No. 18-_____

In the
Supreme Court of the United States

CEH ENERGY, LLC, and
SHENZHEN CAREALL INVESTMENT
HOLDINGS GROUP, CO., INC.,

Petitioners,

–v–

KEAN MILLER, LLP and
STEPHEN C. HANEMANN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 59(e) establishes a party's right to file a motion to alter or amend a judgment. Other circuits have held, where a Rule 59(e) motion is filed to alter a judgment, and a court subsequently issues a new ruling based on "new grounds" that a party has not had an opportunity to challenge, a second Rule 59(e) motion tolls the appeal deadline pending a ruling on the second Rule 59(e) motion. Here, the Fifth Circuit affirmed the district court, which had ruled that a second Rule 59(e) motion addressing the new grounds raised by the district court did not toll the appellate deadline. This view diverges from the other circuits. The question therefore presented is:

Should the Supreme Court reverse this outlier Fifth Circuit case and provide clear guidance to practitioners on when successive Rule 59(e) motions are appropriate?

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants in the court of appeals, are CEH Energy, LLC, a Delaware LLC handling oil and gas investments and its parent company Shenzhen Careall Investment Holdings Group Co., Ltd., a Chinese investment company.

Respondents, who were the appellees in the court of appeals, are Kean Miller, LLP and Stephen C. Hanemann, the law firm and counsel who formerly represented the Petitioners.

RULE 29.6 STATEMENT

Both of the Petitioners are privately held companies. Shenzhen Careall Investment Holdings Group Co., Ltd. does not have a parent company. CEH Energy, LLC's parent company is Shenzhen Careall Investment Holdings Group Co., Ltd. No public company owns more than 10% of the stock of either company.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in the Appendix at App.1a.

The first Order and Reasons of the district court granting the defendant-Respondents' motions to dismiss is unreported (App.17a).

The second Order and Reasons of the district court denying the plaintiff-Petitioners' first Rule 59(e) motion is unreported (App.8a).

The third Order and Reasons of the district court denying the plaintiff-Petitioners' second Rule 59(e) motion is unreported (App.2a).

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 4, 2018 (App.1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

- **Fed. R. Civ. P. 59(e)**

  [a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

- **Fed. R. App. P. 4(a)(4)(A)**

  [i]f 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: [iv] to alter or amend the judgment under Rule 59.

STATEMENT OF THE CASE

1. a. This case presents the question whether, after a Federal Rule of Civil Procedure 59(e) motion to amend or alter a judgment results in a new ruling based on entirely different and unbriefed grounds, a second Rule 59(e) motion directed at that new ruling tolls the time to appeal the final judgment. Under the longstanding *stare decisis* on this issue, the appeal period is tolled by a second Rule 59(e) motion where the motion addresses a second ruling based on "new issues" or "new grounds." However, the Fifth Circuit has recently diverged from other circuits based on a new interpretation of some language from a single

case, *Charles L.M. v. Ne. Indep. Sch. Dist.*, 884 F.2d 869 (5th Cir. 1989) ("*Charles*"). The new interpretation has generated a series of problems and conflicts with other circuits.

This Petition presents the question in simple terms because the district court ruled on new grounds, expressly applied the divergent case law language from *Charles*, and foreclosed the Petitioners' ability to appeal in stark contrast to *stare decisis*.

b. This case arose when a law firm and one of its attorneys (the Respondents) secretly represented both opposing sides to an investment transaction in clear violation of ethical rules. The Respondent attorney favored his preferred Mississippi friend and long-term client, helping that client scam the distant and relatively unfamiliar, new, Chinese client (the Petitioners) out of millions of dollars. This scam was performed, in part, to assure that the local, preferred client would have badly needed money to pay $200,000 in legal bills it owed to the Respondents.

c. The foreign client victim (the Petitioners) sued the attorney and law firm (the Respondents) for fraud and other claims in Mississippi federal court. The court ruled that it lacked jurisdiction (App.25a at 509-510]. The Petitioners refiled in Louisiana federal court. In response to Motions to Dismiss based on peremption filed by the Respondents, the district court ruled that the Petitioners' claims were perempted and prescribed as being asserted beyond a one-year and two-year time limits (App.23a at 507).

