

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONTE PARRISH, )  
Petitioner, )  
v. ) No. 24-275  
UNITED STATES, )  
Respondent. )  
- - - - -

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1 P R O C E E D I N G S

2 (11:31 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 24-275, Parrish versus  
5 United States.

6 Ms. Rice.

7 ORAL ARGUMENT OF AMANDA RICE

8 ON BEHALF OF THE PETITIONER

9 MS. RICE: Good morning, Mr. Chief  
10 Justice, and may it please the Court:

11 Courts have long recognized that  
12 notices of appeal that are filed early take  
13 effect when an appeal clock starts running so  
14 long as they're otherwise sufficient and no  
15 one's prejudiced. That principle is consistent  
16 with the functional approach this Court takes to  
17 notices of appeal. It was applied in FirstTier,  
18 Lemke, and Luckenbach, and no one disputes, not  
19 the Fourth Circuit, not Mr. Huston, not any  
20 other court to my knowledge, that it's  
21 consistent with 2107(a), which sets the notice  
22 of appeal requirement and the default deadline  
23 for filing. The Fourth Circuit was wrong to  
24 read subsection (c) as displacing the ripening  
25 principle and requiring a second notice in the

1 reopening context only.

2           The principle applies to notices filed  
3 after final judgment, just like it does to  
4 notices filed before. That's why courts have  
5 consistently held that notices of appeal ripen  
6 when an extension is granted under 2107(c)'s  
7 first sentence. Nothing in the second sentence  
8 suggests that notices of appeal work differently  
9 for reopening. And requiring a duplicative  
10 notice of appeal would serve no conceivable  
11 purpose.

12           I welcome the Court's questions.

13           JUSTICE THOMAS: So you don't think  
14 that there's a material difference between  
15 filing a notice of appeal prematurely as opposed  
16 to too late?

17           MS. RICE: I do think there's a  
18 difference, Justice Thomas. I think filing a  
19 notice of appeal too late, as this Court held in  
20 Bowles, is a jurisdictional problem. But --

21           JUSTICE THOMAS: So why isn't this  
22 notice of appeal too late?

23           MS. RICE: The notice of appeal is  
24 certainly too late with respect to the original  
25 appeal period. If nothing else had happened,

1     there'd be no argument that the notice of appeal  
2     was timely. But there was another appeal  
3     period. Reopening was granted here. And it's  
4     too early with respect to that reopening period  
5     in the same sense that a prejudgment notice of  
6     appeal is too early with respect to the original  
7     appeal period.

8                 JUSTICE JACKSON: So I -- I'm  
9     struggling with your argument, and the reason is  
10    because I'm not sure that ripening is really the  
11    best way to think about what is happening here.

12                In my view, the notice of appeal was  
13    not actually premature. I mean, it was late  
14    with respect to the initial -- the initial  
15    period, but lateness doesn't necessarily doom  
16    your position because, in this context, we have  
17    a separate set of rules that allows for a  
18    late-filed notice of appeal to be deemed timely  
19    if certain conditions are satisfied.

20                And I guess what I keep coming back to  
21    in my mind is what happens in district courts  
22    every day when people file late. Let's say it's  
23    a motion or a brief or whatever, and they have a  
24    motion for an extension of time attached to it.  
25    It comes in together, the motion of -- for

1 extension of time and the brief they want to  
2 file late.

3 And when the court grants the motion,  
4 the clerk docket the brief. There's not like  
5 an extra determination that the person needs to  
6 refile the brief or it needs to come in, you  
7 know, in certain -- it's there already because  
8 they submitted it along with.

9 So, in that situation, I guess I just  
10 don't understand, nobody thinks of it as  
11 ripening. These things arrived at the same  
12 time, which is sort of what's happening here.  
13 The notice of appeal came in, and it was  
14 construed as having a motion to reopen as a part  
15 of it or construed as being a motion to reopen.  
16 So why do we even need ripening to get to the  
17 result that you are seeking in this case?

18 MS. RICE: I -- I think I agree with  
19 just about everything you said, Justice Jackson.  
20 I don't know that the -- there's anything to the  
21 concept as ripe -- of ripening as magic words.  
22 This Court used that language in FirstTier. It  
23 also talked about the notices of appeal relating  
24 forward. But -- but I don't think there's  
25 anything magic about those words.

1           I -- I think the logic that you're  
2     articulating is similar to what this Court said  
3     in Lemke, which is just that a premature notice  
4     of appeal is filed within the time period --

5           JUSTICE JACKSON: But I guess what I'm  
6     saying, it's not premature. Like, the -- these  
7     things happened at the same time. The reason  
8     why ripening is confusing is because that is a  
9     scenario like the one that we talk about --  
10    gosh, I don't have the -- the name of the case  
11    right in front of me -- but, you know, there  
12    are -- there are times when something will come  
13    in before the judgment --

14           MS. RICE: Mm-hmm.

15           JUSTICE JACKSON: -- for example, and  
16    we have to wait for the judgment in order for  
17    the notice to take effect, and you say, okay, it  
18    ripens at the time that the judgment happens.

19           Here, we don't have a separate  
20    action --

21           MS. RICE: Yeah.

22           JUSTICE JACKSON: -- that we're  
23    waiting for this notice of appeal to be  
24    cognizable relative to. Do you understand what  
25    I'm saying?



1 MS. RICE: I -- I do. It was the same  
2 document in this case.

3 JUSTICE JACKSON: The motion -- it was  
4 the same document.

5 MS. RICE: It was the same document.

6 JUSTICE JACKSON: It was the same  
7 document. So I can't understand why ripening is  
8 at play --

9 MS. RICE: Is the concept.

10 JUSTICE JACKSON: -- in this  
11 situation.

12 MS. RICE: Yeah. I think it's not  
13 always the same document. You could file a  
14 notice of appeal and then realize you needed to  
15 file an extension motion or a motion to reopen.  
16 I think that happens too. You're certainly  
17 right that these -- this often arises in the  
18 context of pro se litigants. It's often one  
19 document. But it doesn't have to be if it's  
20 filed before a motion to reopen, at least before  
21 the motion to reopen is granted.

22 I think, you know, another way to  
23 think about it is the prematurity is -- it's not  
24 with respect to the motion. It's with respect  
25 to the granting of the motion. So the motion is

1 filed at the same time as the notice, that's  
2 absolutely right. But reopening isn't granted  
3 until after the motion is filed.

4 JUSTICE JACKSON: No, I understand,  
5 but in -- for a motion for extension of time for  
6 late-filed documents, the same dynamic exists.  
7 The motion comes in stapled to the document, and  
8 the court has to grant the motion in order for  
9 the document to be deemed timely.

10 I mean, what we're doing here is just  
11 deciding whether this notice of appeal is --  
12 should be deemed timely. And we have rules  
13 related to it. It's not timely with respect to  
14 the first set of rules --

15 MS. RICE: Mm-hmm.

16 JUSTICE JACKSON: -- but it could be  
17 if the court finds the conditions related to  
18 motions for reopen exist, and they do.

19 So, I mean, I just wonder why the  
20 court of appeals didn't just docket this when it  
21 came back to them, having had the district court  
22 find that the motion to reopen was -- the  
23 conditions were granted.

24 MS. RICE: I -- I wonder that too,  
25 Justice Jackson. I think every other court of

1 appeals would have. These are ordinarily just  
2 treated as notices of appeal that have become  
3 effective. In your language, have been deemed  
4 timely.

5 JUSTICE JACKSON: They're deemed  
6 timely as a result of the conditions.

7 JUSTICE KAVANAUGH: And you --

8 MS. RICE: I -- I think that's exactly  
9 right.

10 JUSTICE KAVANAUGH: You rely heavily  
11 on the background principle. And, of course,  
12 amicus says, well, if that background principle  
13 controlled throughout, you wouldn't have 4(a)(2)  
14 and 4(a)(4), I think, in the rules, and,  
15 therefore, there really is -- that defeats the  
16 concept of a overriding background principle.

