NO.

IN THE

Supreme Court of the United States

MARLENE A. DOUGHERTY, doing business as, LAW OFFICE OF MARLENE A. DOUGHERTY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNKNOWN JOHN AND JANE DOE(S), EMPLOYED BY DHS,

Respondents.

MOTION TO DIRECT THE CLERK TO FILE THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OUT OF TIME

Petitioner avers that her Petition for Writ of Certiorari was timely filed and received by the Clerk 3 days later. Alternatively, exceptional circumstances exist which should lead the Court to grant this motion to accept out of time for good cause. The decision of the Court of Appeals is attached as Exhibit A. *Dougherty v. DHS, et al*, No. 22-40665, 2-3 (5th Cir. Sept. 19, 2023)(per curiam, Davis, Southwick, and Oldham).

Corporate Disclosure Statement

1. No nongovernmental corporation is a party to this case.

Jurisdictional Statement

2. The Supreme Court's jurisdiction is invoked under the U.S. Const., art. III §2, 28 U.S.C. §1254(1), and 28 U.S.C. §2101(c) (allowing up to a sixty day good cause extension of time).

3. Petitioner e-filed her petition on December 18, 2023 as required by Sup. Ct. Rule 29.7 and received an acknowledgement from @sc-us.gov. (Attached as Exhibit B). The paper copies were delivered to the Court, as were paper copies to the Solicitor General, and Counsel of Record in proceedings below, 3 days later on December 21, 2024 as confirmed by FedEx delivery confirmations[1]. Sup. Ct. Rule 29.2 requires that the paper copies be deposited "on or before the last day for filing to a third-party commercial carrier "for delivery to the Clerk within 3 calendar days."", in this case December 18, 2023 for delivery no later than December 21, 2023. *Id.* (internal quotation added).

4. The problem in this case is, that as a result of technical problems, the paper copies could not be deposited with the third-party commercial carrier until December 20, 2024, for overnight delivery at a cost of over $500. U.S. dollars; two days after the Petition for Writ of Certiorari was "submitted" electronically.

5. The Supreme Court's rule is that paper filing is the official manner of filing. Sup. Ct. Rule 29.1. Petitioner asserts that where the e-filing of the Petition was timely, and the paper copies were delivered to the Clerk within 3 calendar days, that Sup. Ct. Rule 29.7 should control as to the submission date of the Petition for Writ of Certiorari, such that the petition should be accepted as timely.

6. Electronic filing has been a requirement since 2017; in December 2023, it is an archaic rule that would not accept the electronic submission combined with the timely

[1] FedEx Tracking: U.S. Supreme Court Clerk signed for by K. Hackerson – Tracking No. 788368528178; Solicitor General signed for by A. Owens – Tracking No. 788368457675; and Counsel of Record USAO signed for by C. Cantu – Tracking No. 788368351939.

receipt of the paper copies as a timely filed petition. *Sudduth v. Texas Health and Human Servs. Comm'n,* 830 F.3d 175, 178 (5th Cir. 2016) (the timely filing of the notice of appeal through the electronic filing process initiates the appeal in the federal circuit court of appeals), citing, *Bowles v. Russell,* 551 U.S. 205, 214, 127 S.Ct. 2360 (2007). Petitioner acknowledges that the district and appellate courts long ago converted to e-filing and this Court, though requiring e-filing, maintains paper filing as the official form of filing, yet petitioner believes that because of her substantial compliance with the rules that the Court can order the Clerk to accept the petition as timely. *United States v. Ohio Power Company,* 353 U.S. 98, 99, and 104, 77 S.Ct. 652, 1 L.Ed.2d 683 (1957)(per curiam)(where the interests of justice would make unfair the strict application of our rules the Court has inherent authority to reach back and correct, even if out of time under the rules).

Alternatively, the Court can Extend Time Up to and Including, February 16, 2024, as allowed by the Statute for Good Cause, and by the Rules for Extraordinary Circumstances.

7. In this case extraordinary circumstances exist to accept and grant this motion even though not filed 10 days prior to the date the petition was due. Sup. Ct. Rules 13.5 and 30.2.

8. Petitioner, moved the Supreme Court to accept service of the paper copies *instanter*, to the date of e-filing the petition because this is a case where numerous computer intrusions are alleged and on the date that petitioner began to print the paper copies of the petition unforeseen computer issues delayed the printing of the paper copies, including losing access to my word processing program – Microsoft

Word, and then having printer issues. Microsoft 365 could not be used because it changed all of the document's formatting. Microsoft Word was re-downloaded from my domain, but it was difficult to access to work with. *Dougherty v. DHS, et al*, No. 22-40665, 2-3 (5th Cir. Sept. 19, 2023)(per curiam, Davis, Southwick, and Oldham)(the case is about unlawful access of protected computers).

9. Petitioner checked with FedEx Office to have them complete the printing, but was told they could not get to it December 21, 2024. Petitioner worked diligently to write, print and submit 40 paper copies, and 10 copies of a motion to accept instanter: Sep. 19, 2023 through Dec. 17, 2023 (108 hours), and Dec. 18, 2023 through Dec. 20, 2023, (35 hours).

10. While drafting documents I print them for review and did not have a problem printing until the paper copies had to be printed. Petitioner misunderstood that the motion could not be e-filed because the case was not yet docketed, so wrote it last and paper filed it with the petition, appendix and other papers. The Clerk denied the motion and returned the docket fee and paper copies. (Attached as Exhibit C).

11. Petitioner acknowledges that the motion was not addressed as a motion to extend time for filing, but a motion to accept the paper copies *instanter*, which would require findings that the Clerk was not authorized to find; because, even though e-filing of the petition was required and completed on Dec. 18, 2023, in 2023-2024, paper remains the official form of filing. Sup. Ct. Rule 29.1, 29.2 and 29.7.