The Petitioners filed a Federal Rule of Civil Procedure 59(e) Motion for Reconsideration, arguing that the district court had wrongly conflated irrelevant

claims with the claims actually asserted by the Petitioners (App.29a, 32a at 512-526). The irrelevant claims consisted of claims for negligent breach of fiduciary duty, which trigger one- and two-year statute of limitations. The claims actually asserted by the Petitioners consisted of fraudulent and intentional breaches of fiduciary duty based on self-dealing (*i.e.*, fraud), which trigger five- and ten-year statute of limitations (App.29a, 32a at 512-526).

In its second ruling, the district court agreed with the argument in the Petitioners' motion, ruling that there is indeed a distinction between negligent and fraudulent or intentional breaches of fiduciary duty (App.14a at 689-690). This should have settled the entire issue because it established that the Petitioners were well-within the five- and ten-year statute of limitations. But the district court ruling went on—*sua sponte*—to rule that the Petitioners had not pled fraud with particularity, and thus dismissed the claim on an entirely "new ground" which had never been briefed (App.14a-16a at 690-691).

Because the district court issued a ruling on an entirely new ground that had never been briefed (nor had the Respondent even asserted it), the Petitioners were in a bind. The Petitioners could appeal it, but Supreme Court jurisprudence clearly forbids a party from raising a new argument with the court of appeal that has not been made at the trial court. *See City of Waco, Tex. v. Bridges*, 710 F.2d 220 (5th Cir. 1983) (citing *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941)). Alternatively, the Petitioners could move to amend their Complaint, or file a Rule 59(e) motion to alter the judgment in

order to get their argument into the record. To cover all bases, the Petitioners here took two courses simultaneously: they (1) filed a Motion to Amend the Complaint in order to replead fraud with particularity and (2) filed a second Rule 59(e) motion to address the new grounds for dismissal, which had never been briefed (App.48a, 53a at 822-847 and 4a-6a at 920 (denying the Motion to Amend Complaint as moot in light of the court's denial of the plaintiff-Petitioners' second Rule 59(e) motion)).

2. Generally speaking, in an appeal to a court of appeals, the filing of a timely motion to alter or amend the judgment under Rule 59(e) tolls the time within which the notice of appeal must be filed. Fed. R. App. P. 4(a)(4)(A)(iv). The reason for this rule is that when such a motion is filed, "the case lacks finality." 11 Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 2821, at 220 (2d ed. 1995). However, there is a carveout under which Appellate Rule 4(a)(4)(A)(iv) does not apply. Specifically, under both Supreme Court jurisprudence and the case law of every circuit to consider the issue, a second Rule 59(e) motion addressing a second ruling does not toll the appeal period if the second ruling and second Rule 59(e) motion are based on the "same grounds" as the original ruling and original Rule 59(e) motion. Stated affirmatively, the longstanding jurisprudence on interpreting Rule 59(e) is that where a second ruling is based on "new grounds" and a Rule 59(e) motion addresses that second ruling's "new grounds," the time to appeal is tolled. This makes sense because, but for this sensible rule, a losing party could repeatedly file identical Rule 59(e) motions to extend judgment indefinitely.