17 You want to respond to that?

18 MS. RICE: Sure. I -- I think part of  
19 the -- the confusion there is rules are a little  
20 bit different than statutes. Rulemakers  
21 sometimes just codify existing practice.  
22 Sometimes they just codify statutes almost  
23 exactly or decisions by this Court. It doesn't  
24 mean that the rules are superfluous or aren't  
25 doing anything. There's real value added even

1 just by pulling them all together in one place.  
2 It's much easier to go look at the rules for  
3 appellate procedure than to try to search  
4 through all the statutes for the relevant rules.

5 So I think what the committee was  
6 doing was codifying common applications of this  
7 principle, both in the prejudgment context. The  
8 rules just don't speak to this distinct context,  
9 which is notices of appeal filed after --

10 JUSTICE KAGAN: And is there any  
11 background as to why they codified those  
12 particular applications and not other  
13 applications? Do we know anything about that?

14 MS. RICE: Sure. So Rule 4(a)(2) was  
15 adopted at the same time as the old version of  
16 Rule 4(a)(4), which displaced ripening for a  
17 short period of time. It said ripening actually  
18 doesn't apply in this post-judgment motion  
19 context. There were concerns that there might  
20 be confusion, who has control of the case, the  
21 appellate court or the district court.

22 So, at the time the committee created  
23 an express exception to ripening, I think it  
24 made sense to make clear that it actually was  
25 preserving that concept in a -- in a closely

1 related context. Rule 4(a)(2) survived when the  
2 committee changed its mind. It said that hadn't  
3 actually worked very well, and it changed Rule  
4 4(a)(4) back in 1993. So I think that's a  
5 little bit of historical context.

6 None of that had anything to do with  
7 this post-final judgment context, which doesn't  
8 have the kind of interlocutory appeal/final  
9 judgment issues that the committee was dealing  
10 with in the prejudgment context.

11 JUSTICE GORSUCH: Well, on that score,  
12 Mr. Huston suggests that background ripening  
13 principles were historically confined to the  
14 judgment context, (a)(2), (a)(4), but not to  
15 (a)(6), the reopening context.

16 I wanted to give you a chance to  
17 address that.

18 MS. RICE: Yeah, I don't think that's  
19 right. This Court hasn't had a chance to  
20 address it in the post-judgment context, but  
21 there are cases going back to the '60s where  
22 it's been -- it's been applied in the extension  
23 context, which works just like reopening.

24 I don't have old reopening cases for  
25 you, Justice Gorsuch, just because reopening

1       wasn't created until 1991.

2                   JUSTICE GORSUCH:   Yeah.

3                   MS. RICE:   So -- so we can't go back  
4       further than that, but extension, I think, is a  
5       pretty good analog, and -- and those cases go  
6       back to the '60s.  And I don't -- I don't  
7       believe that there's any case that's rejected  
8       ripening in the extension context.

9                   JUSTICE SOTOMAYOR:  In that regard --  
10       in that regard, you spoke about interpreting  
11       federal rules of procedure being different than  
12       interpreting statute.

13                   MS. RICE:  Mm-hmm.

14                   JUSTICE SOTOMAYOR:  Rules themselves  
15       say that we have to consider efficiency and not  
16       to read the rules literally but with a view to  
17       what's just, correct?

18                   MS. RICE:  That's -- that's exactly  
19       right.

20                   JUSTICE SOTOMAYOR:  I was taken -- not  
21       taken -- but you pointed out that in Scarborough  
22       versus Principi in your reply brief that we  
23       rejected the argument that background principle  
24       for pleadings codified in Rule 15(c) of the  
25       Federal Rules of Civil Procedure foreclosed

1 application of background principles to other  
2 filings, like fee applications, correct?

3 MS. RICE: That's exactly right. I  
4 think Chambers --

5 JUSTICE SOTOMAYOR: So we -- we --  
6 that's in support of your argument that Congress  
7 usually with rules is paying attention to just  
8 one thing at a time.

9 MS. RICE: I think that's exactly  
10 right, Justice Sotomayor. Scarborough --  
11 Scarborough is, I think, the best example.  
12 Chambers is another, where the Court held that  
13 statutes and rules that address sanctions in  
14 certain contexts doesn't displace broader  
15 background authority that courts have to  
16 sanction litigants.

17 JUSTICE GORSUCH: Well, and we're not  
18 really even addressing the rules here, are we?  
19 Because, as I understand it, the government has  
20 waived any -- any objection under Rule 4(a)(6).  
21 And it's a claims processing rule. So, really,  
22 the question turns on 2107 and the statutory  
23 limit.

24 MS. RICE: Yep. I think that's  
25 exactly right. You don't have to say anything

1 about the rules here if you don't want to,  
2 Justice Gorsuch. The Fourth Circuit ruled on  
3 jurisdictional grounds.

4 JUSTICE GORSUCH: Maybe leave that to  
5 the Rules Committee. How about that?

6 MS. RICE: You could. You could. You  
7 know, the rules just aren't jurisdictional, as  
8 you held in Hamer, so it doesn't matter actually  
9 if you -- if you thought that the rules might  
10 require a second notice. And I think there's  
11 every indication that the Rules Committee might  
12 act on this. They formed a subcommittee to  
13 consider it.

14 JUSTICE SOTOMAYOR: I'm sorry. You  
15 took a step further than I had in my own  
16 thinking, so let me go back to that answer.

17 MS. RICE: Mm-hmm.

18 JUSTICE SOTOMAYOR: If we answer it  
19 the way that Justice Gorsuch just suggested, we  
20 wouldn't reach the substantive question at all.  
21 We would just say since it's a claim processing  
22 rule --

23 JUSTICE GORSUCH: You still have --  
24 sorry.

25 JUSTICE SOTOMAYOR: No, no.



1 JUSTICE GORSUCH: I don't want to  
2 answer your question. You -- you -- you can do  
3 it.

4 MS. RICE: Please.

5 (Laughter.)

6 MS. RICE: No. I -- I -- I expect  
7 what Justice Gorsuch was about to say is that  
8 you still need to answer the statutory question.  
9 If the statute requires a second notice --

10 JUSTICE SOTOMAYOR: I see. Okay.

11 MS. RICE: -- in this context, as the  
12 Fourth Circuit held, then the Rules Committee is  
13 powerless to expand this Court's jurisdiction.

14 JUSTICE SOTOMAYOR: To expand.

15 MS. RICE: So all you need to hold is  
16 that the -- the statute doesn't preclude  
17 ripening, and then the Rules Committee can  
18 actually -- you know what? I don't think the  
19 rules question's hard, so you could address it.

20 JUSTICE GORSUCH: You did a better  
21 job --

22 JUSTICE KAVANAUGH: Why --

23 JUSTICE GORSUCH: -- with it than I  
24 would.

25 JUSTICE KAVANAUGH: I mean, why

1 wouldn't we answer the rules question as well?

2 MS. RICE: I -- I agree with that.

3 JUSTICE KAVANAUGH: Save a little  
4 time, right?

5 MS. RICE: Save everybody a little  
6 time at least, you know, as a --

7 JUSTICE KAVANAUGH: If you're correct  
8 on your interpretation, it seems like.

9 MS. RICE: Yeah. I think it's a  
10 pretty straightforward question. I think it  
11 would be helpful to say, you know, as a -- as a  
12 default matter, the rules don't address this,  
13 and so it doesn't displace the common law  
14 principle. You know, the Rules Committee could  
15 act to displace it if it wants to, but absent  
16 action from the Rules Committee, that's --  
17 that's the principle the Court should apply.

18 CHIEF JUSTICE ROBERTS: Well, the  
19 rules don't address it, but -- in this instance,  
20 but they do in others. Others talk about  
21 relation forward. And this one doesn't.  
22 Shouldn't the expressio unius principle apply  
23 here?

24 MS. RICE: You know, I don't think so,  
25 Mr. Chief Justice. The -- these rules codify

1 common applications in prejudgment context. I  
2 thing expressio unius recognizes, when you're  
3 looking at specific enumerations, there's a  
4 context. So those rules address certain  
5 post-judgment motions and other pre-judgment  
6 issues. They don't speak to the separate  
7 post-judgment context at all.

8 JUSTICE GORSUCH: Yeah. I think the  
9 Chief -- the Chief's point, though, is relation  
10 forward is mentioned now in two other rules in  
11 Rule 4, in Rule 4, and that -- doesn't that tell  
12 us something?