12. Sup. Ct. Rule 29.3 provides in pertinent part that paper copies of e-filed documents must be served on the other party by mail or by commercial carrier for service within 3 days. *Id.* Sup. Ct. Rule 29.2 provides in pertinent part that the paper copies be delivered on or before the last day for filing to "a commercial carrier for "delivery to the Clerk within 3 calendar days."" *Id.* (internal quotations added). E-filing was accomplished on the due date of the petition, Dec. 18, 2023, but extraordinary circumstances, described *supra*, delayed the mailing of the paper copies, however, the paper copies were deposited with FedEx on Dec. 20, 2023, and delivered to the mailroom for the clerk of the court overnight by 11:06 am on Dec. 21, 2023; to the Solicitor at 9:41 am on Dec. 21, 2023; and a courtesy copy to counsel of record for the government at 2:12 on Dec. 21, 2023 - three days from the date the Petition was e-filed. The copies were delivered on the date they were due as confirmed by FedEx delivery confirmations. See, n.1. The documents were not stamped by the Court Clerk's Office until Dec. 22, 2023, and the motion was denied by the clerk. Sup. Ct. Rule 13.2; Exhibit C. A motion to extend time shall be filed within the period of time sought to be extended. Sup. Ct. Rule 30.2.

13. On January 5, 2024, Petitioner filed an Application for Extension of Time to File the Petition to the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court for the Fifth Circuit, which the Clerk denied. (Attached as Exhibit D).

14. Using its inherent powers, notwithstanding the mandate in Sup. Ct. Rule 30.2, the Court may in extraordinary circumstances grant this application even if not filed

10 days prior to the date the petition is due, because it is a claims processing rule. *Kontrick v. Ryan,* 540 U.S. 443, 453-454 (2004) (construing a Bankruptcy Rule). 28 U.S.C. § 2101(c) allows for a good cause extension of time to file not to exceed 60 days. *Id.* This Court has made clear that Congress may set jurisdictional limits on Courts and that rules implementing the statutes are claims processing rules. *Bowles v. Russell,* 551 U.S. at 209, citing, *Kontrick v. Ryan,* 540 U.S. 443, 453-454 (2004) (failure to comply with a federal rule's time limits did not affect jurisdiction). By statute, 28 U.S.C. §2107, Bowles was given the benefit of the 14 day statutory extension, however, by a misstatement of the Court that he could file within 17 days his petition was deemed untimely when filed after the 14th day. *Bowles v. Russell,* 551 U.S. at 213 (dissent).

15. Pertinent to this case 28 U.S.C. §2101(c) also provides for a good cause extension of 60 days:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." *Id.*

16. Only the Sup. Ct. Rules, and not the statute, provide that the motion must be filed prior to 90 days. See, Sup. Ct. Rules 13.5, and 30.2. The Court disfavors extensions, yet the rule also provides for flexibility in extending the time for filing "for good cause", even if not filed 10 days before the date the petition is due "in extraordinary circumstances." Sup. Ct. Rule 13.5; 28 U.S.C. §2101(c). The statute is

silent as to when the extension request must be filed. 28 U.S.C. §2101(c). When Congress amended §2101, "notwithstanding the language of the Supreme Court ... to the effect that the 3 months' period is "more than ample..."", Congress left in the provision for an additional 60 days in which to apply for a writ for good cause. §2101(1958)(Attached as Exhibit E, Legislative History, Subsection (c); see also, Amendments, 1949, adding the 60 day extension)). The pertinent parts of §2101, remain unchanged. 28 U.S.C. §2101(c).

17. Petitioner asks this Court, or a Justice of this Court to consider the extraordinary circumstances of this case and for good cause to extend the time for applying for a writ of certiorari for a period not exceeding sixty days. *Id.* The issues presented, undecided by this Court, are of significant and far reaching importance which should be settled by this Court. Sup. Ct. Rule 10.

The Case to be presented on Petition for Writ of Certiorari

18. The petitioner seeks review of the decision of the Court of Appeals which fails to utilize the sound rules of statutory construction whether 18 U.S.C. §2712, waives sovereign immunity for claims under 18 U.S.C. §2510, et seq., and 18 U.S.C. §2701, et seq., notwithstanding 18 U.S.C. §§2520, and 2707, and jurisdiction under 18 U.S.C. §1030. See, *Dougherty v. DHS, et al*, No. 22-40665, at 2. A circuit split exists. *Cf.*, *Al-Haramain Islamic Foundation, Inc. v. Obama,* 705 F.3d 845, 851-852 (9th Cir. 2012); *Attkisson v. Holder,* 925 F.3d 606, 621 (4th Cir. 2019). The court of appeals should have simply dismissed for failure to exhaust administrative remedies, because the federal statutory claims provide for civil actions in the district court, because subject

matter jurisdiction is clear under 18 U.S.C. §2712. See, *Dougherty v. DHS, et al*, No. 22-40665, at 6-9, 14.

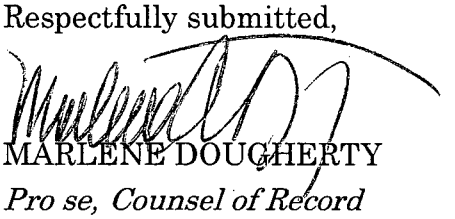
19. The court of appeals, failing to utilize the sound rules of statutory construction, affirmed the district court finding that the statutory claims are time barred, when it ignored that each act which violates the statutes has its own limitations period because the statutes are written in the singular. *Id.*, at 14 (no analysis set out); *Cf.*, *Sewell v. Bernardin,* 795 F.3d 337, 341 (2nd Cir. 2015); *Page v. Comey,* Civ. No. 1:20-3460-DLF, ECF 115, at 10, 14-16 (D.D.C. Sept. 1, 2022) (Complaint doesn't reveal when reasonable discovery of every alleged violation could be made, declining to dismiss on limitations). The petitioner is prejudiced by the interpretation of the court of appeals which construes all subsequent claims to be barred if a claim is not filed within two years of the first violation whether or not sovereign immunity is waived. *Dougherty v. DHS, et al*, No. 22-40665 at 14. The petition asserts that in light of the plain statutory text, the court of appeals construction is wrong, otherwise a violator need only violate in stealth mode for two years, and they would be in the clear forever no matter how egregious and how often the violations, surely that was not the intent of Congress. 18 U.S.C. §1030; 18 U.S.C. §2510, et seq., as amended by 18 U.S.C. §2712; and 18 U.S.C. §2701, et seq.