3. In this matter, the district court's second ruling was based on "new grounds" (specifically, the unbriefed *sua sponte* ruling on fraud being pled with particularity). Pursuant to the longstanding *stare decisis* interpretation of Appellate Rule 4(a)(4)(A)(iv), the time for the Petitioners to appeal should have restarted on the court's subsequent ruling (App.8a at 685-692). But instead, the district court applied—and the court of appeals affirmed via its grant of Respondents' motion to dismiss—a different standard that contradicts jurisprudence and Appellate Rule 4(a)(4)(A)(iv). The application of this different, *Charles*-based, standard effectively foreclosed the Petitioners' ability to appeal or even address the new issue raised by the court. In short, the Petitioners' matter was dismissed on an issue (whether fraud was pled with particularity) that the Petitioners have never even had an opportunity to challenge by brief or oral argument. It is a violation of the Due Process Clause of the Fourteenth Amendment for a judgment to be binding on a party who has never had an opportunity to be heard. *See* U.S. Const. amend. XIV.

The district court's dismissal of the Petitioners' appeal as untimely was based on some language in *Charles*. Interpretation of that language in *Charles* has evolved to bring about a 180-degree shift in Fifth Circuit rulings on the issue. Earlier rulings in the Fifth Circuit respected the "new grounds" rule (*see* below, Section I). This jurisprudential shift has caused a stark conflict with the longstanding jurisprudential consensus on the issue. The *Charles* ruling has some language suggesting that the appeal period restarts only when a second ruling "amended the judgment" (by changing "what the judgment did") rather than a

change in the "grounds" for judgment. *Charles* at 870. This shift sweeps in matters, such as here, where a court issues a new ruling based on new grounds, but does not necessarily "amend the judgment" (*i.e.*, does not "change what the judgment did"). The *Charles* language contradicts U.S. Supreme Court jurisprudence and appellate court jurisprudence in other circuits (including prior Fifth Circuit jurisprudence), and was expressly rejected by the Tenth Circuit and Federal Circuit.

4. It is impossible to know whether, going forward, a Fifth Circuit court will apply the "changes what the judgment did" rule or the "new grounds for judgment" rule, and this puts parties in a bind. The party that receives a ruling based on a new ground must decide whether to, on one hand, appeal the ruling and thereby violate the *Hormel* rule (forbidding a party from raising a new argument with the court of appeal that has not been made at the trial court). Or, on the other hand, file a Rule 59(e) motion and thereby risk triggering a *Charles*-based ruling that forecloses an appeal. This is a Catch-22 situation that has arisen only because the Fifth Circuit has adopted a new, divergent interpretation of *Charles*.

The court of appeals in this matter affirmed the district court without issuing reasons for judgment (App.1a [6/4/18 ruling]). Specifically, the court of appeals granted the Respondents' Motion to Dismiss on this issue (App.74a [4/26/18 motion]). This ruling worsens the circuit court split on the issue by enshrining the divergent interpretation into Fifth Circuit case law. The Supreme Court should grant writ

to unify the circuit court split, restore the *Hormel* requirement that trial courts consider all issues before an issue can be raised to an appellate court, and remove the Catch-22 created by the application of the divergent *Charles* interpretation.

REASONS FOR GRANTING THE WRIT

The court of appeals ruling in this matter applies some language from a Fifth Circuit ruling—*Charles*—in a way that worsens a circuit court split and enshrines into case law a Catch-22 problem that arises when a court responds to a Federal Rule of Civil Procedure 59(e) motion by issuing a new ruling on new grounds. This Court should grant writ to consider whether the Fifth Circuit's divergent case law should be unified to coincide with longstanding *stare decisis*.

I. *STARE DECISIS* ESTABLISHES THAT A SECOND RULE 59(e) MOTION TOLLS THE TIME TO APPEAL IF IT RESPONDS TO A COURT RULING BASED ON "NEW GROUNDS"

When a Rule 59(e) motion to alter a judgment results in a court issuing a new ruling on entirely "new grounds," it is longstanding *stare decisis* that a second Rule 59(e) motion tolls the time to appeal under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv) (a Rule 59 motion tolls the time to file an appeal "from the entry of the order disposing of the last such remaining motion"). The inverse is true: a second Rule 59(e) motion fails to toll the time to appeal only if the second Rule 59(e) motion is a duplicate of the first Rule