13 I mean, maybe it should -- maybe --  
14 maybe it's wrong. Maybe the Rules Committee  
15 wants to change its mind. Maybe it's irrelevant  
16 in this case since the government's waived it,  
17 but, gosh, normally, expressio unius means  
18 something in these kinds of contexts, doesn't  
19 it?

20 MS. RICE: It -- it -- it means  
21 something. I think, if there were  
22 another post-judgment motion, for example, that  
23 was not covered by Rule 4(a)(4), you might read  
24 into that an intention by the committee to not  
25 cover that motion, but this is a different

1 context. And expressio unius usually  
2 understands that the decisionmaking body or the  
3 person writing the statute or the rule is  
4 addressing the context at hand. And I just  
5 don't think that post-judgment notices are --

6 JUSTICE GORSUCH: So we should look at  
7 (a)(6) in a vacuum without looking at (a)(2) and  
8 (a)(4)?

9 MS. RICE: No, I -- I think (a)(2) and  
10 (a)(4) are relevant and they -- they reflect the  
11 Rules Committee's recognition of this background  
12 principle, but the fact that there's no rule  
13 addressing 4(a)(5), addressing extensions,  
14 doesn't mean that ripening doesn't operate in  
15 that context. The Rules Committee just hasn't  
16 codified that.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Justice Thomas, anything further?

21 Justice Alito?

22 JUSTICE ALITO: Do we have any  
23 information about the frequency with which the  
24 situations addressed by 4(a)(2) and 4(a)(4)  
25 arise and the frequency with which the situation

1 present here arises?

2 MS. RICE: My -- I don't have any  
3 empirical data on that. My sense is that the  
4 4(a)(2) and 4(a)(4) situation arises more  
5 frequently. That's part of what prompted the  
6 committee to address that issue and to make a  
7 rule.

8 This issue, the reopening issue,  
9 didn't come to the Committee's attention until  
10 recently because it doesn't arise very often.  
11 And every court had treated it the same way. I  
12 don't have any -- any data to back that up, but  
13 that's my sense from looking at the cases.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Sotomayor?

17 Justice Kagan?

18 Justice Gorsuch, anything further?

19 Justice Kavanaugh?

20 Justice Jackson?

21 Thank you, counsel.

22 Ms. Brown.

23

24

25

1 ORAL ARGUMENT OF AIMEE BROWN  
2 ON BEHALF OF THE RESPONDENT  
3 IN SUPPORT OF THE PETITIONER

4 MS. BROWN: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 Permitting a premature notice of  
7 appeal to ripen when the appeal period reopens  
8 is consistent with Section 2107, the rules of  
9 appellate procedure, and this Court's precedent.

10 Section 2107 doesn't address premature  
11 notices of appeal, but this Court has already  
12 recognized that the statute doesn't preclude  
13 them. FirstTier held that even though  
14 Section 2107 requires filing a notice of appeal  
15 after the entry of judgment, a notice filed  
16 before judgment relates forward to the day the  
17 judgment is entered.

18 Rule 4 likewise confirms that  
19 premature notices of appeal can relate forward  
20 and requires such treatment in multiple  
21 contexts. And this Court's precedents have long  
22 instructed courts to disregard technical  
23 deficiencies in notices of appeal.

24 Amicus's contrary position would  
25 require the Court to hold that filing too early

1 has the same jurisdictional consequences as  
2 filing too late, but that's flatly inconsistent  
3 with FirstTier, with Rule 4, and common sense.

4 Unlike filing too late, filing too  
5 early doesn't disrupt finality or risk prejudice  
6 to others. Petitioner's premature filing  
7 provided adequate notice here, and there's no  
8 basis to require a duplicative filing.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Is there any  
11 difference between your argument and that of  
12 Petitioners?

13 MS. BROWN: So not really and not in  
14 any respect that should affect the outcome of  
15 the case today. I think Petitioner's argument  
16 with respect to the way 4(a)(2) and 4(a)(4) are  
17 interpreted might be slightly different. We do  
18 take those two rules to be the only  
19 circumstances in which prejudgment notices of  
20 appeal could relate forward or in which a notice  
21 of appeal filed while certain prejudgment  
22 motions are pending can relate forward.

23 I think, in -- in some parts at least  
24 of the Petitioner's reply brief, they suggested  
25 those rules may not cover the waterfront even in

1 the circumstances that they address. We do take  
2 those rules to be codifying and -- and  
3 displacing any inconsistent practices within  
4 those two contexts, but when the rules do not  
5 address the particular context, which is the  
6 case here, we think that that background  
7 judicial principle that promotes ripening or  
8 that preserves this kind of ripening in relation  
9 forward continues in effect.

10 JUSTICE BARRETT: You mean so if there  
11 were another post-judgment motion that wasn't on  
12 this list, that's where you're distinguishing  
13 your position?

14 MS. BROWN: So I do take the  
15 Petitioner this morning to have said or my  
16 friend this morning to have said that if there  
17 were another post-judgment motion, then maybe  
18 4(a)(4) wouldn't apply and ripening would apply.

19 JUSTICE BARRETT: Okay. And that's  
20 where you're distinguishing your position?

21 MS. BROWN: We agree with that.

22 JUSTICE BARRETT: Okay.

23 MS. BROWN: But I understood the --  
24 the reply brief --

25 JUSTICE BARRETT: Okay.



1                   MS. BROWN:  -- the Petitioner's reply  
2     brief, to indicate that in certain contexts  
3     where there's a prejudgment --

4                   JUSTICE BARRETT:  Prejudgment.

5                   MS. BROWN:  -- that there might be  
6     additional circumstances not covered by the rule  
7     where relation forward or ripening would still  
8     be permissible.

9                   JUSTICE BARRETT:  And, Ms. Brown, what  
10    do you think about Justice Gorsuch's point that  
11    we don't need to address Rule 4 because the  
12    government has -- has waived that, that we  
13    should just address the statute?  Do you have a  
14    view?

15                  MS. BROWN:  So I -- I do think that is  
16    correct that this Court could take a very narrow  
17    approach to this decision and just hold that --  
18    that -- that Section 2107 does not itself  
19    preclude relation forward in this context and  
20    that to the extent the rules might suggest that  
21    relation forward is not permissible here, those  
22    aren't jurisdictional.

23                  The government waived any argument  
24    about relation forward in this context or about  
25    the need for a duplicative notice of appeal and,

1       therefore, that waiver controls and could  
2       reverse.

3               We do think it would be helpful for  
4       the Court to recognize the existence of this  
5       background principle. It has been the rule  
6       that's been applied in five circuits. We don't  
7       see any issues with that. And, of course, so  
8       long as the Court holds that the statute doesn't  
9       preclude relation forward, the Advisory  
10      Committee can continue its work and can continue  
11      studying this issue and propose a rule that this  
12      Court could then do as well.

13             JUSTICE SOTOMAYOR: What does it do to  
14      amici's argument that it's a matter of  
15      discretion for the Fifth Circuit, that even  
16      though you waived it, that they could still say  
17      we just won't accept the waiver?

18             MS. BROWN: So that's inconsistent  
19      with this Court's precedent. In Wood versus  
20      Milyard, the Court has held that it would be an  
21      abuse of discretion for a court to disregard the  
22      government's waiver of any non-jurisdictional  
23      defense. And so we -- we don't think that that  
24      is an available alternative argument for  
25      affirmance in this case.

1 JUSTICE SOTOMAYOR: But not addressing  
2 the rule question leaves open the possibility  
3 that in the future the government could refuse  
4 to waive?

5 MS. BROWN: That's correct, and we  
6 think that that would be another basis for the  
7 Court to just ensure, to just clarify to the  
8 extent that there is any lack of clarity,  
9 although, you know, the other circuits have all  
10 held, consistent with what we've said today,  
11 that -- that relation forward here is  
12 permissible and -- and is the -- the correct  
13 result.

14 JUSTICE SOTOMAYOR: Is the background  
15 principle --

16 MS. BROWN: Exactly.

17 JUSTICE SOTOMAYOR: -- that governs  
18 the interpretation of the rule. Okay. Thank  
19 you.

20 JUSTICE GORSUCH: Your -- your  
21 differences, I just want to clarify, on what --  
22 you're saying other rules that don't expressly  
23 mention relation forward don't contain a  
24 relation forward element?

