

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARMAINE HAMER, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 16-658  
 )  
 ) NEIGHBORHOOD HOUSING SERVICES )  
 )  
 ) OF CHICAGO, et al., )  
 )  
 ) Respondents. )  
 )  
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CHARMAINE HAMER, )

Petitioner, )

v. ) No. 16-658

NEIGHBORHOOD HOUSING SERVICES )

OF CHICAGO, et al., )

Respondents. )

- - - - -

Washington, D.C.

Tuesday, October 10, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

JONATHAN A. HERSTOFF, New York, New York; on behalf of the Petitioner.

DAMIEN G. STEWART, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 16-658, Hamer versus Neighborhood Housing Services of Chicago.

Mr. Herstoff.

ORAL ARGUMENT OF JONATHAN A. HERSTOFF  
ON BEHALF OF THE PETITIONER

MR. HERSTOFF: Mr. Chief Justice, and may it please the Court:

One of the fundamental tenets of our constitutional structure is that only Congress can set the jurisdiction of the lower courts.

Based on that fundamental principle, Federal Rule of Appellate Procedure 4(a)(5)(C) is non-jurisdictional. The plain language of 28 U.S.C. Section 2107(c) is unambiguous. A district court can extend the time to appeal as long as a motion is timely filed and there has been a showing of excusable neglect or good cause.

No maximum extension of time is set in the statute or in any other statute. And, therefore, Rule 4(a)(5)(C) does not constitute

1 a limitation on a court's jurisdiction.

2 Because of that, Rule 4(a)(5)(C) is  
3 subject to forfeiture, waiver, and equitable  
4 considerations. And here there have been  
5 several acts of forfeiture and waiver. The  
6 Respondents forfeited their right to rely on  
7 Rule 4(a)(5)(C) by --

8 JUSTICE GINSBURG: Should we -- should  
9 we reach that question, Counsel? I mean, the  
10 Seventh Circuit typed this limitation as  
11 jurisdictional, so they never went on to  
12 consider any question of forfeiture or waiver.  
13 So, are you suggesting that we should decide  
14 those questions in the first instance?

15 MR. HERSTOFF: I submit that the  
16 record is sufficiently clear that the Court can  
17 -- can reach that issue here. Certainly, the  
18 Court has discretion just to have it considered  
19 on remand, but we do think that the forfeitures  
20 and waivers are clear here.

21 CHIEF JUSTICE ROBERTS: The issues of  
22 equitable considerations, special circumstances  
23 that you talk about, are there limits to those?  
24 I mean, let's say the issue comes up three  
25 years later. Can the district court at that

1 point consider to extend the time to appeal?

2 MR. HERSTOFF: Well, certainly, the  
3 equities would have to be weighed. Certainly,  
4 the longer -- the longer the extension is,  
5 perhaps the less reasonable it is for an  
6 appellant to rely on the district court's  
7 order, but assuming that a -- an order is  
8 relied on in good faith by the appellant,  
9 there's been no objection from the other side,  
10 there's been no showing of bad faith, we think  
11 that the equities should be considered. And  
12 here it's undisputed that Ms. Hamer was misled  
13 by the district court's order.

14 There's absolutely no showing of bad  
15 faith here. The Seventh Circuit itself  
16 recognized that Ms. Hamer was misled. And  
17 under those circumstances, we think that  
18 equitable considerations should require that  
19 the appeal be decided on the merits.

20 JUSTICE SOTOMAYOR: But -- but who  
21 misled her? Was it the court or was it her own  
22 attorney?

23 MR. HERSTOFF: Well --

24 JUSTICE SOTOMAYOR: Was this  
25 malpractice on the attorney's part for asking

1 for an extension that exceeded the Federal  
2 Rules? Assuming it's non-jurisdictional, that  
3 the statute is -- that you're right, that this  
4 is a non-jurisdictional barrier, it would still  
5 be a statutory barrier, a Federal Rules  
6 barrier.

7 MR. HERSTOFF: Yes, and we then -- we  
8 think that Ms. Hamer was misled by the district  
9 court's order. It's certainly true that she  
10 may have also been misled by the attorney's  
11 motion for the extension of time. But -- but  
12 both of those factored in here, and the  
13 equities should be considered.

14 There --

15 JUSTICE GINSBURG: That was an  
16 attorney who simultaneously was asking to be  
17 relieved from representing her, right?