59(e) motion that challenges a second ruling based on the same grounds as the first ruling. *See* Black's Legal Dictionary (2nd ed.) (defining "ground" as "[t]he reason or point that something (as a legal claim or argument) relies on for validity"). That is, where a second ruling relies on a new reason or point (a new "ground"), a new Rule 59(e) motion tolls the appeal period. Courts apply this rule consistently. As stated by the Federal Circuit in *Kraft, Inc. v. United States*, "we agree with all other circuits that have addressed the issue that a motion to reconsider a revised judgment tolls the time for appeal only in instances where the second judgment presents a new significant adverse ruling against the movant which the movant has had no previous opportunity to challenge." *Kraft, Inc. v. United States,* 85 F.3d 602, 605 (Fed. Cir. 1996), *opinion modified on denial of reh'g*, 96 F.3d 1428 (Fed. Cir. 1996).

Courts have characterized this unified principle with slightly different language, by specifically establishing that the time to appeal is tolled if:

- The second ruling is based on a "new ground." *Dixie Sand & Gravel Co. v. Tennessee Valley Auth.*, 631 F.2d 73, 75 (5th Cir. 1980).
- The second ruling is "on an issue not addressed in the original judgment." *Trowel Trades Employees Health and Welfare Trust Fund of Dade County v. Edward L. Nezelek, Inc.*, 645 F.2d 322, 325 (5th Cir. 1981).
- The second ruling is not "wholly unchanged" from the first ruling. *Brown v. United Ins. Co. of Am.*, 807 F.2d 1239, 1242 (5th Cir. 1987).

- The second ruling reflects that the trial court has "change[ed] its mind" such that the second ruling is "plainly substantively different." *Harrell v. Dixon Bay Transp. Co.,* 718 F.2d 123, 127-29 (5th Cir. 1983).
- The second ruling "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered." *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 211, 73 S.Ct. 245, 248-49, 97 L.Ed. 245 (1952).
- The second Rule 59(e) motion is not "based upon the same grounds." *Ellis v. Richardson*, 471 F.2d 720, 720-21 (5th Cir. 1973); *see also S.E.C. v. Dowdell*, 144 F. App'x 716, 721 (10th Cir. 2005); *Wright v. Preferred Research, Inc.*, 891 F.2d 886, 889-90 (11th Cir. 1990) ("substantially the same grounds").
- The second Rule 59(e) motion "does not parrot the arguments from a prior motion but raises for the first time the grounds upon which the trial court should reconsider its order." *Wright v. Preferred Research, Inc.,* 891 F.2d 886, 890 (11th Cir. 1990).
- The second Rule 59(e) motion is based on an issue that a party "has not had his 'day in court when resisting the original post-judgment motion." *Harrell v. Dixon Bay Transp. Co.,* 718 F.2d 123, 128 (5th Cir. 1983).

In short, the consensus is that where a second ruling is based on "new grounds" and a subsequent Rule 59(e) motion targets the new grounds raised for the

first time, that subsequent Rule 59(e) motion tolls the time to appeal.

II. THE *CHARLES* LANGUAGE RELIED ON BY THE DISTRICT AND APPELLATE COURTS IN THIS MATTER CONFLICTS WITH *STARE DECISIS*

Since 1989, Fifth Circuit jurisprudence on this issue has evolved to the point that it now directly contradicts *stare decisis*. The genesis of this circuit court conflict is some language in the *Charles* ruling. Pre-*Charles* cases respected the settled "new grounds" rule (*see above*, Section I). But more recent cases have used some Charles language in a way that diverges from the "new grounds" rule. Settled law on the issue establishes that where a second ruling after a Rule 59(e) motion is based on "new grounds," the time to appeal is tolled. The language in *Charles* suggests instead that the time to appeal is tolled only if the second ruling "changes what a judgment did" (rather than a change in the grounds for judgment). *See Charles* at 870. This interpretation based on *Charles* is in direct contrast with *stare decisis* because where courts apply this divergent interpretation, new rulings that are based on "new grounds" will not toll the time to appeal, causing otherwise timely appeals to be ruled untimely. For example, if a court's first and second rulings grant a motion to dismiss, but on different grounds, a Fifth Circuit court could will *Charles* to foreclose an otherwise timely appeal. Such is what happened here.