25 MS. BROWN: No. That's -- I'm -- I

1 apologize for the confusion. My --

2 JUSTICE GORSUCH: No, I'm sure it's  
3 me.

4 MS. BROWN: What I was trying to  
5 clarify is that we do think that with respect to  
6 Rule 4(a)(2) and the way that this Court  
7 interpreted that rule in FirstTier, those are the  
8 only circumstances in which relation forward can  
9 apply for prejudgment notices of appeal.

10 I take Petitioner's reply brief to  
11 state that courts have continued to apply a  
12 broader kind of background interpretation of --  
13 or a broader background principle allowing  
14 relation forward even in contexts that wouldn't  
15 be directly covered by 4(a)(2). And we think  
16 that Rule 4(a)(2) does cover the waterfront --

17 JUSTICE GORSUCH: So how do we --

18 MS. BROWN: -- at least for -- for  
19 prejudgment.

20 JUSTICE GORSUCH: And can you give me  
21 an example of the differences?

22 MS. BROWN: Sure. So the court in --  
23 this comes I think -- or the -- the opinion from  
24 the D.C. Circuit in Outlaw really kind of lays  
25 this out. Before the Court adopted -- before

1 Rule 4(a)(2) was adopted, there was a  
2 preexisting line of precedents that had applied  
3 this background principle, that it held that any  
4 time there's a notice of appeal after kind of  
5 any decision, that would be permitted to relate  
6 forward to final judgment so long as final  
7 judgment had occurred before the court of  
8 appeals acted.

9 And FirstTier limited that in some ways  
10 to suggest that the decision had to be one that  
11 would be appealable, so long as judgment were  
12 entered right after that. And so we think that  
13 that narrower class of decisions is the -- is  
14 the class that's covered by Rule 4(a)(2) and  
15 that the background principle is displaced as to  
16 the earlier precedents in --

17 JUSTICE GORSUCH: You think that the  
18 rules committee might have something profitable  
19 to say about how far this relation forward  
20 principle might obtain in 4(a)(6) contexts too?

21 MS. BROWN: I certainly think that the  
22 --

23 JUSTICE GORSUCH: I mean the --

24 MS. BROWN: -- the Rules Advisory  
25 Committee will have the ability to study this

1     issue and can take into account any comments  
2     that come from practitioners or can look at the  
3     different contexts in which this is -- this  
4     arises and may well choose to provide a more  
5     limited relation forward principle or to  
6     displace it altogether. But unless and until  
7     the Rules Committee acts, I do think that that  
8     background principle that provides for ripening  
9     should be applied.

10           JUSTICE GORSUCH: They -- they can't  
11     overrule what we do. So -- so --

12           MS. BROWN: So long as the Court  
13     doesn't say that it's compelled by the statute,  
14     I think they -- they actually can --

15           JUSTICE GORSUCH: I see.

16           MS. BROWN: If you recognize this as a  
17     background principle, that doesn't mean that  
18     it's a background principle that can't be  
19     replaced by the -- by the rules themselves.

20           JUSTICE GORSUCH: By The rules, yeah.  
21     Fair enough.

22           JUSTICE JACKSON: Ms. Brown --

23           JUSTICE GORSUCH: Thank you.

24           JUSTICE JACKSON: -- I guess I'm just  
25     really hung up on the characterization of this

1 as a premature notice of appeal. And I totally  
2 see relation forward and all of that analysis in  
3 a situation in which the notice of appeal is  
4 filed before the judgment. The judgment has to  
5 be forthcoming in order for us to give any --  
6 you know, any life to the notice of appeal. And  
7 so then you have a whole analysis as to what  
8 happens once the judgment occurs.

9 Can you help me to see how that is  
10 analogous to what is happening here where the  
11 motion to reopen and the notice of appeal are  
12 the same document --

13 MS. BROWN: Mm-hmm.

14 JUSTICE JACKSON: -- and I think it's  
15 filed late? The notice of appeal in this case  
16 is outside the window of when you're supposed to  
17 file a notice of appeal.

18 MS. BROWN: Right. So I think that  
19 the best way to understand this is that it's  
20 both too late and potentially too early. It's  
21 too late with respect to the appeal period that  
22 has, of course, already expired, but it's too  
23 early with respect to the possible, potential  
24 reopened appeal period that might occur.

25 JUSTICE JACKSON: I understand. That

1 part --

2 MS. BROWN: Right.

3 JUSTICE JACKSON: -- is confusing to  
4 me because it came in at the same time.

5 MS. BROWN: The same time as the  
6 motion.

7 JUSTICE JACKSON: Yes.

8 MS. BROWN: But not at the same time  
9 that the motion is granted. And so once the  
10 motion is granted, the idea of relation forward  
11 is that we think of the date on which the motion  
12 was filed --

13 JUSTICE JACKSON: Right.

14 MS. BROWN: -- and the notice of  
15 appeal was filed, and we -- we allow to it  
16 relate forward to the --

17 JUSTICE JACKSON: No, I understand,  
18 but we don't do that with respect to other  
19 motions that are filed potentially too early  
20 relative to when they are granted. I mean, my  
21 -- you know, we don't do that.

22 MS. BROWN: Sure.

23 JUSTICE JACKSON: And so it's just a  
24 weird thing to suddenly say that even though  
25 this motion and the document to which it relates



1     were filed at the same time, we're going to  
2     somehow give, you know, life to the notion that  
3     you don't grant the motion until later and so  
4     then we say the document has to catch up with  
5     that in some way.

6                 MS. BROWN:   So I think that this  
7     probably comes from the statutory text here,  
8     which holds -- or which -- which states that the  
9     motion to reopen grants an appeal period for the  
10    -- for 14 days from the date on which the motion  
11    was granted.

12                JUSTICE JACKSON:   I understand, but  
13    wouldn't -- wouldn't the simplest, most  
14    straightforward way to deal with this is just to  
15    clarify in interpreting the statute in a  
16    situation like this one in which the motion and  
17    the document arrive at the same time, that  
18    14-day period is obviously satisfied.  It's  
19    here.

20                MS. BROWN:   I -- I think that's  
21    consistent with what we're saying with respect  
22    to the relation forward principle.  It maybe  
23    just be a different in -- in kind of the  
24    terminology that you're using.  The way I've  
25    thought about it is that any defect of

1     prematurity in this area is effectively cured by  
2     the fact that you're just holding on to the  
3     premature notice of appeal until the motion to  
4     reopen is granted, and it's only given effect  
5     when that motion is granted.

6                 And so any defect that existed prior  
7     to that point disappears at that -- at that --  
8     at that later date.

9                 JUSTICE KAVANAUGH: I guess they seize  
10    on the literal text, right?

11                MS. BROWN: Correct. Right.

12                JUSTICE KAVANAUGH: Time to file --

13                MS. BROWN: Right.

14                JUSTICE KAVANAUGH: -- an appeal.

15                MS. BROWN: Right. And -- and we --  
16    we don't dispute that that may be the  
17    circumstance that Congress had foreseen, that --  
18    that may happen in these contexts, but now this  
19    rule is a rule that operates almost exclusively  
20    for pro se litigants and really almost  
21    exclusively for pro se prisoners who are filing  
22    by mail versus filing electronically.

23                And for those litigants, I think it is  
24    a more common circumstance to be filing both of  
25    the documents at the same time. Sometimes, in

1 fact, you have a litigant who does exactly, I  
2 think, what Justice Jackson was suggesting and  
3 files the motion to reopen, attaches a notice of  
4 appeal to that, and says please hold this notice  
5 of appeal and allow for it to be effective only  
6 if and when you grant the motion to reopen.

7 We don't think that there is any  
8 problem with that kind of practice, but we also  
9 don't think there's a basis to distinguish that  
10 practice from a scenario where you have a  
11 litigant who just isn't sophisticated enough to  
12 specifically ask for that kind of treatment.

13 JUSTICE GORSUCH: What do you say  
14 about the differences between 4(a)(2) and (4),  
15 which expressly mention relation forward, and  
16 (a)(6), which just doesn't?