20. While the petition raises four questions for review, petitioner has set out the most important questions based on statutory construction above; the most important of them all in paragraph 19, because by the Court of Appeals' construction computers

would no longer be our castles but tools of oppression instead. The petition raises important questions under Sup. Ct. Rule 10(a), and (c) that should be settled by this Court.

Accordingly, the petitioner respectfully requests that good cause and extraordinary circumstances be found and an order entered directing the Clerk to accept the petition as timely filed whether initially, or with an order extending the time to file a petition for a writ of certiorari for 60 days, up to and including February 16, 2023.

Respectfully submitted,



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January 18, 2023

Exhibit A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 19, 2023
Lyle W. Cayce
Clerk

No. 22-40665

MARLENE A. DOUGHERTY, *doing business as* LAW OFFICE OF MARLENE A. DOUGHERTY,

Plaintiff—Appellant,

versus

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNKNOWN JOHN AND JANE DOES, EMPLOYED BY DHS,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:21-CV-154

Before DAVIS, SOUTHWICK, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Plaintiff-appellant, Marlene A. Dougherty, proceeding *pro se*, filed suit against Defendants-Appellees, the Department of Homeland Security ("DHS") and unnamed DHS officers ("Unnamed Defendants"), alleging that Defendants unlawfully accessed and tampered with her computer network and telecommunications systems, in violation of her rights under the

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

First, Fourth, and Fifth Amendments, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2523, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the Stored Communications Act, 18 U.S.C. §§ 2701-2712, and state law. The district court dismissed Dougherty's amended complaint for lack of subject matter jurisdiction and for failure to state a claim. We AFFIRM but MODIFY THE JUDGMENT to dismiss without prejudice Dougherty's claims over which we lack subject matter jurisdiction.

I. BACKGROUND

Dougherty is an attorney practicing immigration law in Brownsville, Texas. She characterizes her practice as focusing on the "lawful defense of undocumented immigrants" who are "victims of the unauthorized practice of immigration law." As part of this work, Dougherty contends that she regularly appears before "the immigration agencies" and often is required to criticize "employees of the [a]gencies, including immigration judges."

In light of Dougherty's advocacy, she contends that DHS has retaliated against her by "unlawfully monitoring . . . her electronic and aural communications" and interfering in her "right to practice law on behalf of undocumented immigrants." As detailed in her amended complaint and attached exhibits, Dougherty alleges that she first became aware of this alleged unlawful monitoring in 2010 and continued to experience problems through 2021.

Specifically, in 2010, Dougherty's amended complaint implies that her phone conversation with a client about a filing fee payment was intercepted and resulted in her checks not being returned with a "receipt number" from DHS. In early 2018, Dougherty states that she mentioned her concern about these checks in conversation at her office and afterwards her checks "began to be blacked out." Also in 2018, Dougherty noticed

"changes to information stored in her QuickBooks," unauthorized edits to a legal brief, and the loss of computer access to her email account.

From 2019-2020, Dougherty had repeated issues registering for and signing into DHS-run websites and accounts. In October of 2019, Dougherty alleges that she received an anonymous voicemail that noted "where [she] was going [and] mischaracterizing her private religious activities." She further asserts that a year later an anonymous user posted on Twitter details from Dougherty's private conversation with her mother. On June 14, 2021, Dougherty alleges she "inadvertently found that the Office of the Principal Legal Advisor (OPLA)[,] a division of ICE[,] was logged in to and was the control organization to [her] Office 365 and Outlook Mail." And within the past two years, Dougherty alleges that she has received phone messages "in which law enforcement could be heard in the background."

Dougherty has reported the above issues several times throughout the years. In 2016, 2018, and 2020, she hired security experts to investigate the alleged unauthorized access and surveillance. Additionally, Dougherty has twice reported these issues to the Federal Bureau of Investigation ("FBI"), but no issues were found with her devices.

On October 7, 2021, Dougherty filed her original complaint seeking damages, injunctive relief, and a temporary restraining order. After the district court denied her request for a temporary restraining order, Dougherty filed her amended complaint—the operative pleading for this appeal—reasserting claims against DHS and the Unnamed Defendants.[1]

[1] Dougherty's amended complaint does not state whether she is asserting claims against the Unnamed Defendants in their official or personal capacities. However, Dougherty's opening brief on appeal clarifies that she intended to sue the Unnamed Defendants in their individual capacities. To the extent she also intended to sue the officers in their official capacities, such claims would face the same fate as those brought against

Specifically, Dougherty's amended complaint asserts claims under the Electronic Communications Privacy Act ("ECPA"), the Computer Fraud and Abuse Act ("CFAA"), and the Stored Communications Act ("SCA") against DHS and the Unnamed Defendants. She additionally brings claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[2] and a state-law antitrust claim against the Unnamed Defendants.

On January 11, 2022, Dougherty issued third-party subpoenas to AT&T and Twitter in order to identify the Unnamed Defendants. In response, Defendants filed an emergency motion to quash these subpoenas as prematurely issued under Rule 45 of the Federal Rules of Civil Procedure. After giving Dougherty a chance to respond, the district court granted Defendants' motion to quash and denied Dougherty's request for expedited discovery. On February 28, 2022, Defendants moved to dismiss Dougherty's claims for lack of subject matter jurisdiction and for failure to state a claim.

