

No. 22M16

IN THE
Supreme Court of the United States

RILEY'S AMERICAN HERITAGE FARMS, ET AL.,
Petitioners,
v.

JAMES ELSASSER, ET AL.,
Respondents.

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

**RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO
DIRECT THE CLERK TO FILE PETITION FOR WRIT OF
CERTIORARI OUT OF TIME**

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**RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO
DIRECT THE CLERK TO FILE PETITION FOR WRIT OF
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Respondents James Elsasser, Steven Llanusa, Hilary LaConte, Beth Bingham, Nancy Treser Osgood, David Nemer, Ann O'Connor, and Brenda Hamlett respectfully submit the following response in opposition to petitioners Riley's American Heritage Farms and James Patrick Riley's motion to direct the clerk to file their petition for writ of certiorari out of time. Because, as detailed herein, the time to file a petition for writ of certiorari had clearly expired prior to petitioners' attempted filing on August 8, 2022, the Clerk correctly rejected the filing. This Court lacks jurisdiction to entertain the late-filed petition for writ of certiorari or to extend the deadline retroactively and should therefore deny petitioners' motion, in its entirety.

I. INTRODUCTION

The Court of Appeals filed its published opinion in this case on March 17, 2022, and entered judgment accordingly the same day. 14 days after the Court of Appeals entered the judgment, petitioners filed a petition for panel rehearing and rehearing en banc. On April 29, 2022, the Court of Appeals entered an order denying the petition for rehearing. Therefore, pursuant to Supreme Court Rule 13(3), the 90-day time limit to file a petition for writ of certiorari began to run on April 29, 2022.

Petitioners miscalculated the deadline to file their petition for writ of certiorari. Rather than starting the 90-day clock when the petition for rehearing was denied on April 29, 2022, petitioners' counsel erroneously calculated the deadline based on the Court of Appeals' issuance of the mandate on May 9, 2022. *See Eastmond Decl.*, ¶ 3. Petitioners then waited until more than 90 days after denial of rehearing to attempt to file their petition for writ of certiorari. The consequences of this mistake were severe, as they deprived this Court of jurisdiction to entertain the petition for writ of certiorari. But the severity of the result does not excuse the mistake or expand this Court's jurisdiction to entertain a petition that is time-barred. The Clerk correctly rejected petitioners' untimely petition for writ of certiorari when they attempted to file it 101 days after the denial of rehearing. Accordingly, petitioners' motion to direct the Clerk to file the petition for writ of certiorari out of time should be denied.

II. ARGUMENT

A. The 90-Day Time Limit to File a Petition for Writ of Certiorari Began to Run When the Court of Appeals Denied the Petition for Rehearing on April 29, 2022

Pursuant to 28 U.S.C. section 2101(c), a petition for writ of certiorari must be filed within 90 days after entry of judgment. The Court of Appeals

entered judgment in this case on March 17, 2022. *See* Petitioners' Appendix E, p. 155, docket no. 35. Therefore, ordinarily, the 90-day time limit to file a petition for writ of certiorari would have run from that date.

On March 31, 2022, however, petitioners timely filed a petition for panel rehearing and rehearing en banc¹. Therefore, pursuant to Supreme Court Rule 13(3), the time to file a petition for writ of certiorari was tolled. The 90-day time limit began to run anew "from the date of the denial of rehearing," which in this case was April 29, 2022. *See* Petitioners' Appendix B, p. 47.

B. The Clerk Correctly Rejected the Untimely Petition for Writ of Certiorari, Pursuant to Rule 13(2), as It Was Jurisdictionally out of Time

Based on the correct trigger date of April 29, 2022, the last day for petitioners to file a petition for writ of certiorari was July 28, 2022. The 90-day limit for filing a petition for writ of certiorari in a civil case is "mandatory and jurisdictional." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994). Therefore, when petitioners presented their petition on August 8, 2022 – 101 days after denial of rehearing, it was jurisdictionally out of time. Pursuant to

¹ The 14-day time limit to file a petition for rehearing runs from entry of judgment, and petitioners filed their petition for rehearing on the deadline, so clearly they were aware that judgment had been entered.

Supreme Court Rule 13(2), it was appropriate for the Clerk to refuse to file the untimely petition.

Petitioners argue that 90-day time limit should be deemed not to have begun to run until the Court of Appeals issued the mandate on May 9, 2022. However, this argument is directly refuted by Supreme Court Rule 13(3), which plainly states: “The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate.” Petitioners incorrectly claim that the standard language of the mandate, in which the Court of Appeals indicated that its March 17, 2022, judgment “takes effect this date” somehow superseded the language of Rule 13(3), but as the rule makes clear the deadline runs from the denial of rehearing, *not* from the finality of the judgment. Petitioners’ motion must therefore be denied.

**C. Petitioners Cannot Move to Extend the Time to File a
Petition for Writ of Certiorari after the Deadline Expired**

Petitioners alternatively request that the Court extend the time to file a petition for writ of certiorari, pursuant to Supreme Court Rule 13(5). However, an application seeking an extension must “be filed within the period sought to be extended.” Supreme Court Rule 30(2). Once the 90-day time limit expired, this Court no longer had jurisdiction to entertain the petition. With

its jurisdiction extinguished, the Court cannot now unilaterally revive jurisdiction based on a late-filed application to extend the deadline. Indeed, to avoid this problem, applications to extend the deadline to file a petition for writ of certiorari must ordinarily be filed at least 10 days before the deadline. Supreme Court Rules 13(5) & 30(2). Petitioners failed to comply with these rules, and their application must therefore be denied.

**D. Even if the Application to Extend the Time to File a
Petition for Writ of Certiorari Were Timely, Petitioners
Have Not Demonstrated Good Cause**

Finally, even if the application to extend the time to file a petition for writ of certiorari were timely (which it was not), such applications are “not favored” and should be granted only upon a showing of “good cause.” Supreme Court Rule 13(5). Counsel’s mistake in calculating the deadline is not good cause for extending the deadline. Therefore, the application should be denied.

Dated: September 12, 2022

Respectfully submitted,

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