

No. 20-426

IN THE
Supreme Court of the United States

WILLIAM L. HUNTRESS AND ACQUEST
DEVELOPMENT, LLC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for A Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**PETITIONERS' MOTION FOR LEAVE TO FILE
PETITION FOR REHEARING OUT-OF-TIME**

GEORGE ROBERT BLAKEY	JOHN J. BURSCH
WILLIAM J. & DOROTHY K.	<i>Counsel of Record</i>
O'NEILL PROFESSOR OF LAW	BURSCH LAW PLLC
EMERITUS, NOTRE DAME	9339 Cherry Valley
LAW SCHOOL*	Avenue SE, #78
8630 East Monterosa Avenue	Caledonia, MI 49316
Scottsdale, AZ 85251	(616) 450-4235
(574) 514-8220	jbursch@burschlaw.com

*For identification only

Counsel for Petitioners
(Additional counsel on inside cover)

GARY T. CORNWELL
THE CORNWELL LAW FIRM
900 North Rainbow
Ranch Road
Wimberly, TX 78676
(409) 659-7788

BRADLEY R. CAHOON
DENTONS DURHAM JONES PINEGAR P.C.
111 South Main Street, Suite 2400
Salt Lake City, UT 84111
(801) 415-3000

Petitioners William Huntress and Acquest Development respectfully seek the Court's leave to file their Petition for Rehearing out-of-time. The Petition was initially efiled timely under Rule 44.2, but it was submitted without a paper copy due to a misunderstanding about the Court's Covid-submission rules.

In support of their motion, Petitioners state:

1. On September 29, 2020, Petitioners filed their Petition for Writ of Certiorari, asking the Court to resolve the question whether the discretionary-function exception in 28 U.S.C. 2680(a) nullifies the law-enforcement proviso in 28 U.S.C. 2680(h) (as four circuits have now held), limits that proviso (as one circuit has held), or yields to it (as one circuit has held). Seven amici filed two supporting briefs urging the Court to grant the petition, the United States filed its Brief in Opposition, and Petitioners timely submitted their Reply Brief.

2. On January 11, 2021, the Court denied the Petition for Writ of Certiorari.

3. Within the 25 days provided for in Rule 44.2, on February 4, 2021, Petitioners timely efiled their Petition for Rehearing. Due to a misunderstanding of the Court's emergency Covid rules, Petitioners did not submit a paper copy of the Petition for Rehearing.

4. The same day, February 4, 2021, Petitioners mailed a \$200 check for the filing fee. The cover letter noted the case name and number and the purpose of the check. It concluded, "Please let me know if you have any questions *or need additional information to process the Petition, which has been filed electronically.*" [Ex. A (emphasis added).]

5. After seeing on the case docket that the Petition had not yet been distributed, Petitioners' Counsel of Record called the Clerk's office (202-479-3011) on March 22, 2021, at approximately 4:02 pm. Counsel left a detailed message about the Petition and asked *if there was anything additional that needed to be submitted* for the Petition to be considered by the Court. Counsel received no response to the voice message.

6. On April 12, 2021, Counsel of Record received a letter from the Clerk's office dated April 9, 2021, returning the \$200.00 filing fee because, "[a]s of this date, a paper filing of the petition for rehearing was not received in this office." [Ex. B] This was the first Counsel was notified that there was any deficiency in the April 4, 2021 e filing.

7. The same day, Counsel mailed to the Clerk's office both the filing-fee check and a paper copy of the Petition for Rehearing. Later, Counsel spoke with the Clerk's office and was instructed to also file this Motion to File Petition for Rehearing Out-of-Time.

8. Although this resubmission of the Petition for Rehearing is after the expiration of time prescribed in Rule 44.2, the Court should consider it. The Court has the power, in its discretion and in the interests of justice, to consider a petition for rehearing filed outside the formal limits imposed by Rule 44.2. *United States v. Ohio Power Co.*, 353 U.S. 98 (1957) (granting certiorari out-of-time); *id.* at 99 ("We have consistently ruled that the interests in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."); Robert L. Stern, et al., *Supreme Court Practice* § 15.3 (8th Ed. 2002) ("But [it] is not necessarily the case [that petitions for rehearing must be filed in time or not at

all], provided that the tardy petition is accompanied by a motion for leave to file the petition out of time.” See also *Bowles v. Russell*, 551 U.S. 205, 212 (2007) (“[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion”) (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970)).

The absence of any jurisdictional language in Rule 44.4 confirms that it is a Rule governing the orderly processing of claims that can be relaxed where appropriate. Compare Rule 44.4 (“The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.”) with Rule 13.2 (“The clerk will not file any petition for a writ of certiorari that is *jurisdictionally* out of time. See, e.g., 28 U.S.C. § 2101(c).”) (emphasis added).

9. Here, justice is best served by granting leave to file the Petition for Rehearing. Most critically, the Court should have the opportunity to decide whether the mature circuit conflict presented should be heard in light of the substantial additional grounds and intervening circumstances presented in the Petition for Rehearing.

For the foregoing reasons, Petitioners respectfully request that the Court grant leave to hear their Petition for Rehearing outside the time limits contained in Rule 44.2, and that the Court grant the Petition.

Respectfully submitted,

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

GEORGE ROBERT BLAKEY
WILLIAM J. & DOROTHY K. O'NEILL
PROFESSOR OF LAW EMERITUS,
NOTRE DAME LAW SCHOOL*
8630 East Monterosa Avenue
Scottsdale, AZ 85251
(574) 514-8220

GARY T. CORNWELL
THE CORNWELL LAW FIRM
900 NORTH RAINBOW RANCH ROAD
WIMBERLY, TX 78676
(409) 659-7788

BRADLEY R. CAHOON
DENTONS DURHAM JONES
PINEGAR P.C.
111 South Main Street, Suite 2400
Salt Lake City, UT 84111
(801) 415-3000

Counsel for Petitioners

April 15, 2021

* For identification only

Certificate of Service

I hereby certify that on April 15, 2021, a copy of the foregoing Petitioners' Motion for Leave to File Petition for Rehearing Out-of-Time was served by electronic mail and by mail deposited with the U.S. Postal Service, postage prepaid, upon the following:

Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
SupremeCtBriefs@USDOJ.com

Exhibit A

Bursch Law PLLC
Attorney at Law

JOHN J. BURSCH
616.450.4235
jbursch@burschlaw.com

February 4, 2021

Clerk of Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: **William L. Huntress et al. v. United States of America, No. 20-426**

Dear Clerk:

Enclosed is the \$200.00 filing fee required to process Petitioners' Petition for Rehearing. Please let me know if you have any questions or need additional information to process the Petition, which has been filed electronically.

Best regards,


John J. Bursch

RECEIVED
FEB 17 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BURSCH LAW PLLC
ATTORNEY AT LAW
9339 CHERRY VALLEY AVE SE, #78
CALEDONIA, MICHIGAN 49316 • WWW.BURSCHLAW.COM

RECEIVED
FEB 17 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Exhibit B

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001**

April 9, 2021

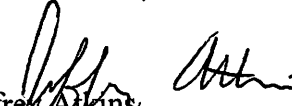
John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Avenue SE, #78
Caledonia, MI 49316

RE: William L. Huntress, et al. v. United States
No: 20-426

Dear Mr. Bursch:

The \$200.00 check for the above-entitled case, postmarked February 4, 2021, and received February 17, 2021, is herewith returned. As of this date, a paper filing of the petition for rehearing was not received in this office.

Sincerely,
Scott S. Harris, Clerk
By:


Jeffrey Atkins
(202) 479-3263

Enclosures