On March 1, 2022, the district court heard arguments on the Defendants request for a stay of discovery pending the court's resolution of the pending motion to dismiss. The court granted the stay, citing the strength of Defendants' motion to dismiss and Dougherty's lack of any allegation "that ties these particular defendants to the specific technological issues that . . . [she] allege[d]."

The district court also granted Defendants' motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6), dismissed Dougherty's claims with prejudice, and denied her request for a temporary and permanent injunction.

DHS. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." (citation omitted)).

[2] 403 U.S. 388 (1971).

Dougherty moved to amend the judgment, which the district court granted in part, agreeing with Dougherty that the dismissal of her SCA claims should have been without prejudice. As amended, the district court's judgment dismissed with prejudice Dougherty's ECPA and CFAA claims and dismissed without prejudice her SCA claims.[3] Dougherty timely appealed.

II. DISCUSSION

On appeal, Dougherty reasserts her claims and argues that the district court erred by dismissing them with prejudice and by denying her early discovery to identify the DHS agents. We address these contentions in turn.

A. Rule 12(b)(1)

1. Standard of Review

A dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) is reviewed *de novo*, applying the same standard as the district court.[4] "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction."[5] "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."[6]

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[3] The district court again denied Dougherty's request for injunctive relief in its amended order. Although Dougherty appeals this order, she does not brief the issue of injunctive relief. Accordingly, she has "waived or abandoned this issue on appeal." *Al-Ra'id v. Ingle*, 69 F.3d 28, 31 (5th Cir. 1995).

[4] *Flores v. Pompeo*, 936 F.3d 273, 276 (5th Cir. 2019) (citing *Musslewhite v. State Bar. of Tex.*, 32 F.3d 942, 945 (5th Cir. 1994)).

[5] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam) (citation omitted).

[6] *Id.* (citing *Hitt v City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam)).

2. Sovereign Immunity

The district court correctly dismissed Dougherty's ECPA and CFAA claims against DHS because the Government has not waived sovereign immunity under either statute. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."[7] And because sovereign immunity goes to the court's subject matter jurisdiction, "Congress's waiver of [it] must be unequivocally expressed in statutory text and will not be implied."[8]

Here, Dougherty asserts that DHS violated the ECPA's prohibition on the unauthorized interception and disclosure of wire, oral, or electronic communications, codified at 18 U.S.C. § 2511. Although "[s]ection 2511 is . . . primarily a criminal provision," § 2520(a) "expressly allows private civil suits by any person whose electronic communication is intercepted in violation of 'this chapter' of the statute."[9] Section 2520(a) states that an aggrieved party has a cause of action against "the person or entity, *other than the United States*, which engaged in that violation."[10] Because Dougherty seeks relief under § 2520(a), which expressly bars relief against the United States and its agencies, the district court correctly dismissed her claim for lack of subject matter jurisdiction.[11]

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[7] *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (citations omitted).

[8] *Freeman v. United States*, 556 F.3d 326, 335 (5th Cir. 2009) (internal quotation marks and citation omitted).

[9] *DIRECTV, Inc. v. Bennett*, 470 F.3d 565, 566-67 (5th Cir. 2006) (per curiam).

[10] 18 U.S.C. § 2520(a) (emphasis added).

[11] *See Voinche v. Obama*, 744 F. Supp. 2d 165, 175-76 (D.D.C. 2010) (dismissing plaintiff's claims against federal agencies and officers because under § 2520 "the United States is specifically exempted" (internal quotation marks and citation omitted)).

However, as Dougherty points out, another section of the ECPA, titled the Stored Communications Act, does provide a cause of action for money damages against the United States. Specifically, 18 U.S.C. § 2712 permits suits against the United States for willful violations of the SCA and "chapter 119" of title 18.[12] However, like other courts, we determine that the express language of § 2520 prohibits claims against the United States brought under that section, regardless of whether immunity is waived for claims raised under § 2712.[13]

Dougherty has similarly failed to demonstrate that the United States has waived sovereign immunity for claims under the CFAA. The CFAA provides a civil cause of action to "[a]ny person who suffers damage or loss by reason of a violation of this section."[14] Dougherty argues that because the statute defines "person" to include the United States and its agencies, the Government has waived sovereign immunity because DHS is a "'person' 'who' can be sued for a violation of the statute." We find this argument not only misreads the statute, but also falls short of the requirement that

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[12] Chapter 119 includes 18 U.S.C. §§ 2510-2523.

[13] *See Thomas v. Seth*, 317 F. App'x 279, 282 (3d Cir. 2009) (per curiam) (unpublished) ("[T]he Wiretap Act exempts the United States . . . from liability, barring certain conditions not present in this case." (citing 18 U.S.C. §§ 2520(a) and 2712)); *see also Lott v. United States*, No. 4:10-2862, 2011 WL 13340702, at *4 (S.D. Tex. May 31, 2011), *report and recommendation adopted*, No. 10-2862, 2011 WL 13340701 (S.D. Tex. June 17, 2011) ("Although a person may bring a civil cause of action under the Federal Wiretap Act under some circumstances, the United States is specifically excepted as a permissible defendant." (citing 18 U.S.C. § 2520(a)). Even assuming there was ambiguity between § 2520 and § 2712 regarding the Government's waiver of sovereign immunity, we "construe any ambiguities in the scope of a waiver in favor of the sovereign." *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012).

[14] 18 U.S.C. § 1030(g).

Congress's waiver of sovereign immunity be "unequivocally expressed in statutory text."[15]

Accordingly, because the United States has not expressly waived its sovereign immunity for claims under § 2520 and § 1030, the district court correctly dismissed these claims against DHS for lack of jurisdiction.