18 MR. HERSTOFF: That's correct, Justice  
19 Ginsburg, yes. And that -- this case is  
20 directly analogous to Harris Truck Lines. In  
21 Harris Truck Lines, the attorney asked for an  
22 extension of time that was prohibited, both by  
23 rule and by statute, and yet this Court held  
24 that the -- the reliance on the extension of  
25 time required that the equities be considered

1 and required that the appeal be decided on the  
2 merits. And we submit here the same course  
3 should be followed.

4 JUSTICE KENNEDY: As a matter of  
5 custom and usage in the district courts, could  
6 you just tell me -- suppose the verdict is  
7 returned or the judge indicates it's what the  
8 -- what the ruling will be -- can both sides  
9 and do both sides sometimes say please don't  
10 enter the judgment, Your Honor, so that we can  
11 talk settlement? Does that happen?

12 MR. HERSTOFF: So do the parties ask  
13 that the district court withhold --

14 JUSTICE KENNEDY: Yes, in other words,  
15 both -- both parties tell -- in order to avoid  
16 these problems, say please don't enter  
17 judgment.

18 MR. HERSTOFF: Yeah, and that  
19 certainly can happen. In this particular  
20 case --

21 JUSTICE KENNEDY: Does it happen? I  
22 was curious to know.

23 MR. HERSTOFF: I have certainly seen  
24 some instances where a court comes out with a  
25 decision and then asks the parties to submit a



1 proposed form of judgment. So, that could  
2 certainly happen.

3 Here the judge -- the final judgment  
4 was entered alongside the --

5 JUSTICE KENNEDY: My -- my question  
6 was a little different. Could they say, Your  
7 Honor, we're in settlement negotiations, could  
8 you please withhold entry of judgment?

9 MR. HERSTOFF: I'm not sure that I've  
10 seen that specific scenario, especially in the  
11 summary judgment context where the motion was  
12 pending. What I have seen is where summary  
13 judgment motions are pending and the parties  
14 ask the court not to issue a decision at all.

15 I'm not sure I've seen a situation  
16 where a decision is out and the parties have  
17 asked the court to withhold --

18 JUSTICE KENNEDY: Could the parties in  
19 the district court agree to withhold entry of  
20 judgment for -- for -- for years and,  
21 therefore, prejudice the Court of Appeals when  
22 ultimately it has a case that -- that's old?

23 MR. HERSTOFF: For years, no, because  
24 Rule 58 of the Rules of Civil Procedure says  
25 that the judgment is considered to be entered

1 if --

2 JUSTICE KENNEDY: It's 180 days or  
3 something like that?

4 MR. HERSTOFF: It -- yes, Justice  
5 Kennedy.

6 JUSTICE KENNEDY: Right.

7 MR. HERSTOFF: So -- but outside of  
8 that, I don't -- I don't see any barrier to the  
9 parties asking the Court to do that. Although  
10 I --

11 JUSTICE GINSBURG: We have one brief,  
12 an amicus brief in this case, telling us that  
13 we were wrong in drawing a distinction between  
14 what's in a statute, jurisdictional, what's in  
15 the rule, non-jurisdictional.

16 And instead, anything that shifts a  
17 case from one court to the other, as notice of  
18 appeal does, that should be considered  
19 jurisdictional. This is Professor Dodson's  
20 brief.

21 MR. HERSTOFF: Yes. And I  
22 respectfully disagree with that for a couple of  
23 reasons.

24 That formulation of jurisdiction is  
25 inconsistent with this Court's case law and

1 also with the Rules of Civil Procedure.

2 For instance, under Professor Dodson's  
3 formulation of jurisdiction, the time to -- to  
4 appeal from the VA to the Court of Appeals for  
5 veterans' claims would be jurisdictional  
6 because it involves the transfer of  
7 adjudicatory authority, yet this Court  
8 unanimously held that that time period is  
9 non-jurisdictional.

10 Similarly, the Federal Rules of Civil  
11 Procedure, such as Rules 54(b) and 23(f), would  
12 be jurisdictional under Professor Dodson's  
13 formulation, but we know from Rule 82 that the  
14 Rules of Civil Procedure are  
15 non-jurisdictional.

16 So, therefore, Professor Dodson's  
17 formulation of jurisdiction is incorrect.

18 JUSTICE KAGAN: Do you think a rule  
19 can ever be jurisdictional without being  
20 codified in a statute?

21 MR. HERSTOFF: A rule that is not in a  
22 statute, no. I think that it cannot be  
23 jurisdictional.

24 JUSTICE KAGAN: But that's a flat  
25 rule, there are no exceptions to it? What if

1 the rule, for example, interpreted statutory  
2 language?