III. THE DISTRICT COURT'S SECOND RULING HERE WAS BASED ON "NEW GROUNDS," AND THE SECOND RULE 59(e) MOTION WAS BASED ON THESE NEW GROUNDS, WHICH THE MOVANT-PETITIONER "HAD NO PREVIOUS OPPORTUNITY TO CHALLENGE"

The district court's own characterization of its first ruling was that it "dismiss[ed] Plaintiffs' breach of fiduciary duty claim as perempted under La. R.S. 9:[5]605." (App.12a, 10a at 688). In response to this first ruling, the Petitioners' first Rule 59(e) motion was, as the district court states, "to correct an error of law." Indeed, the Petitioners argued that the district court's first ruling erred on the law because it failed to regard the law's distinction between negligent breaches and fraudulent (intentional) breaches, which trigger distinct peremptive and prescriptive periods (App.32a-46a at 515-526).

The district court ruled on the Petitioners' first motion (the "second ruling") by reversing course and essentially conceding the error of law (App.13a-14a at 685-692). Specifically, the court ruled that the law does indeed "distinguish[] between negligent breach of fiduciary duty and fraudulent or intentional breach of fiduciary duty based on self-dealing." But the court then, *sua sponte*, ruled against the Petitioners on entirely different grounds. After the court recognized the distinction between negligent breaches and fraudulent breaches, it then held that fraud was not pled with particularity. The Petitioners never had and still have not had a chance to challenge this ground, which makes all the difference in this matter.

The district court declared in its third ruling that in its second ruling it "simply stated that its original

ruling was correct and supported by an alternative justification" (App.4a at 917-921). This is incorrect. The district court's second ruling, newly distinguishing negligent and fraudulent breaches of fiduciary duty, would have revived the Petitioners' claims. The second ruling expressed uncertainty about which prescriptive period would apply in light of its new acknowledgment of the distinction in breaches (App.14a at 690). The ruling pivoted to entirely new grounds in a way that dismissed the case without giving the Petitioners a chance to ever address the merits of the dismissal. This is not an "alternative justification" because the court's second ruling completely altered its first ruling by acknowledging the key distinction and the fact that the distinction affects the relevant prescriptive period. The second ruling acknowledges this because, where the first ruling concluded that the ten-year prescriptive period did not apply (App.24a-25a at 508), the second ruling reversed course and acknowledged the prospect that the ten-year period could apply (then taking up, *sua sponte*, the "particularity" issue to rule that there was no fraud) (App.13a-16a at 689-90). The first ruling had made clear that the Petitioners' Complaint alleged fraud (App.17a-27a at 502-509). This is unlike other cases, in which a second judgment is amended to rest on the other of two grounds relied on in the original judgment. *See Dixie Sand & Gravel Co. v. Tennessee Valley Auth.*, 631 F.2d 73, 75 (5th Cir. Unit B 1980). The second ruling here rested on a brand-new ground that was not relied on in the original judgment.

In short, the court's second ruling here was on entirely "new grounds," a "new issue not addressed in the original judgment," a court "changing its mind"

with a second ruling that is "plainly substantively different," and all for which the Petitioner has not "had his day in court" or even a single "bite at the apple." Under settled law in every other circuit, this should have tolled the time to appeal.

IV. THE FIFTH CIRCUIT RULING IN THIS MATTER WORSENS THE CONFLICTS CREATED BY THE DIVERGENT *CHARLES* INTERPRETATION

The Fifth Circuit ruling worsens problems grounded in the divergent language in *Charles*. It does so in seven distinct ways, each of which supports that the Supreme Court grant writ in order to address the problems, unify interpretation of the appellate rule, and thereby end unnecessary motion practice over timeliness of appeal periods.