3. Administrative Exhaustion

Dougherty alleges that DHS violated § 2701(a) of the SCA by gaining access to her electronic communications while the messages were in storage with her email providers. As noted above, although the SCA allows for suits against the United States for willful violations of the Act, § 2712 preconditions such suits on compliance with an administrative scheme. Specifically, a plaintiff may file suit against the United States "only after a claim is presented to the appropriate department or agency under the procedures of the Federal Tort Claims Act."[16]

Under the Federal Tort Claims Act ("FTCA"), "a plaintiff must give notice of his claim to the appropriate federal agency."[17] Such notice "is a jurisdictional prerequisite to filing suit under the FTCA."[18] Dougherty's amended complaint does not allege that she presented her claim to DHS prior to filing suit. Instead, she asserts that she satisfied the jurisdictional prerequisite by serving DHS with notice on the same day she filed suit. We find this argument unavailing in light of § 2712's explicit requirement that a

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[15] *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)).

[16] 18 U.S.C. § 2712(b)(1).

[17] *Cook v. United States*, 978 F.2d 164, 165-66 (5th Cir. 1992) (per curiam) (citations omitted).

[18] *Id.*

plaintiff can bring suit "*only after* a claim is presented to the appropriate department."[19] Accordingly, the district court correctly held that it lacked subject matter jurisdiction over Dougherty's SCA claim against DHS.

4. Dismissal Without Prejudice

The district court dismissed Dougherty's claims against DHS for lack of subject matter jurisdiction. Specifically, the court dismissed her ECPA and CFAA claims with prejudice and her SCA claims without prejudice. However, this Court has made "clear that a jurisdictional dismissal must be *without* prejudice to refiling in a forum of competent jurisdiction."[20] Because "[t]his rule applies with equal force to sovereign-immunity dismissals,"[21] the district court erred when it dismissed Dougherty's ECPA and CFAA claims with prejudice.

B. Rule 12(b)(6)

1. Standard of Review

We review the grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*.[22] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[23] In considering a motion to dismiss, "a district court must limit itself to the contents of the pleadings, including

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[19] 18 U.S.C. § 2712(b)(1) (emphasis added).

[20] *Carver v. Atwood*, 18 F.4th 494, 498-99 (5th Cir. 2021) (citing *Mitchell v. Bailey*, 982 F.3d 937, 944 (5th Cir. 2020)).

[21] *Id.* (citing *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996)).

[22] *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012) (en banc).

[23] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

attachments thereto."[24] Although "pro se complaints are held to less stringent standards," this Court has made clear that even for *pro se* litigants "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."[25]

2. Chapter 15 of the Texas Business & Commerce Code Claim

Dougherty additionally alleges that Unnamed Defendants violated the Texas Business and Commerce Code § 15.05(a) by conspiring to "reduce the output" of her legal practice. Under § 15.05(a), "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful." The district court dismissed this claim on the grounds that Dougherty had failed to state a claim against the Unnamed Defendants "absent actionable identifying information" regarding the identity of the defendants or sufficient information to render it conceivable that discovery would prove fruitful in uncovering their identities.

On appeal, Dougherty does not dispute that she has not plausibly alleged a state-law antitrust claim and instead argues that dismissal should be without prejudice, allowing her to refile and obtain discovery to identify the unknown officers. We agree that Dougherty's amended complaint does not "contain sufficient factual matter, accepted as true," to state a Texas antitrust claim against the Unnamed Defendants.[26]

Even setting aside the fact that Dougherty's amended complaint lacks any identifying information about the Unnamed Defendants, the complaint

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[24] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (citing FED. R. CIV. P. 12(b)(6)).

[25] *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (internal quotation marks and citations omitted).

[26] *Iqbal*, 556 U.S. at 678 (citation omitted).

fails to survive a Rule 12(b)(6) motion for the independent reason that it is devoid of any allegations that these officers were part of an antitrust conspiracy that resulted in significant market control over the relevant industry. The totality of Dougherty's allegation under this claim is that "[t]he Doe Defendants violated . . . § 15.05(a) by acting in combination and/or conspiring in their acts to reduce the output of plaintiff's lawful business activities which are in opposition to the unauthorized practice of immigration law and to remedy the injury thereby imposed." Notably lacking is any allegation—plausible or otherwise—that the Unnamed Defendants were conspiring to unreasonably restrain trade, which is an essential element of the Texas antitrust statute.[27] Accordingly, Dougherty has failed to state a plausible state-law antitrust claim against the Unnamed Defendants.

3. Bivens *Claims*

Finally, Dougherty brings claims under *Bivens* against the Unnamed Defendants for violating her First, Fourth, and Fifth Amendments by "exceeding every state and/or federal statut[e] . . . which concerns wiretaps, protected information, and computer access." The district court dismissed Dougherty's *Bivens* claims after concluding there was no "compelling argument" to extend *Bivens* to this new context.

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[27] *See In re Champion Printing & Copying, L.L.C.*, No. 21-51234, 2023 WL 179851, at *4 (5th Cir. Jan. 13, 2023) (per curiam) (unpublished) (analyzing claims filed under Texas Business and Commercial Code § 15.05(a) and noting that under that provision "plaintiffs cannot 'demonstrate the unreasonableness of a restraint merely by showing that it caused [one person] economic injury." (citing *Regal Ent. Grp. v. iPic-Gold Class Ent., LLC*, 507 S.W.3d 337, 348 (Tex. App.—Houston [1st Dist.] 2016, no pet.)). Unpublished opinions issued in or after 1996 are "not controlling precedent" except in limited circumstances, but they "may be persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

The Supreme Court has set forth a two-step inquiry to determine whether a cognizable *Bivens* remedy exists. At step one, the court must determine whether a claim "presents a new *Bivens* context."[28] A *Bivens* claim arises in a "new context" if "the case is different in a meaningful way from previous *Bivens* cases decided by" the Supreme Court.[29] If a case arises in a new context, "a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'"[30]

As to the first step, we agree with the district court that Dougherty's claims arise in a "new *Bivens* context." The Supreme Court has never recognized a First Amendment *Bivens* claim, and Dougherty's Fourth and Fifth Amendment *Bivens* claims differ meaningfully from previous *Bivens* cases involving those constitutional provisions.[31] As recognized by the Fourth Circuit, "a claim based on unlawful electronic surveillance presents wildly different facts and a vastly different statutory framework from a warrantless search and arrest."[32]

At the second step, we find that "special factors" counsel hesitation against recognizing a new *Bivens* remedy. Specifically, because "Congress has provided alternative remedies for aggrieved parties in [Dougherty's]

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[28] *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017).