3 MR. HERSTOFF: If the rule interpreted  
4 statutory language, then perhaps under that  
5 interpretation of the statute, the statute  
6 could be jurisdictional. But the rule on its  
7 own could never be jurisdictional.

8 JUSTICE ALITO: And why is that?

9 MR. HERSTOFF: It stems from a long  
10 line of this Court's cases, such as Kontrick,  
11 and it also stems from Article III of the  
12 Constitution, which says that it's for Congress  
13 to establish the lower courts. So --

14 JUSTICE GINSBURG: We have drawn the  
15 line, I think it was in Justice Thomas's  
16 decision, between statute and rule pretty  
17 clearly.

18 MR. HERSTOFF: Yes, Justice Ginsburg,  
19 Bowles versus Russell establishes that and  
20 Kontrick versus Ryan establishes it, and cases  
21 as far back as the 1940s and perhaps even  
22 earlier have also said that court-promulgated  
23 rules cannot be jurisdictional. So, we think  
24 that the same course should be followed here.

25 CHIEF JUSTICE ROBERTS: The -- the

1 rule by its terms, I suppose, it says you've  
2 got to file the motion no later than 30 days  
3 after the time proscribed under Rule 4(a),  
4 right?

5 MR. HERSTOFF: That's right, Mr. Chief  
6 Justice.

7 CHIEF JUSTICE ROBERTS: But then it's  
8 quite clear that that's not jurisdictional,  
9 right?

10 MR. HERSTOFF: Rule 4(a)(5)(C) is not  
11 jurisdictional, yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: No, I'm  
13 talking about the time to file the motion for  
14 an extension.

15 MR. HERSTOFF: Oh, I'm sorry, the time  
16 to file, yes, under Bowles, that probably would  
17 be jurisdictional because it's right in the  
18 statute as well.

19 So the first sentence of Section  
20 2107(c) sets the time to file the motion. So I  
21 think under Bowles that would likely be  
22 jurisdictional.

23 CHIEF JUSTICE ROBERTS: The motion for  
24 an extension?

25 MR. HERSTOFF: The -- the time to file

1 the motion, yes, that would be jurisdictional,  
2 whereas the length of the extension would not  
3 be, and would, therefore, be subject to --

4 JUSTICE GINSBURG: What do you make of  
5 the argument that at one time it was in the  
6 statute and it was left out inadvertently?

7 MR. HERSTOFF: They respectfully  
8 disagree with that. I think the plain language  
9 of the statute is very clear, and this Court  
10 presumes that Congress intends its amendments  
11 to have effect.

12 And aside from that, the legislative  
13 history shows that Congress knew exactly which  
14 limitations it was incorporating into the  
15 statute.

16 Specifically, the House report says  
17 that it is incorporating the first sentence of  
18 Rule 4(a)(5) into the statute, which -- which  
19 is the time to file the motion and the  
20 requirement that there be excusable neglect or  
21 good cause.

22 That was being incorporated, whereas  
23 the entirety of Rule 4(a)(6) was being  
24 incorporated. So, certainly Congress made a  
25 specific decision which parts to incorporate

1 and which parts not to incorporate.

2 CHIEF JUSTICE ROBERTS: Well, they  
3 also said these were only technical changes,  
4 right?

5 MR. HERSTOFF: That -- that was said.  
6 However, a comparison between the old statute  
7 and the new statute shows that very significant  
8 changes were made. The older statute only  
9 permitted an extension of time if there was  
10 excusable neglect, plus a lack of notice.

11 Here, there can be an extension of  
12 time under the 1991 statute if there's any  
13 showing of excusable neglect or if there's any  
14 showing of good cause.

15 Additionally, the statute in the  
16 second part of 2107(c) permits a reopening of  
17 the appeal time if there's a showing of lack of  
18 notice, even if there's no excusable neglect.

19 JUSTICE GINSBURG: That's the part  
20 that was carried over the time limit in the  
21 case where the would be appellant didn't  
22 receive timely -- didn't receive notice of the  
23 judgment, that the judgment had been entered?

24 MR. HERSTOFF: Yes, Your Honor, that's  
25 right. But excusable neglect was not required

1 there, whereas it was under the old statute.