A. The Ruling Worsens Conflicts with Federal Rule of Appellate Procedure 4(a)(4)(A)(iv)

Under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv), the filing of a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) tolls the time within which the notice of appeal must be filed. The appellate rule itself does not allow for any exceptions. It even implies that multiple Rule 59(e) motions may be filed to toll the appeal period. *Robbins v. Saturn Corp.*, 532 F. App'x 623, 628 (6th Cir. 2013) ("Rule 4(a)(4) of the Federal Rules of Appellate Procedure refers to the entry of an order 'disposing of the last such remaining motion,' implying that more than one Rule 59(e) motion may be filed.").

However, there is a jurisprudentially created carveout that limits application of the appellate rule where successive Rule 59(e) motions are based on the same grounds. The district court and court of appeal in this matter expanded the carveout beyond the limited, *stare decisis* application. This interpretation, based on the *Charles* ruling, adds more support to a new, divergent precedent that sweeps in nearly all second Rule 59(e) motions, even those based on new grounds. This divergence worsens the gap between what the appellate rule provides and what the carve out applies to. To allow this ruling (and its elevation of the *Charles* language) to strengthen Fifth Circuit precedent would swallow nearly every second Rule 59(e) motion because so few second rulings "change what the judgment did." This is the exception swallowing the rule.

B. The Ruling Worsens Conflicts with Other Circuits' Jurisprudence

The Federal Circuit considered this same issue in *Kraft*, and concluded that "we agree with all other circuits that have addressed the issue that a motion to reconsider a revised judgment tolls the time for appeal only in instances where the second judgment presents a new significant adverse ruling against the movant which the movant has had no previous opportunity to challenge." *Kraft, Inc. v. United States,* 85 F.3d 602, 605 (Fed. Cir. 1996), *opinion modified on denial of reh'g,* 96 F.3d 1428 (Fed. Cir. 1996).

More recently, the Tenth Circuit specifically considered the divergent language within *Charles* and expressly rejected it. The Tenth Circuit specifically rejected the "what the judgment did" rule and instead reiterated the customary rule: whether the second

motion is "based upon substantially the same grounds as urged in the earlier motion." *See S.E.C. v. Dowdell*, 144 F. App'x 716, 721 (10th Cir. 2005).

By adopting the divergent *Charles* language, the district court and court of appeals in this matter elevate the divergent "what the judgment did" rule, and thereby worsen a circuit court split. This court split leaves the Fifth Circuit as an outlier, causing it to foreclose an otherwise timely and proper appeal.

C. The Ruling Worsens Conflicts with Supreme Court Jurisprudence

The U.S. Supreme Court established that the type of judgment alteration that restarts the time to appeal is an alteration of judgment that "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered." *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211, 73 S.Ct. 245, 248-49, 97 L.Ed. 245 (1952). This bedrock Supreme Court standard of sixty-six years has been cited dozens of times by courts throughout the country on precisely this issue. The divergent *Charles* language, and the ruling in this matter, are in direct conflict with this Supreme Court ruling because the courts in this matter have applied a much narrower standard (whether the new ruling "changed what the judgment did"), and thereby foreclosed an appeal by the Petitioners that would otherwise be timely under Supreme Court jurisprudence. That is, here, the district court's second judgment changed matters of substance or, at least, resolved an ambiguity in the earlier judgment. The second judgment should therefore have restarted the time period to appeal.