[29] *Id.*

[30] *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (quoting *Ziglar*, 582 U.S. at 136).

[31] In *Bivens*, the Court created an implied damages remedy under the Fourth Amendment for an allegedly unconstitutional search and seizure. 403 U.S. at 389. And in *Davis v. Passman*, the Court recognized a *Bivens* remedy in a Fifth Amendment gender-discrimination case. 442 U.S. 228, 230 (1979).

[32] *Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019).

position," that "independently foreclose a *Bivens* action."[33] As evidenced by Dougherty's federal statutory claims, "Congress has created several private causes of actions under various statutes governing the surveillance and the integrity of personal computing devices, including the SCA, FISA, and the CFAA."[34] Accordingly, we affirm the district court's dismissal of Dougherty's First, Fourth, and Fifth Amendment *Bivens* claims with respect to the Unnamed Defendants.

4. Dismissal With Prejudice

Dougherty argues that the district court erred in dismissing her state-law antitrust claim and *Bivens* claims with prejudice given that she has not been able to conduct discovery into the identity of the Unnamed Defendants. Although the decretal language in the district court's amended order did not explicitly dismiss these claims with or without prejudice, "a dismissal is presumed to be with prejudice unless the order explicitly states otherwise."[35]

"Generally[,] a district court errs in dismissing a *pro se* complaint for failure to state a claim under Rule 12(b)(6) without giving the plaintiff an opportunity to amend."[36] However, dismissal without prejudice is not required "if the plaintiff has already pleaded his 'best case.'"[37] We find that Dougherty has pleaded her "best case." She has presented her arguments several times before the district court in both her initial and amended

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[33] *Egbert*, 142 at 1806.

[34] *Attkisson*, 925 F.3d at 621.

[35] *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 n.8 (5th Cir. 1993) (citations omitted).

[36] *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (per curiam) (citing *Moawad v. Childs*, 673 F.2d 850, 851-52 (5th Cir. 1982)).

[37] *Brewster v. Dretke*, 587 F.3d 764, 768 (5th Cir. 2009) (per curiam) (citation omitted).

complaint, as well as her opposition to the Defendants' motion to dismiss and her Rule 59(e) motion to "alter or amend" the district court's order. Despite these opportunities, Dougherty remains unable to state plausible antitrust and *Bivens* claims against the Unnamed Defendants.

Further, Dougherty's appellate filings fail to identify "what facts [s]he would have added or how [s]he could have overcome the deficiencies found by the district court if [s]he had been granted an opportunity to amend."[38] Although Dougherty contends that she would not refile these claims without identifying the Unnamed Defendants, she does not explain how uncovering the identity of the officers would cure the deficiencies in her *Bivens* claims or her failure to even allege the basic components of an antitrust conspiracy. Therefore, because Dougherty has failed to show the district court erred in dismissing her *Bivens* and antitrust claims presumably with prejudice.

5. Statute of Limitations

Dougherty's complaint also appears to assert violations of the ECPA, CFAA, and SCA against the Unnamed Defendants in their individual capacities. The district court dismissed these claims as time barred under 18 U.S.C. § 2520(e) (ECPA), 18 U.S.C. § 1030(g) (CFAA), and 18 U.S.C. § 2707(f) (SCA). We find no reversable error in the district court's dismissal of Dougherty's ECPA, SCA, and CFAA claims against the Unnamed Defendants.

C. Entitlement to Discovery

Finally, Dougherty asserts the district court abused its discretion in staying discovery pending resolution of Defendants' motion to dismiss and

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[38] *Goldsmith v. Hood Cnty. Jail*, 299 F. App'x 422, 423 (5th Cir. 2008) (per curiam) (unpublished).

granting Defendants' motion to quash her third-party subpoenas. The district court explained that the subpoenas were premature under the Federal Rules, and that the court had concerns about potential First Amendment issues as to the Twitter subpoena. We review a district court's order to stay discovery pending a dispositive motion for abuse of discretion.[39] And we review a district court's grant of a motion to quash a subpoena under the same standard.[40] As the party seeking discovery, Dougherty bears the burden of showing its necessity.[41]

A plaintiff is not entitled to jurisdictional discovery "if the record shows that the requested discovery is not likely to produce the facts needed to withstand" a motion to dismiss.[42] In this case, we are unable to see how discovery into the identities of the Unnamed Defendants would have impacted our dismissal of Dougherty's claims on the grounds of sovereign immunity, exhaustion, timeliness, failure to plausibly state an antitrust injury, and the creation of a new *Bivens* context. Accordingly, we can discern no abuse of discretion in the district court's decision to grant a motion to stay discovery and quash Dougherty's third-party subpoenas.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's amended judgment as modified. Specifically, we modify the judgment to state that Dougherty's ECPA and CFAA claims against DHS are dismissed without

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[39] *Davila v. United States*, 713 F.3d 248, 263-64 (5th Cir. 2013) (citation omitted); *see also Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

[40] *Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994).

[41] *Freeman v. United States*, 556 F.3d 326, 341 (5th Cir. 2009) (citation omitted).

