of Veterans' Appeals to the United States Court of Appeals for Veterans Claims); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (considering jurisdictionality of registration requirement in copyright cases); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67(2009) (determining jurisdictionality of procedural rules established by the National Railroad Adjustment Board); *Arbaugh*, 546 U.S. 500 (2006)(deciding jurisdictionality of employee numerosity requirement in Title VII of the Civil Rights Act of 1964); *Eberhart*, 546 U.S. 12 (reviewing jurisdictionality of deadline in

Federal Rules of Criminal Procedure); *Scarborough v. Principi,* 541 U.S. 401 (2004) (evaluating jurisdictionality of timing requirement in Equal Access to Justice Act); *Kontrick*, 540 U.S. 443 (assessing jurisdictionality of deadline in Federal Rules of Bankruptcy Procedure).

However, this Court has not yet addressed this important federal question of whether the filing requirements imposed by 28 U.S.C. § 158(c)(2) and Federal Rule of Bankruptcy Procedure 8002 on an appeal from final judgments, orders or decrees from a bankruptcy court are jurisdictional in nature or not. This Court's clarification is needed to determine whether 28 U.S.C. § 158(c)(2) and Rule 8002 should be permitted to "alter[] the normal operation of our adversarial system" by being "[b]rand[ed] . . . as going to a court's subject-matter jurisdiction." *Henderson*, 562 U.S.at 434.

As the final arbiter of the law, to ensure equal justice for all the citizens, this Court's clarification is needed to resolve the circuits split over the question of whether an untimely motion to alter or amend a judgment pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e), that a court appropriately entertains and decides on the merits, tolls the time for appeal. Congress has only given courts of appeal jurisdiction over final judgments.[7] This Court has long held that such motions that a court appropriately entertains

[7] See 28 U.S.C. §§ 158(a)(1), 1291

suspends the finality of that judgment. See *Department of Banking* v. *Pink,* 317 U. S. 264, 266 (1942) (A timely petition for rehearing tolls the running of the [appeal] period because it operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.) The courts of appeal are divided over whether an untimely motion, that a court appropriately entertains, can also do the same. The time prescription for filing these motions are only contained in court-made rules, not mandated by statute. This Court should find these to be non-jurisdictional claim-processing rules which can "be forfeited if the party asserting the rule waits too long to raise the point," *Kontrick,* 540 U.S. at 456, and thus toll the time for appeal under Rule 4(a)(4)(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MICHAEL LYNN ROBERTSON, Debtor. BANNER BANK, formerly doing business in Utah as American West Bank or Far West Bank, Plaintiff - Appellee, v. MICHAEL LYNN ROBERTSON, Defendant - Appellant.	No. 18-4060 (BAP No. 17-034-UT) (Bankruptcy Appellate Panel)

ORDER AND JUDGMENT*

(Filed May 29, 2019)

Before **HOLMES**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.