No. 19-320

In the
Supreme Court of the United States

HAROLD WADE, ET UX.,
Petitioners,

v.

KREISLER LAW, P.C.,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Seventh Circuit Court of Appeals commit error when it held that Bankruptcy Rule 8006(g) was a mandatory claim-processing rule and therefore, since properly invoked by Kreisler, the Court could not make an exception to compliance with the same therefore requiring dismissal of the Wades' appeal for lack of jurisdiction when the Wades failed to file a Petition for Permission to Appeal.

CORPORATE DISCLOSURE STATEMENT

Kreisler Law, P.C. is an Illinois professional corporation the shares of which are 100% owned by Barry Kreisler.

STATEMENT OF RELATED PROCEEDINGS

- *In re Wade*, 926 F.3d 447 (7th Cir.) (opinion issued and judgment entered June 14, 2019)
- *In re Wade*, No. 15-01035 United States Bankruptcy Ct., Northern District of Illinois (opinion issued and order entered June 6, 2018)

There are no additional proceedings in any other court that are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions at issue. Petitioner misconstrued the holding of the 7th Circuit.

INTRODUCTION

Petitioners have confused the holding of the Seventh Circuit. The Court of Appeals held, rightfully so, that Bankruptcy Rule 8006(g) is a mandatory, though not jurisdictional, claim-processing rule. Kreisler invoked the Rule and, therefore, functional equivalence does not come into play as the law is clear, based on this Court's decisions in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017) and *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). The Seventh Circuit simply overruled its own circuit precedent in light of *Hamer* and *Nutraceutical Corp.*, and no Seventh Circuit judge favored rehearing *en banc* to review the panel's decision.

STATEMENT OF THE CASE

On September 27, 2013, Kreisler filed suit against Lorraine Wade in an Illinois state court. On September 19, 2013, the Wades (Petitioners herein) had filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. Upon receiving notice of the Wades' bankruptcy, Kreisler ceased all action in the state court and filed a proof of claim in the Wades' 2013 bankruptcy. On November 20, 2014, the Wades voluntarily dismissed the 2013 bankruptcy case and

the case was closed on March 10, 2015. On November 26, 2014, after dismissal of the 2013 bankruptcy case, Kreisler returned to state court and continued litigating that case against Lorraine Wade.

On January 14, 2015, the Wades filed a new Chapter 13 bankruptcy case in the Northern District of Illinois. On January 29, 2015, the Wades filed a Motion to Extend the Automatic Stay pursuant to 11 U.S.C. § 362(c)(3). Counsel for the Wades noticed the hearing on their Motion for February 5, 2015, a day that the bankruptcy judge was not sitting. Also on January 29th, because the judge was not going to be sitting on February 5, the bankruptcy clerk struck the hearing on the Wades' Motion and notice of the clerk's action was sent via the Court's CM/ECF system to the Wades' counsel. Wades' counsel failed to re-schedule the hearing on the Motion to Extend the Stay. As a result of their non-compliance with § 362(c)(3), the Automatic Stay expired on February 13, 2015, by operation of law.

After the Stay terminated in the 2015 bankruptcy case, Kreisler proceeded in state court and obtained a default judgment against Lorraine Wade on April 6, 2015. Kreisler then recorded a memorandum of judgment which created a lien on all of Lorraine Wades' property in Cook County, Illinois.

On October 27, 2017, the Wades sought permission from the bankruptcy court to sell certain of Lorraine's real property. It was at this time that Kreisler's judgment lien was discovered and the same prevented the sale of the property. The Wades' demanded Kreisler release his lien, claiming it violated the Automatic Stay. Kreisler's counsel disagreed and

refused to release the lien. The Wades sought sanctions against Kreisler for violating the Automatic Stay. The bankruptcy judge, Judge Hunt, denied the Wades' motion for sanctions, concluding that the Stay had expired on February 14, 2015, pursuant to 11 U.S.C. § 362(c)(3), as to property of the debtors and property of the Estate. Judge Hunt issued her Order and opinion on June 6, 2018. This Order is the subject of the Wades' appeal.

The Wades filed a Notice of Appeal in the bankruptcy court on June 11, 2018. Also in the bankruptcy court, the Wades filed a request for bankruptcy court certification for direct appeal to the Court of Appeals pursuant to 28 U.S.C. § 158(b)(i) and Bankruptcy Rule 8006(g) on June 18, 2018. On July 2, 2018, Judge Hunt entered an order certifying the Wades' appeal for direct appeal to the Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A). Judge Hunt's contemporaneous opinion certified that the June 6th Order satisfied all three of the conditions in 28 U.S.C. § 158(d)(2)(A)(i), (ii), and (iii). (Pursuant to the statute, any one of the three conditions in § 158(d)(2)(A) would have been sufficient standing alone.)

The Wades failed to file a Petition for Permission to file a direct appeal to the Court of Appeals as required by Bankruptcy Rule 8006(g). However, the Clerk of the Court of Appeals inexplicably docketed the direct appeal from the bankruptcy court on July 18, 2018. On that same day, the Clerk for the Court of Appeals sent a docketing notice to the Clerk of the bankruptcy court and sent a Notice of Case Opening to counsel of record "in furtherance of the revised Circuit Rule 3(d)".