17 MS. BROWN: So I -- I take the same  
18 position on that as I -- I think my friend did.  
19 I do think that when the Rules Advisory  
20 Committee and when the rule makers were adopting  
21 Rule 4(a)(2) and 4(a)(4), they were doing so  
22 against the preexisting backdrop of this  
23 ripening principle and of this relation forward  
24 principle.

25 And they acted when they wanted to

1     displace that in certain respects with respect  
2     to 4(a)(4) specifically and I think for 4(a)(2),  
3     when they wanted to adopt -- to codify some of  
4     those practices but maybe not necessarily all of  
5     the practices. But where they're not acting,  
6     that we -- we, I think, read that to mean that  
7     the preexisting judicial practice remains in  
8     place. And I do think that's consistent with  
9     the Scarborough case that Justice Sotomayor was  
10    -- was referencing as well.

11                 JUSTICE GORSUCH: Even though  
12    expressio -- what about expressio unius?

13                 MS. BROWN: So I -- I -- I take the  
14    expressio unius point, and I think that that  
15    supports our reading of 4(a)(2) to provide the  
16    exclusive option -- opportunities for relation  
17    forward in the context that it's speaking to,  
18    which is the context of prejudgment notices of  
19    appeal.

20                 But this is not a prejudgment notice  
21    of appeal. And I don't take the rule makers to  
22    have -- have disrupted or displaced the  
23    preexisting practice in that area.

24                 JUSTICE GORSUCH: Then as you point  
25    out, (a)(6) applies predominantly to prisoners

1 and pro se litigants.

2 MS. BROWN: At this point, yes.

3 JUSTICE GORSUCH: At this point. And  
4 it -- the government waived compliance with  
5 (a)(6) --

6 MS. BROWN: Yes.

7 JUSTICE GORSUCH: -- in this case.  
8 And it's really only one circuit we're talking  
9 about where this is an issue. Is it the  
10 government's practice in that circuit to -- to  
11 waive the --

12 MS. BROWN: I'm not familiar with --  
13 this honestly doesn't come up that frequently,  
14 even for us. I do think it's a very rare set of  
15 circumstances that has to occur in order for  
16 this to be the -- the --

17 JUSTICE GORSUCH: Yeah, but is this a  
18 one-off waiver or is this the government's view?

19 MS. BROWN: I mean, I think as far as  
20 I know, our position has been in this area that  
21 we don't think a duplicative notice of appeal is  
22 required when we feel like we've got sufficient  
23 notice --

24 JUSTICE GORSUCH: Okay.

25 MS. BROWN: -- where we're happy to

1 move forward with the merits of the appeal.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas, anything further?

6 Justice Alito?

7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: The 4(a) language  
9 was necessary in part because the rule actually  
10 required a filing of the notice of appeal after  
11 judgment, correct?

12 MS. BROWN: That's correct.

13 JUSTICE SOTOMAYOR: And we don't have  
14 similar language here.

15 MS. BROWN: The -- I don't take -- so  
16 it's true that Section 2107(c) does not  
17 specifically require filing anything within that  
18 14-day period. I think --

19 JUSTICE SOTOMAYOR: Exactly.

20 MS. BROWN: I think it is implicit in  
21 that language that there will be a notice of  
22 appeal filed at some point.

23 JUSTICE SOTOMAYOR: Well, but I'm  
24 thinking of, which happens all the time,  
25 employment applications. I get notices all the

1 time. You have X number of days to apply. The  
2 day after there's an announcement there's been  
3 an extension. I don't think anybody reads that  
4 as requiring all the pre-deadline applications  
5 to be resubmitted, correct?

6 MS. BROWN: So I agree with that. I  
7 do think there's a very commonsense  
8 understanding here that something that comes in  
9 too early just shouldn't be treated the same way  
10 as something that comes in too late. You don't  
11 have the same concerns with disrupting finality  
12 or with prejudice to other parties.

13 JUSTICE SOTOMAYOR: Because what's  
14 being appealed is that judgment and it's known  
15 what it is.

16 MS. BROWN: Correct.

17 JUSTICE SOTOMAYOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 Justice Gorsuch, anything?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson?

23 MS. BROWN: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1                   Mr. Huston.

2                   ORAL ARGUMENT OF MICHAEL R. HUSTON

3                   COURT-APPOINTED AMICUS CURIAE

4                   IN SUPPORT OF THE JUDGMENT BELOW

5                   MR. HUSTON: Mr. Chief Justice and may  
6 it please the Court:

7                   Section 2107(c) is unmistakably clear  
8 about what a litigant must do when he misses  
9 both the regular notice of appeal window and the  
10 time to request an extension. That would-be  
11 appellant must proceed in two steps.

12                  First, file a motion in the district  
13 court to reopen and demonstrate the relevant  
14 factors; and, second, after entry of the order  
15 on that motion, file a notice of appeal within  
16 the next 14 days.

17                  The Solicitor General agrees in their  
18 reply brief that that process is the plain  
19 meaning of the statutory text, and that text  
20 does not permit Petitioner here to be excused  
21 from the second step, filing the notice of  
22 appeal after the reopening window, just because  
23 he filed the wrong document at step 1.

24                  The lower courts exercise discretion  
25 to overlook Petitioner's step 1 mistake, and



1     they created a window for Petitioner to file a  
2     timely notice of appeal, but Petitioner did not  
3     take advantage of that reopened window, and he  
4     has never offered a justification for failing to  
5     do so.

6             The court of appeals thus correctly  
7     determined that it lacked appellate jurisdiction  
8     because Petitioner never filed a timely notice  
9     of appeal during any window when Congress  
10    authorized that notice to be filed. Any other  
11    conclusion would violate Rule 26(b)(1)'s  
12    instruction that courts "may not extend the time  
13    to file a notice of appeal, except as  
14    specifically authorized by Rule 4."

15            Now, Rule 4, as we have discussed,  
16    does contain two enumerated exceptions  
17    validating premature notices of appeal in  
18    certain limited circumstances, but as the Court  
19    explained in *FirstTier*, those exceptions codify a  
20    much more limited practice than the one  
21    advocated certainly by Petitioner.

22            A reopening -- they codify a practice  
23    of excusing reasonable mistakes about when the  
24    notice of appeal should be filed. A reopening  
25    situation does not give rise to any similar

1 reasonable doubt because the statutory text is  
2 incredibly clear about the process for filing  
3 notices of appeal here.

4 The judgment of the court of appeals  
5 should be affirmed. I welcome the Court's  
6 questions.

7 JUSTICE THOMAS: Would you comment  
8 briefly on the government's and Petitioner's  
9 characterization of this as the notice of appeal  
10 being premature?

11 MR. HUSTON: Yes, Justice Thomas. So  
12 I think I agree with my friend Ms. Brown from  
13 the Solicitor General's office that the notice  
14 was both too late and too early. And, again, I  
15 think that the statutory text sets up a process  
16 here, not -- not the rule text, we're not  
17 relying on the rule, we're relying on the  
18 statutory text.

19 The statutory text sets up a process  
20 of proceeding in two steps. It was, I think,  
21 you know, the notice was premature only in the  
22 sense that the Petitioner filed the wrong  
23 document. He ignored the statutory instruction  
24 to file a motion to reopen and instead filed a  
25 notice of appeal.

1                   But I think that just reinforces the  
2 point that in order to file a notice of appeal,  
3 going all the way back to Curry in 1848, you  
4 must file the notice of appeal in accord with  
5 the statutory process. And here the statute is  
6 very specific about when that notice of appeal  
7 must be filed.

8                   When? During the period after entry  
9 of the order on reopening, but before the next  
10 14 days.

11                  JUSTICE JACKSON: So to be clear, are  
12 you quibbling with the Court's decision to  
13 construe the notice of appeal as a motion to  
14 reopen?

15                  MR. HUSTON: Not at all, Justice  
16 Jackson.

17                  JUSTICE JACKSON: All right. So you  
18 say there are two steps. And he clearly, you  
19 know, messed up on the first step. The court  
20 cured it by saying we're going to treat this as  
21 a motion to reopen.

22                  I guess I don't understand why they  
23 also can't treat the second step as having been  
24 satisfied by the early filing of the document?