D. The Ruling Worsens Conflicts with the Long-Standing Supreme Court Principle That a Party Should First Address an Alleged Error at the Trial Court Level Before Appealing

The law makes clear that a party should address an alleged error at the trial court, rather than raise the error for the first time at the appellate level. *See, e.g., City of Waco, Tex. v. Bridges*, 710 F.2d 220 (5th Cir. 1983) (citing *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941)) ("As a general rule, an appellate court will not consider a new issue raised for the first time on appeal for the purpose of reversing the lower court's judgment"). This is the clear point of the "new grounds" rule: allow a second motion when there are "new grounds" in order to avoid unnecessary appellate review. *See Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (citing *United States v. Dieter*, 429 U.S. 6, 97 S.Ct. 18, 50 L.Ed.2d 8 (1976)) ("the purpose of Rule 59 is to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings."). The use of *Charles* to foreclose second Rule 59(e) motions means that when courts rule based on new grounds on issues that have never been briefed at the trial court level (as is the case here), the appellate courts will have these new arguments foisted on them, in violation of the *Hormel* rule.

E. The Ruling Is at Odds with Supreme Court Rule 13(3)

It is instructive that the Supreme Court's rule governing time to file a petition for writ of certiorari (Sup. Ct. R. 13.3), which is parallel to Federal Rule of

Appellate Procedure 4(a)(4), provides for tolling of the time to file a certiorari petition when a petition for rehearing is pending in the court of appeals. *See, e.g., Clarke v. United States*, 898 F.2d 162, 164 (D.C. Cir. 1990) (citing *Gypsy Oil Co. v. Escoe*, 275 U.S. 498, 499, 48 S.Ct. 112, 113, 72 L.Ed. 393 (1927) ("If . . . a timely motion for leave to file [a] second petition [for rehearing] is granted, and the petition is actually entertained by the Court, then the time within which application may be made . . . for certiorari begins to run from the day when the Court denies such second petition.")). The second ruling, not the first ruling, triggers the time to file the petition. This is analogous to the Petitioners' argument here, that the time to appeal should have been triggered by the second ruling, not the first ruling. The district court and court of appeals ruling in this matter illustrates how far the Fifth Circuit has diverged from settled law.

F. The Ruling Has Created Problems Around the Country

According to Westlaw Headnotes, *Charles* has been cited fifty-four times by courts on this issue, in varying applications. This shows how disruptive the divergent *Charles* language and the rulings in this matter are. Specifically, it shows how allowing the appellate court ruling in this matter to stand will cause unnecessary challenges to timely appeals and render uncertain the appeal-deadline law, Appellate Rule 4(a)(4)(A). These problems will crop up in the frequent context of when a second ruling is based on new grounds after an initial Rule 59(e) motion to alter or amend judgment.

G. The Dangers Warned of by the *Charles* Court Are Not Present in This Context

The limited carveout regarding duplicate Rule 59(e) motions is intended to foreclose a movant from (1) indefinitely delaying the time to appeal and (2) getting another "bite at the apple" on the same issue. *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (citing *United States v. Dieter*, 429 U.S. 6, 97 S.Ct. 18, 50 L.Ed.2d 8 (1976)); *see also Charles* at 870 (citing *Dixie Sand & Gravel Co. v. Tennessee Valley Auth.*, 631 F.2d 73, 75 (5th Cir. 1980)); *In re Halko*, Bkrtcy. (N.D. Ill. 1996, 203 B.R. 668.). Neither danger is presented here. First, the longstanding "new grounds" rule, which should have been applied here, does not allow a movant to indefinitely delay the time to appeal with successive motions because it limits successive motions to delay the time to appeal only where there is a ruling on new grounds. So there can be no indefinite repeat motions. Second, the "new grounds" rule does not give the Petitioners another "bite at the apple" because the Petitioners—due to the court's *sua sponte* ruling on an unbriefed issue—have never had the chance to argue that its fraud allegations were adequately pled. Accord *Harrell v. Dixon Bay Transp. Co.*, 718 F.2d 123, 129 (5th Cir. 1983). The fact that the dangers warned of by the *Charles* court are not present is another indication that the recent divergent interpretation of the rule on multiple Rule 59(e) motions is an outlier that contradicts good, longstanding precedent.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to repair the circuit court split.

Respectfully submitted,

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SEPTEMBER 4, 2018