[42] *Davila*, 713 F.3d at 264.

prejudice. We otherwise affirm the district court's judgment that Dougherty's SCA claims are dismissed without prejudice and the remainder of her claims are dismissed with prejudice. AFFIRMED AS MODIFIED.

Exhibit B

Marlene Dougherty

From: no-reply@sc-us.gov
Sent: Monday, December 18, 2023 7:39 PM
To: Marlene Dougherty
Subject: Your Electronic Filing record has been submitted.

Your Petition for a Writ of Certiorari has been submitted. It will be reviewed once the hard copy is received. If you are not expecting this email, please contact the Supreme Court Electronic Filing Support Group at eFilingSupport@supremecourt.gov.

Exhibit C

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

December 27, 2023

Marlene A. Dougherty
Law Office of Marlene A Dougherty
314 E. 8th Street
Brownsville, TX 78520

RE: Dougherty v. DHS
USAP5 22-40665

Dear Ms. Dougherty:

The above-entitled petition for a writ of certiorari was postmarked December 20, 2023 and received December 22, 2023. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was September 19, 2023. Therefore, the petition was due on or before December 18, 2023. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.

The time for filing a petition for a writ of certiorari is not controlled by the date of the issuance of the mandate. Rule 13.3.

Your petitions and check no. 004398 in the amount of $300.00 are herewith returned.

Sincerely,
Scott S. Harris, Clerk
By:

Sara Simmons
(202) 479-3023

Enclosures

Exhibit D

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

January 9, 2024

Marlene A. Dougherty
Law Office of Marlene A. Dougherty
314 E. 8th Street
Brownsville, TX 78520

RE: Dougherty v. DHS
USAP5 22-40665

Dear Ms. Dougherty:

The above-entitled petition for a writ of certiorari was originally postmarked December 20, 2023 and received again on January 9, 2024. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was September 19, 2023. Therefore, the petition was due on or before December 18, 2023. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.

If you wish to proceed, you may submit your petition with a motion to direct the Clerk to file the petition for a writ of certiorari out of time.

Sincerely,
Scott S. Harris, Clerk
By:
Sara Simmons
(202) 479-3023

Enclosures

Exhibit E

effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. (June 25, 1948, ch. 646, § 1, 62 Stat. 961; May 24, 1949, ch. 139, § 104, 63 Stat. 104; May 10, 1950, ch. 174, § 3, 64 Stat. 158.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 28, U. S. C., 1940 ed., §§ 637, 723, and 730 (R. S., §§ 862, 913, 917; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Section consolidates section 723 with parts of sections 637 and 730 of title 28, U. S. C., 1940 ed. The remainder of such sections 637 and 730 is incorporated in section 2072 of this title.

Words "and of proceedings before trustees appointed by the court" and "suits in equity" were omitted, inasmuch as such matters are covered by the Federal Rules of Civil Procedure prescribed under section 2072 of this title.

Specific references to "mode of proof," "mesne process," and "other process," in sections 637, 723, and 730 of title 28, U. S. C., 1940 ed., were omitted as covered by words "practice and procedure".

The term "district courts of the United States" includes the district courts for Hawaii and Puerto Rico. (See reviser's note under section 2072 of this title.)

The second, third, and fourth paragraphs of the revised section were included to give the Supreme Court the same rule-making power with respect to admiralty and maritime procedure which Congress has already conferred with respect to all other cases.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

For Senate amendment to this section, see 80th Congress Senate Report No. 1559, amendment No. 41.

AMENDMENTS

1950—Act May 10, 1950, amended section to allow proposed rule changes to be submitted to Congress not later than May 1st of each year and to become effective 90 days from the date of their being reported from the Supreme Court.

1949—Act May 24, 1949, amended section by substituting "Chief Justice" for "Attorney General" in the third par.

ADMIRALTY RULES

See Appendix to this title.

CROSS REFERENCES

District Court of Guam, rules promulgated under this section as applicable, see section 1424 of Title 48, Territories and Insular Possessions.

§ 2074. Rules for review of decisions of the Tax Court of the United States.

The Supreme Court shall have the power to prescribe, and from time to time amend, uniform rules for the filing of petitions or notices of appeal, the preparation of records, and the practice, forms, and procedure in the several United States Courts of Appeals in proceedings for review of decisions of the Tax Court of the United States.

Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

Such rules shall not take effect until they shall have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. (Added July 27, 1954, ch. 583, § 1, 68 Stat. 567.)

Chapter 133.—REVIEW—MISCELLANEOUS PROVISIONS

AMENDMENTS

1958—Pub. L. 85-791, § 1, Aug. 28, 1958, 72 Stat. 941, amended analysis by adding item 2112.

1949—Act May 24, 1949, ch. 139, § 105, 63 Stat. 104, amended analysis by adding item 2111.

FEDERAL RULES OF CIVIL PROCEDURE

Appeals, how taken, see rules 72—76, Appendix to this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Appeals, how taken, see rules 37—39 and 46 (a) (2), Title 18, Appendix, Crimes and Criminal Procedure.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the

period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. (June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 106, 63 Stat. 104.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 28, U. S. C., 1940 ed., §§ 47, 47a, 349a, 350, 380, 380a, section 29 of title 15, U. S. C., 1940 ed., Commerce and Trade, and section 45 of title 49, U. S. C., 1940 ed., Transportation (Feb. 11, 1903, ch. 544, § 2, 32 Stat. 1167; Mar. 3, 1911, ch. 231, §§ 210, 266, 291, 36 Stat. 1150, 1162, 1167; Mar. 4, 1913, ch. 160, 37 Stat. 1013; Oct. 22, 1913, ch. 32, 38 Stat. 220; Sept. 6, 1916, ch. 448, § 6, 39 Stat. 727; Feb. 13, 1925, ch. 229, §§ 1, 8 (a, b, d), 43 Stat. 936, 940; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926; Aug. 24, 1937, ch. 754, §§ 2, 3, 50 Stat. 752; June 9, 1944, ch. 239, 58 Stat. 272).