25                  MR. HUSTON: I think it's because of

1 Bowles, Your Honor. Recall that in Bowles, the  
2 Petitioner there filed a motion to reopen, but  
3 then ultimately filed the notice of appeal too  
4 late, after the 14-day period.

5 And the court said it's a very harsh  
6 result, but the statutory text simply dictates  
7 the period when that notice of appeal must be  
8 filed.

9 JUSTICE JACKSON: No, I understand.  
10 But he didn't file a notice of appeal. In this  
11 case he did, and it was the court that construed  
12 it as the -- as the threshold motion to reopen.  
13 And it just seems odd to me that having  
14 construed a document as a motion to reopen for  
15 the purpose of allowing for a document to be  
16 filed, called a notice of appeal, when you have  
17 the document there, why couldn't the court also  
18 then say okay, we have the notice of appeal  
19 within the window that we've just opened, and  
20 we're done.

21 MR. HUSTON: Because that's not --  
22 there's no general practice. Your Honor, as you  
23 were describing in the colloquy with my friends  
24 is exactly right, that with lots of different  
25 kinds of documents, courts do file this

1 procedure. You -- you -- you make a motion to  
2 lodge an amicus brief and you attach the brief,  
3 motion to file an amended complaint, but it  
4 doesn't happen with jurisdictionally significant  
5 documents like a notice --

6 JUSTICE JACKSON: A complaint is not a  
7 jurisdictionally --

8 MR. HUSTON: It has --

9 JUSTICE JACKSON: -- significant  
10 document?

11 MR. HUSTON: It has jurisdictional  
12 significance obviously in some respects, Your  
13 Honor.

14 JUSTICE JACKSON: No. I mean, let --  
15 let's explore this because this is, I think, the  
16 key to it, right? Suppose the -- instead of  
17 filing a single document, called the notice of  
18 appeal, Mr. Parrish had filed a notice of people  
19 and stapled to the front of it was a motion to  
20 reopen.

21 In that situation if the district  
22 court had found that the criteria to open were  
23 satisfied, are you saying that Mr. Parrish would  
24 have had to send in a new notice of appeal?

25 MR. HUSTON: As presently constituted,

1     yes, because the rules are clear about that, but  
2     this is actually in the --

3                 JUSTICE JACKSON:  The one that the  
4     district court got to begin with would not be  
5     enough?

6                 MR. HUSTON:  Yes.  I -- I --

7                 JUSTICE JACKSON:  Because it was filed  
8     too early?

9                 MR. HUSTON:  Presently because of the  
10    way the rule text is written.  But I think this  
11    is very important.  And I think perhaps the best  
12    thing that this Court could do in this case  
13    would be to instruct the Rules Committee to  
14    adopt a new rule that would look very much like  
15    that one.

16                I do think that's consistent with the  
17    statutory text.  And the reason why is this  
18    Court's decision in FirstTier.

19                FirstTier explains that you cannot  
20    change the -- the jurisdictional period when a  
21    notice of appeal must be filed.  That's always  
22    jurisdictional.  But, importantly, the Rules  
23    Committee does have the power to enact rules  
24    that change how documents get filed.  The best  
25    example is Rule 4(c).

1 JUSTICE JACKSON: I guess what I don't  
2 understand is that if you can construe this very  
3 document as a motion to reopen for the purpose  
4 of all of the jurisdictional consequences that  
5 you're describing, I don't understand why you  
6 can't also construe that very document as a  
7 timely-filed notice of appeal?

8 MR. HUSTON: It's because, Your Honor,  
9 this Court has said over and over again that the  
10 rule of liberal construction for pro se filers  
11 can accommodate looking at what -- at the  
12 substance of a document and understanding it to  
13 be something else. But, importantly, the court  
14 cannot construe -- reconstrue when something is  
15 filed.

16 That's the whole point of the Court's  
17 holding in Bowles, is that there are limitations  
18 on the judicial discretion of -- of -- of  
19 construing something. And you can't just  
20 construe the thing to have been filed at a  
21 different time.

22 So in a situation where the rules  
23 describe when the document must be filed for  
24 jurisdictional purposes, and 2107(c) is such an  
25 instruction, it must actually be filed during

1     that period, but, again, consider the prison  
2     mailbox rule.

3             The prison mailbox rule, which we have  
4     no problem with, is a rule whereby the Rules  
5     Committee has provided an opportunity for  
6     certain filers to ensure that their filing gets  
7     made during the jurisdictional period. And I  
8     think actually, importantly, Rule 4(a)(2) also  
9     works this way.

10            I would urge the Court to take a look  
11     at the way in which Rule 4(a)(2) is written. It  
12     is written awkwardly and very precisely. It  
13     says that the document will become -- the notice  
14     of appeal will become effective on and after the  
15     relevant -- the entry of the judgment that  
16     authorizes the notice of appeal.

17            It's written that way, I think,  
18     precisely because the purpose of the rule is to  
19     transport the filing into the jurisdictional  
20     period.

21            And we think that is within the Rules  
22     Committee's power for the same reason why the  
23     prison mailbox rule is within the Rules  
24     Committee's power, but we don't have any rule  
25     like that as we sit here today. Perhaps the



1 Rules Committee should enact one. And I think  
2 that as we've discussed this morning, there's  
3 every reason to think that the Rules Committee  
4 will carefully study this issue.

5 And if the rule that my friend's  
6 advocate is a good one, they may well adopt a  
7 rule very much like the one that Justice Jackson  
8 has suggested, file a motion to reopen and  
9 attach a notice of appeal, and then an  
10 instruction to the clerk to file that notice of  
11 appeal during the jurisdictional window.

12 But the Rules Committee, with all  
13 respect, is much better suited than this Court  
14 to undertake the process of developing those  
15 rules -- this Court, I mean, just acting by sort  
16 of one-off judicial decisions to -- to deal with  
17 sympathetic litigants in individual situations.

18 The Committee undertakes, as the Court  
19 is aware, a complicated process of study.  
20 Congress has the opportunity to weigh in. We're  
21 going to get a better -- a better overall rule  
22 if the Rules Committee is allowed to do its  
23 work.

24 CHIEF JUSTICE ROBERTS: Counsel, you  
25 make much of the expressio unius doctrine in

1 your brief. You heard counsel's effort to  
2 distinguish that. Do you have any comments on  
3 that?

4 MR. HUSTON: Yes, Your Honor. So I'm  
5 -- I -- I think that the -- Your Honor's opinion  
6 for the D.C. Circuit in Outlaw is exactly right  
7 in two important respects. Outlaw --

8 CHIEF JUSTICE ROBERTS: I wasn't  
9 fishing for that but you can go ahead --

10 (Laughter.)

11 MR. HUSTON: Outlaw is important, most  
12 of all, because of what it had to say about this  
13 Court's opinion in FirstTier. So as I think the  
14 Solicitor General helpfully explained here  
15 today, the reopening principle is not as broad  
16 as Petitioner advocates. And I think it's  
17 really quite important that this Court's  
18 decision in this case reject the sort of  
19 universal ripening principle whereby it's okay  
20 to file something too early.

21 The reason that -- FirstTier is very  
22 clear about that. FirstTier says that, yes,  
23 although there was at common law a certain  
24 ripening principle, it was never as broad as the  
25 one advocated by the Petitioner. Instead, the

1 -- that ripening principle existed only to  
2 excuse reasonable mistakes about when a notice  
3 of appeal should be filed.

4           And as I mentioned, because the  
5 statutory text is -- here is so clear, there's  
6 really no corresponding situation where a  
7 Petitioner makes a reasonable mistake about when  
8 the notice of appeal is supposed to be filed.  
9 The Solicitor General agrees that our  
10 understanding of that statutory text is clearly  
11 the best one.

12           So -- and that's -- that is what I  
13 take to be the core thrust of the Court's  
14 opinion in -- in FirstTier, and this Court's and  
15 Your Honor's opinion in Outlaw recognized that.  
16 It said precisely because FirstTier recognized  
17 that the principle, the common law principle, is  
18 more limited and has been codified in a more  
19 limited way, we, as judicial officers in  
20 individual cases, are not free to embrace a sort  
21 of universal ripening principle.