Counsel for the Wades failed to file the required Docketing Statement as required by Rule 3(d), but did eventually file a belated Docketing Statement on August 21, 2018.

On July 25, 2018, the Court of Appeals ordered Kreisler to file a response to the Appellants' Notice of Appeal which Kreisler timely filed on August 8, 2018. Kreisler's response consisted of the required 26.1 Disclosure Statement and a Motion for Affirmative Relief (i.e., dismissal of the appeal for lack of jurisdiction). The Wades filed a Reply to Kreisler's Motion for Affirmative Relief on August 9, 2018. On August 17, 2018, the Court of Appeals entered an order finding, inter alia, that the bankruptcy court had certified an order for appeal pursuant to 28 U.S.C. § 158(d)(2)(A), that a Notice of Appeal had been filed, and therefore the statutory criteria for the appeal had been satisfied and the appeal was accepted for briefing and argument – but only provisionally.

The Court of Appeals went on to note the existing dispute, raised by Kreisler's Motion for Affirmative Relief, concerning whether the Wades had satisfied the requirements of Bankruptcy Rule 8006(g), as the Rule requires the Appellant to file a Petition for Leave to Appeal pursuant to Fed. R. App. P. 5, and the Wades had failed to do so.

In its order, the Court referenced the holdings of *In re Turner*, 574 F.3d 349 (7th Cir. 2009), *Marshall v. Blake*, 885 F.3d 1065 (7th Cir. 2018) and the Supreme Court case of *Hamer v. Neighborhood Housing Services*, 138 S. Ct. 13 (2017), and inquired as to how those cases, considered together, may or may not impact

their decision on jurisdiction. The parties were ordered to address this issue, along with the merits on the issue presented, in their briefs.

The Seventh Circuit ultimately dismissed the appeal for want of jurisdiction in a published decision. *In re Wade*, 926 F.3d 447 (7th Cir. 2019). The court found that Rule 8006(g) is a mandatory claim-processing rule, and, as such, must be enforced because it was invoked by Kreisler. *Id*. at 449. The Court explained how the decisions of this court in *Hamer*, *Nutraceutical Corp*., and *Manrique* conflicted with the Seventh Circuit's decisions in *Turner* and *Marshall* in that *Turner* and *Marshall* approved exceptions to compliance with Bankruptcy Rule 8006(g) and F.R.A.P. 5(a)(1) based on either the functional-equivalence doctrine or the harmless-error doctrine or both. The Court therefore overruled Turner in Marshall to that extent. Nothing more.

REASON FOR DENYING CERTIORARI

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS AND DOES NOT CREATE OR ADD TO A SPLIT OF AUTHORITY IN THE CIRCUITS – PETITIONERS MIS-STATE THE HOLDING OF THE SEVENTH CIRCUIT

The most concise explanation of the Seventh Circuit's decision is found in the Wade opinion itself. The relevant portion is quoted below:

> Because Rule 8006(g) is a "time limitation ... found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule." *Nutraceutical Corp. v. Lambert*, —— U.S. ——, 139 S. Ct. 710, 714, 203 L.Ed.2d 43 (2019). The question here is whether Rule 8006(g) is a "mandatory" claim-processing rule, which "[i]f properly invoked ... must be enforced." *Hamer*, 138 S. Ct. at 17.
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> The Supreme Court's recent decision in *Nutraceutical Corp.* is instructive on this point. There the Supreme Court considered Rule 23(f) of the Federal Rules of Civil Procedure, which permits an interlocutory appeal of a class-certification order if the appellant files a petition for permission to appeal "within 14 days after the order is entered." The Court held that Rule 23(f) is a mandatory claim-processing rule, noting that "the Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment," *Nutraceutical*, 139 S. Ct.

at 715, because Rule 26(b)(1) bars courts from "extend[ing] the time to file ... a petition for permission to appeal," FED. R. APP. P. 26(b).

That reasoning applies with equal force here. Like Rule 23(f), Rule 8006(g) speaks in mandatory terms. *See* FED. R. BANKR. P. 8006(g) (petition "must be filed" before the deadline). And like Rule 23(f), Rule 8006(g) requires a petition for permission to appeal, so Rule 26(b)(1) "singles [it] out ... for inflexible treatment." *Nutraceutical Corp.*, 139 S. Ct. at 715. Rule 8006(g) is thus a mandatory claim-processing rule. Because Kreisler properly invoked the rule, it "must be enforced." *Hamer*, 138 S. Ct. at 17.

In response the Wades rely on the lead opinion in *In re Turner*, 574 F.3d 349 (7th Cir. 2009), and our decision in *Marshall v. Blake*, 885 F.3d 1065 (7th Cir. 2018). In both cases the appellants obtained certification from the bankruptcy court for a direct appeal but failed to file a petition for permission to appeal as required by the Bankruptcy and Appellate Rules. In both cases we declined to dismiss the appeal, but the decisions rested on slightly different grounds.