Section consolidates section 350 of title 28, U. S. C., 1940 ed., with those portions of sections 47, 47a, 349a, 380, and 380a, of said title 28, section 29, of title 15, U. S. C., 1940 ed., and section 45 of title 49, U. S. C., 1940 ed., respective time for taking direct appeal. (For disposition of other provisions of said sections, see Distribution Table.)

Subsection (a) of the revised section is derived from sections 349a and 380a of title 28, U. S. C., 1940 ed. The phrase "under rules prescribed by the Supreme Court" was substituted for the phrase "under such rules as may be prescribed by the proper courts" which appeared in both such sections. The Supreme Court by its revised rules 10—13 has made adequate provision for filing record and docketing case. (See Revised Rules of the Supreme Court following section 354 of title 28, U. S. C. 1940 ed.)

Subsection (b) is in accord with sections 47 and 47a of title 28, U. S. C., 1940 ed., and section 29 of title 15, U. S. C., 1940 ed., Commerce and Trade, and section 45 of title 49, U. S. C., 1940 ed., Transportation.

Subsection (c), with respect to the time for taking other appeals or petitioning for a writ of certiorari, substitutes, as more specific, the words "ninety days" for the words "three months" contained in section 350 of title 28, U. S. C., 1940 ed. The provision in said section 350 for allowance of additional time was retained, notwithstanding the language of the Supreme Court in Comm'r v. Bedford's Estate, 1945, 65 S. Ct. 1157, 1159, 325 U. S. 283, 89 L. Ed. 1611, to the effect that the 3 months' period is "more than ample * * * to determine whether to seek further review".

In subsection (c), words "in a civil action, suit, or proceeding" were added because section 350 of title 28, U. S. C., 1940 ed., was superseded as to criminal cases by Federal Rules of Criminal Procedure, rule 39 (a) (2), (b) (2).

Words "or the United States Court of Appeals for the District of Columbia" in section 350 of title 28, U. S. C., 1940 ed., were omitted as covered by "court of appeals" in subsection (d) of this revised section.

Words in section 350 of title 28, U. S. C., 1940 ed., "excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months", were omitted as obsolete, in view of the independence of the Philippines recognized by section 1240 of title 48, U. S. C., 1940 ed., Territories and Insular Possessions.

Subsection (e) relates only to supersedeas or stay of execution of judgments sought to be reviewed in the Supreme Court on writ of certiorari. Supersedeas or stay of proceedings taken to the Supreme Court by appeal from courts of appeals, or direct appeals from a district court or three-judge courts, is governed by Rule 62 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

AMENDMENTS

1949—Subsec. (c) amended by act May 24, 1949, § 106 (a), to clarify the allowance of an additional 60 days in which to apply for a writ of certiorari.

Subsec. (d) added by act May 24, 1949, § 106 (b).

Subsecs. (e) and (f), formerly subsecs. (d) and (e), renumbered by act May 24, 1949, § 106 (b).

FEDERAL RULES OF CRIMINAL PROCEDURE

Criminal cases, time for appeal or certiorari, see rule 37, Title 18, Appendix, Crimes and Criminal Procedure.

§ 2102. Priority of criminal case on appeal from State court.

Criminal cases on review from State courts shall have priority, on the docket of the Supreme Court, over all cases except cases to which the United States is a party and such other cases as the court may decide to be of public importance. (June 25, 1948, ch. 646, 62 Stat. 962.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 28, U. S. C., 1940 ed., § 351 (Mar. 3, 1911, ch. 231, § 253, 36 Stat. 1160; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Changes were made in phraseology.

§ 2103. Appeal from State court improvidently taken regarded as writ of certiorari.

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs. (June 25, 1948, ch. 646, 62 Stat. 962.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 28, U. S. C., 1940 ed., § 344 (Mar. 3, 1911, ch. 231, §§ 236, 237, 36 Stat. 1156; Dec. 23, 1914, ch. 2, 38 Stat. 790; Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726; Feb. 17, 1922, ch. 54, 42 Stat. 366; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Provisions of section 344 of title 28, U. S. C., 1940 ed., relating to jurisdiction of the Supreme Court to review decisions of the highest courts of the States are the basis of section 1257 of this title. Other provisions of said section 344 are incorporated in section 2106 of this title.

Changes were made in phraseology.

§ 2104. Appeals from State courts.

An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States. (June 25, 1948, ch. 646, 62 Stat. 962.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 28, U. S. C., 1940 ed., § 871 (R. S., § 1003).

Words "An appeal to" were substituted for "writs of error from", in view of the abolition of the writ of error.

Changes were made in phraseology.

§ 2105. Scope of review; abatement.

There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction. (June 25, 1948, ch. 646, 62 Stat. 963.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 28, U. S. C., 1940 ed., § 879 (R. S. § 1011; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318).

NO.

IN THE

Supreme Court of the United States

MARLENE A. DOUGHERTY, doing business as, LAW OFFICE OF MARLENE A. DOUGHERTY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNKNOWN JOHN AND JANE DOE(S), EMPLOYED BY DHS,

Respondents.

MOTION TO DIRECT THE CLERK TO FILE THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OUT OF TIME

CERTIFICATION OF COMPLIANCE

As required, I certify that this Motion, is in compliance with Sup. Ct. Rule 33.2

because it contains 9 pages, with 26 pages of exhibits totaling 35 pages.

Artificial Intelligence was not used to create any part of the motion.

I declare under penalty of perjury that all information contained in this certification is true and correct and is made under the authority of 28 U.S.C. § 1746.

MARLENE DOUGHERTY
Pro se, Counsel of Record

LAW OFFICE OF MARLENE A. DOUGHERTY
314 E. 8th Street
Brownsville, Texas 78520
marlene@mdjd180.com
(956) 542-7108

January 19, 2024