22           JUSTICE ALITO: Well, if there is a  
23 ripening principle of some scope, some limited  
24 scope, what argument would there be that it  
25 should not encompass the situation here? What

1 reason might there be for holding or concluding  
2 as a matter of policy, if this were sent back to  
3 the Rules Committee, that the principle should  
4 not apply in this situation?

5 MR. HUSTON: So I think there are two,  
6 Your Honor. The first is that -- and this is a  
7 situation that has actually played out in the  
8 real world in several of the cases that give --  
9 gave rise to this circuit split. You've seen  
10 two principal problems: False start appeals,  
11 number one; and, second, sort of  
12 misunderstanding about court clerks -- court  
13 administrative staff in the docketing and  
14 processing and the appeals. Both of them  
15 happened here. Both of them happened in the  
16 Winters case from the Sixth Circuit and the  
17 Holden case for the Third Circuit.

18 So if you file a premature notice of  
19 appeal, recall that it divests the district  
20 court of jurisdiction. The case will in many  
21 cases be transferred out of the -- out of the  
22 district court immediately and into the court of  
23 appeals.

24 But that's a mistake. Why? Because  
25 under the statute, it has to be the district

1 court that decides the motion to reopen. So you  
2 get this sort of circuitous process where the  
3 court of appeals has to send it back, and then  
4 we have to put the appeal back on track.

5 Now, I'm not trying to say that's  
6 impossible -- that's an impossible problem to  
7 solve, but it should be discouraged.  
8 Petitioners should be discouraged from  
9 proceeding as this Petitioner did here.

10 JUSTICE ALITO: But those are  
11 different situations from the situation in this  
12 case, right?

13 MR. HUSTON: Well, that's what  
14 happened in this case, Your Honor. Because the  
15 Petitioner filed a notice of appeal instead of a  
16 motion to reopen, the case got sent to the court  
17 of appeals, and the court of appeals had to send  
18 it back for a rule.

19 JUSTICE SOTOMAYOR: Doesn't every  
20 other circuit -- and that's everyone but this  
21 one -- say that the -- the sent-in early notice  
22 of appeal ripens upon reopening?

23 MR. HUSTON: Yes.

24 JUSTICE SOTOMAYOR: So it -- it's a  
25 pretty straightforward rule. Every other

1 circuit has it. It's pretty clear when the  
2 process starts.

3 MR. HUSTON: Well, but, Your Honor, I  
4 think the problem is, again, in order to get to  
5 those decisions, a couple of the courts of  
6 appeals had to first sort of reroute the process  
7 that the statute lays out, where the district  
8 court decides the motion to reopen first.  
9 Courts of appeals had to grab the case, decide  
10 what to do with the mistaken filing, and then --

11 JUSTICE SOTOMAYOR: But they won't  
12 now.

13 MR. HUSTON: Well, I think -- but that  
14 only -- that only reinforces the point, I think,  
15 that the --

16 JUSTICE SOTOMAYOR: Well, it  
17 reinforces the point that you would like the  
18 Rules Committee --

19 MR. HUSTON: Yes.

20 JUSTICE SOTOMAYOR: -- to decide this,  
21 and not us. But in the interim, what you're  
22 asking us to do is to make the rules unfair to  
23 pro se litigants, who already didn't get timely  
24 notice to appeal because they didn't get notice  
25 within the 30 days, all right? And now they're

1       supposed to get notice within 14. And given the  
2       way the Post Office is working, it's unlikely  
3       they're going to receive any notice in 14 days.

4               MR. HUSTON: So, Justice Sotomayor,  
5       it's --

6               JUSTICE SOTOMAYOR: Give it to the  
7       Post Office, give it to the prisons, but the  
8       likelihood of a prisoner receiving timely  
9       notice, enough to file in time, is next to  
10      nothing.

11              MR. HUSTON: So if I might make two  
12      points in response to that. The first is it's  
13      not me who's seeking to make the rule unfair.  
14      It's -- I'm here advocating that the court be --

15              JUSTICE SOTOMAYOR: Yes, but you could  
16      advocate a reading that's totally consistent  
17      with background principles, not addressed  
18      directly by 4(a). And so you're -- I know. We  
19      appointed you as amici.

20              JUSTICE BARRETT: I was going to say  
21      he was appointed to defend the judgment below.

22              (Laughter.)

23              MR. HUSTON: Justice Sotomayor, look,  
24      the -- I don't think --

25              JUSTICE SOTOMAYOR: I don't think

1 we've ever had an amici come in and say the  
2 judgment was wrong.

3 (Laughter.)

4 MR. HUSTON: No, the judgment was not  
5 wrong. Certainly, the judgment -- the judgment  
6 should be affirmed but the principal reason why  
7 is the -- the operative statutory text here in  
8 2107(c), as the Solicitor General agrees, does  
9 not allow what Petitioner did here.

10 So in order to get there, you have to  
11 say we're going to sort of excuse noncompliance  
12 with 2107(c) because we're going to incorporate  
13 this background principle. I think the  
14 fundamental back -- problem with that is that  
15 the background principle is actually not nearly  
16 as broad as the one that Petitioner needs in  
17 order to justify what happened here. It has  
18 always --

19 JUSTICE KAGAN: If -- if you're right  
20 about what 2107 means, doesn't that mean that  
21 the Rules Committee is going beyond what the  
22 statute says, even with respect to the  
23 provisions in Rule 4 now, let alone to any that  
24 they might issue with respect to this situation?

25 MR. HUSTON: The answer is no, Your



1 Honor. We think Rule 4(a)(2) is faithful to the  
2 statutory text, and it's because the Rules  
3 Committee has been careful to write the rule in  
4 a way that respects the jurisdictional nature of  
5 2107(a). And, again, that just gets back to  
6 that text and the way that that rule is written.

7 FirstTier discusses this. I mean, the  
8 argument presented to the Court in FirstTier was:  
9 Rule 4(a)(2) exceeds the jurisdiction -- the --  
10 Rule 4(a)(2) is improper because it goes beyond  
11 what the statutory jurisdiction conferred by  
12 2107(a). The Court said no, it doesn't do that  
13 because it's not a rule that changes the time in  
14 which the document must be filed. That's the  
15 jurisdictional period. Instead, it -- it's a --  
16 Rule 4(a)(2) is a rule about how that document  
17 gets filed, akin to, again, the prison mailbox  
18 rule that enables a petitioner -- decides when  
19 something -- when and how something is being --

20 JUSTICE KAGAN: So I think I'm not --  
21 I'm not understanding. Are you saying that the  
22 Rules Committee could or could not issue a rule  
23 that's similar to the one that the Petitioner  
24 asks us to reach?

25 MR. HUSTON: I think that the

1 committee could enact a rule that is similar,  
2 but it has --

3 JUSTICE KAGAN: Consistent with 2107?

4 MR. HUSTON: Consistent with 2107 and  
5 consistent with its text, so long as that rule  
6 is crafted in a way that respects the  
7 jurisdictional period. So --

8 JUSTICE KAGAN: So I don't understand.  
9 What does that mean? What is -- what could the  
10 Rules Committee do that we can't do right now?

11 MR. HUSTON: So I -- I think the Rules  
12 Committee could enact a rule that would say that  
13 you can file a motion for reopen in the -- a  
14 motion for reopening in the district court,  
15 which is clearly what 2107(c) instructs, and  
16 then you can attach to that a conditional notice  
17 of appeal or a proposed notice of appeal.

18 And the court clerk, the Rules  
19 Committee would direct the court clerk to file  
20 that notice of appeal within the jurisdictional  
21 window. That's going to solve the problems of  
22 this case and all of the ones that gave rise to  
23 the circuit split.

24 But it's not -- that's not a principle  
25 that we have in the law and the rules at present

1 for jurisdictional filings that divest the court  
2 of appeals of jurisdiction. We typically don't  
3 allow notices of appeal to sort of lie in wait.

4 Maybe it would be a good idea to  
5 authorize this filing in this circumstance, for  
6 partly the reasons that Justice Sotomayor  
7 describes.