The lead opinion in *Turner*, representing only the author's views, concluded that the record transmitted from the bankruptcy court contained the information that a petition for leave to appeal would have provided. *See* 574 F.3d at 352 (Posner, J.). Invoking the Supreme

Court's decision in *Torres v. Oakland Scavenger Co.*, the lead opinion concluded that the record sent by the bankruptcy court brought the case within the principle that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Id.* (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988)). In the lead opinion's view, dismissal was unwarranted because treating the bankruptcy-court record as the "functional equivalent" of a petition would not prejudice the appellee. *Id.*; *see also id.* at 356 (Van Bokkelen, J., concurring in the judgment).

In *Marshall* we dropped any reliance on functional equivalence and instead emphasized *Turner*'s discussion of harmlessness. *See* 885 F.3d at 1073 ("[W]e have excused the failure to file a Rule 5 petition if the party filed a timely notice of appeal and 'no one is harmed by the failure.' " (quoting *Turner*, 574 F.3d at 354)). *Marshall* found that the failure to comply with Rule 8006(g) was harmless in that case.

Turner was decided before *Hamer* clarified the effect of mandatory claim-processing rules. The lead opinion presumed that as long as a rule is not jurisdictional, courts could create equitable exceptions. *See* 574 F.3d at 354 ("[T]he failure to comply with a rule that is not jurisdictional ... is

not fatal if no one is harmed by the failure...."). And *Marshall* postdates *Hamer* but does not mention the case. There the litigants framed the Rule 8006(g) objection in jurisdictional terms, and our opinion treated the issue accordingly, concluding that "we have jurisdiction to hear the direct appeal" after rejecting the appellee's Rule 8006(g) objection. *Marshall*, 885 F.3d at 1074.

Marshall and *Turner* are irreconcilable with the Supreme Court's recent decisions on the effect of noncompliance with mandatory claim-processing rules. *Marshall*'s harmless-error analysis cannot coexist with the Court's decision in *Manrique v. United States*, —— U.S. ——, 137 S. Ct. 1266, 1274, 197 L. Ed. 2d 599 (2017), which held that "mandatory claim-processing rules ... are not subject to harmless-error analysis." More broadly, the Court's recent decisions in this area have consistently compelled enforcement of mandatory claim-processing rules. *See, e.g.*, *Nutraceutical Corp.*, 139 S. Ct. at 714 (stating that mandatory claim-processing rules are "unalterable"); *Hamer*, 138 S. Ct. at 17 (stating that mandatory claim-processing rules "must be enforced"); *Manrique*, 137 S. Ct. at 1272 ("[T]he court's duty to dismiss the appeal was mandatory.") (quotation marks omitted). Adopting a harmless-error exception, as *Marshall* did, necessarily alters an "unalterable" claim-processing rule.

The approach of *Turner*'s lead opinion is also unsustainable in light of the Court's recent

cases. The Wades note that *Torres* remains on the books. True, but we're not persuaded that we may accept the bankruptcy court's certification order as the functional equivalent of a petition for permission to appeal.

To start, it's unclear if *Torres* itself ever extended that far. *See* 487 U.S. at 315–16, 108 S. Ct. 2405 ("Permitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether...."). Regardless, the Court has now clearly rejected the reasoning of the lead opinion in *Turner*. In *Manrique* a criminal defendant failed to file a second notice of appeal after the lower court issued an amended judgment, as Rule 4 of the Federal Rules of Criminal Procedure requires. The dissent reasoned that "the clerk's transmission of the amended judgment to the Court of Appeals [was] an adequate substitute for a second notice of appeal." *Manrique*, 137 S. Ct. at 1275 (Ginsburg, J., dissenting). But the Court didn't agree. It treated Rule 4 as a mandatory claim-processing rule and held that the court of appeals "may not overlook the failure to file a notice of appeal at all." *Id.* at 1274 (majority opinion). Because that omission ran afoul of Rule 4, the appeal had to be dismissed. *Id.*

The same result is required here. We cannot overlook the Wades' failure to file a petition for permission to appeal. Because Kreisler properly objected to the violation of Rule 8006(g), our

> "duty to dismiss the appeal [is] mandatory." *Id.* at 1272 (quotation marks omitted). Based on the clear conflict with *Nutraceutical Corp.*, *Hamer*, and *Manrique*, we overrule *Turner* and *Marshall* to the extent that they approved exceptions to compliance with Bankruptcy Rule 8006(g) and Rule 5(a)(1) of the Federal Rules of Appellate Procedure—whether based on the functional-equivalence doctrine, the harmless-error doctrine, or both.[1] The Wades must pursue their appeal through the ordinary process, which starts with the district court.

In re Wade, 926 F.3d at 449-451.

All the Seventh Circuit did in this case was overrule its' own precedent in *Turner* and *Marshall.* It did so because of this Court's decisions in *Hamer* and *Nutraceutical.* The "doctrine" of functional equivalence does not come into play in this case at all because Bankruptcy Rule 8006(g) is a mandatory claim-processing rule which Kreisler properly invoked. Once invoked the Court cannot make an "equitable" exception to compliance therewith. This decision is directly on point with Supreme Court precedent and does not create nor add to any circuit split.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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