8 But I think that's -- again, that's a  
9 thing that the Rules Committee needs to do. And  
10 the -- the important reason why it's not just  
11 better as a policy matter for the Rules  
12 Committee to undertake that, but why I think  
13 it's actually compelled to be the Rules  
14 Committee that does it, is that remember when  
15 we're talking about a rule, we're talking about  
16 something that's been authorized by another Act  
17 of Congress, the Rules Enabling Act.

18 So you have two different sources of  
19 authority. You've got a jurisdictional  
20 limitation set out in 2107(a), but you've also  
21 got an authority from Congress to make rules to  
22 implement that. That doesn't happen in a  
23 situation where the court is just hearing  
24 individual cases.

25 JUSTICE JACKSON: Maybe I'm looking at

1 the wrong statute, but I -- 2107 doesn't say  
2 anything about what the defendant has to do.  
3 Isn't it only speaking to the district court?  
4 The district court may extend the time for  
5 appeal. The district court may reopen the time  
6 for appeal for a period of 14 days from the date  
7 of entry or the order reopening the time for  
8 appeal.

9 MR. HUSTON: Yes, of course, Your  
10 Honor, that's right. The district court has to  
11 reopen the time for appeal. The only --

12 JUSTICE JACKSON: For a period of 14  
13 days.

14 MR. HUSTON: Precisely.

15 JUSTICE JACKSON: So what -- what  
16 about that precludes the district court from  
17 considering a notice of appeal that has been  
18 filed as timely within that 14 days?

19 MR. HUSTON: I think it's because, as  
20 the Solicitor General agrees, 2107(c), the  
21 provision that you were just reading --

22 JUSTICE JACKSON: Yes.

23 MR. HUSTON: -- incorporates the  
24 general principle of 2107(a) that an appeal  
25 within the time for appeal -- that's the

1     statutory text of 2107(c) -- an appeal must  
2     always be taken by the would-be -- you know, the  
3     appellant filing a notice of appeal. That's  
4     2107(a). That's, of course, the general way  
5     that notice -- that's the only way that notices  
6     of appeal can -- or that appeals can ever be  
7     taken under 2107(a), is that the appellant must  
8     file a notice of appeal.

9             And then 2107(c) describes when that  
10     notice of appeal has to be filed, within a  
11     period of 14 days that has both an end point and  
12     a beginning point. It runs from entry of the  
13     order on the motion for reopening.

14            No other provisions of 2107 are  
15     written in this specific way. And I think the  
16     specificity that Congress used to reference the  
17     period of 14 days is among the strongest  
18     evidence that Congress, when it thought of this  
19     particular situation, was -- was intentionally  
20     reaching a balance. Yes, Congress wanted to  
21     create an opportunity for a litigant who missed  
22     -- who did not receive notice of the judgment to  
23     file a notice of appeal.

24            But it only created a very limited and  
25     particular window in which to do that. And

1     that's because, obviously, the judgment  
2     prevailing party's interests in the finality of  
3     that judgment go stronger and stronger as we  
4     move further and further away from entry of the  
5     judgment.

6                 So --

7                 JUSTICE KAVANAUGH: Well, isn't that  
8     the reason for a 14-day limit? And so it can't  
9     be filed months later, obviously. But if  
10    something's already been filed, or filed within  
11    the 14 days, that concern that you just raised,  
12    I don't think, is present.

13                MR. HUSTON: I think it's -- I think  
14    it's the reason for both of the 14-day periods  
15    that are referenced in 2107(c), Your Honor.

16                I think clear -- clearly, Congress was  
17    attempting to strike a balance, and it was  
18    attempting to be quite demanding on, you know, a  
19    situation like the one facing Petitioner about  
20    what you must do when you get notice, and when  
21    you must do it.

22                And Bowles is the surest proof of  
23    that. You know, obviously the Court is saying  
24    in Bowles that if you fail to scrupulously  
25    apply -- or comply with the 14-day deadline,

1 even in, arguably, like the most sympathetic  
2 circumstance that I can think of, we are -- the  
3 court, are going to enforce that jurisdictional  
4 term.

5 I think our point is just simply that  
6 the jurisdictional nature of this statute runs  
7 both at its end point and at its beginning point  
8 because of the particular text that Congress  
9 used in this provision.

10 CHIEF JUSTICE ROBERTS: Counsel, your  
11 argument throughout most of your brief sort of  
12 puts emphasis on turning square corners in this  
13 area because it's jurisdictional. And then on  
14 page 42 you said: Well, if you don't like that,  
15 we'll leave it up to the discretion of the  
16 district -- district court.

17 Do you want to say a little bit more  
18 about the discretionary approach?

19 MR. HUSTON: Your Honor, I mean, this  
20 is an argument in the alternative. Our point --  
21 we think -- you know, we absolutely contend  
22 that, just as in Bowles, there's a  
23 jurisdictional period that Congress created.  
24 And by default, there is no judicial discretion  
25 to sort of forgive it in individual cases.

1           If the Court rejected that, I do think  
2   that in order for Petitioner to win the case  
3   they need an exercise -- they need a deeming of  
4   one thing to happen at a different time. And I  
5   think that is very much an argument that sounds  
6   to me in judicial discretion.

7           So Petitioner needs to go to the court  
8   of appeals or the district court, as the case  
9   may be, and say: Please take my document that  
10   was untimely and deem it to have been filed at  
11   another time.

12           It's -- they analogize it to the  
13   common law nunc pro tunc authority. But that  
14   was always an equitable authority.

15           And I think our point is just simply  
16   that on the particular facts here, where the  
17   court of appeals said: Not only did you fail to  
18   file the statutory text and the rule text, you  
19   also disregarded the specific instructions that  
20   were given by the district court to file a  
21   notice of appeal. On that basis, we're not  
22   going to allow your notice of appeal to ripen.

23           I think that would be a reasonable and  
24   not -- not an abuse of the court of appeals'  
25   discretion on the particular facts here, if the



1 Court concluded that the deeming authority is --  
2 is available at all. In which case, again, I  
3 think it's something that sounds in judicial  
4 discretion.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Thomas? Anything?

7 Justice Alito? No? Anything further?  
8 Thank you, counsel.

9 MR. HUSTON: Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Rebuttal,  
11 Ms. Rice?

12 REBUTTAL ARGUMENT OF AMANDA RICE  
13 ON BEHALF OF THE PETITIONER

14 MS. RICE: There's been quite a bit of  
15 focus today on the rules, for understandable  
16 reasons. I think the rules question is  
17 straightforward and this Court should answer it.  
18 The rules don't speak to ripening in the  
19 postjudgment context, and so it doesn't -- they  
20 don't displace settled practice in that area.

21 But the main question before this  
22 Court is about the statute. The Fourth Circuit  
23 read the statute to impose a jurisdictional  
24 second notice requirement, and I take my  
25 friend's statutory two-step to be functionally

1 the same thing.

2 That's wrong. Nothing in the text of  
3 subsection (c) displaces the background rule.  
4 We usually construe statutes to incorporate  
5 background rules, unless they say otherwise.

6 We also usually construe provisions  
7 that operate across multiple subsections to work  
8 the same way. I think that's true of  
9 subsection (a) here, the notice of appeal  
10 requirement.

11 We also don't usually construe  
12 statutes to defeat their purpose. This was  
13 about creating a mechanism for litigants who  
14 don't get notices of judgments to reopen their  
15 time for appeal. It was not about setting a  
16 trap for the unwary.

17 So we're not excusing compliance with  
18 a jurisdictional requirement here. There just  
19 is no jurisdictional requirement to begin with.  
20 Were it otherwise, I think FirstTier was wrong  
21 and Rules 4(a)(2) and 4(a)(4) have to be  
22 invalid.

23 My friend's concession that the rules  
24 committee could enact a ripening rule for this  
25 context, I think, effectively acknowledges as

1 much. I don't see how the rules committee could  
2 do that if the statute jurisdictionally required  
3 a second notice here.

4 If there are no further questions.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Huston, this Court appointed you  
8 to brief and argue this case as an amicus curiae  
9 in support of the judgment below. You have ably  
10 discharged that responsibility, for which we are  
11 grateful.

12 The case is submitted.

13 (Whereupon, at 12:25 p.m., the case  
14 was submitted.)  
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