2 So certainly the 1991 statute was --  
3 is much more permissive toward extensions of  
4 time than the old statute and really the new  
5 statute codified what had been in the federal  
6 rules since the 1960s.

7 So, certainly the 1991 statute made  
8 very significant changes.

9 JUSTICE ALITO: Do you think there is  
10 anything that would bar the rules of appellate  
11 procedure from altering doctrines like  
12 forfeiture, waiver, and exceptional  
13 circumstances?

14 MR. HERSTOFF: I think that certainly  
15 is possible for the rules to do that. I don't  
16 think it was done here, but -- but yes.

17 JUSTICE ALITO: Well, this is --  
18 assuming it's not jurisdictional, it is a  
19 mandatory claims processing rule.

20 MR. HERSTOFF: Yes, Your Honor.

21 JUSTICE ALITO: And it -- it comes --  
22 it follows from a version of the statute that  
23 did impose a hard time limit, did it not?

24 MR. HERSTOFF: I would --

25 JUSTICE ALITO: The prior version of



1 the statute had a time limit.

2 MR. HERSTOFF: It did, yes.

3 JUSTICE ALITO: And there's at least  
4 some question whether Congress really intended  
5 to eliminate that or whether it was done  
6 inadvertently or whether it was done on the  
7 assumption that a time limit in the rules would  
8 also be jurisdictional, as this Court had  
9 suggested in some earlier cases.

10 MR. HERSTOFF: Well --

11 JUSTICE ALITO: Is all of that -- is  
12 any of that untrue?

13 MR. HERSTOFF: I would -- I would  
14 disagree that there's any evidence that the  
15 omission was -- was inadvertent. Although it's  
16 true that the old statute did have a 30-day  
17 time limit on extensions, the conditions to get  
18 that 30-day extension were much different from  
19 the --

20 JUSTICE GINSBURG: Yeah, it --

21 MR. HERSTOFF: -- 1991 statute.

22 JUSTICE GINSBURG: -- that was the  
23 requirement. You could get an extension if you  
24 weren't notified of the entry of judgment. And  
25 there was no provision for any extension, no

1 time period attached to any requests for  
2 extension other than one where you didn't get  
3 notice of the entry of judgment. Isn't that  
4 so?

5 MR. HERSTOFF: Under the old statute,  
6 there was a requirement that there be a lack of  
7 notice, plus excusable neglect. So both of  
8 those conditions had to be met in order for  
9 there to be an extension of time, whereas here  
10 there's a provision for an extension of time  
11 where there's excusable neglect but no lack of  
12 notice. There's a separate provision for an  
13 extension where there's lack of notice, but no  
14 excusable neglect.

15 So --

16 JUSTICE GINSBURG: And that's what's  
17 new, that was not in the original?

18 MR. HERSTOFF: Yes, Your Honor, that's  
19 correct.

20 JUSTICE ALITO: Well, given that this  
21 is a mandatory claims processing rule, and you  
22 said that you didn't think there was anything  
23 that would prevent the rules from altering  
24 doctrines like forfeiture and waiver, would it  
25 be within the discretion of a Court of Appeals

1 to say that we are going to treat this rule,  
2 even though it's not jurisdictional, in some  
3 respects as if it were jurisdictional, so that,  
4 for example, we will sua sponte raise the  
5 question of timeliness under the rule?

6 MR. HERSTOFF: I think that would be  
7 inconsistent with this Court's case law, which  
8 says that -- that forfeited issues should not  
9 be raised sua sponte unless there are  
10 exceptional circumstances. "Extraordinary  
11 circumstances," I think, was the terminology  
12 that was used.

13 And then here there are no such  
14 extraordinary circumstances that would -- that  
15 would allow a Court of Appeals to address this  
16 sua sponte.

17 JUSTICE ALITO: Well, how is that  
18 consistent with your answer that you -- that  
19 that doctrine could be changed via a rule?

20 MR. HERSTOFF: Oh, no, I'm sorry,  
21 maybe I misunderstood your question. My -- my  
22 understanding of --

23 JUSTICE ALITO: Well, if the doctrine  
24 could be changed by rule, could a court of  
25 appeals interpret the rule as changing the

1 doctrine? After all, it is a mandatory  
2 claims-processing rule. There has to be some  
3 teeth in the concept of mandatory.

4 MR. HERSTOFF: I think there -- there  
5 certainly are teeth here. If there's --

6 JUSTICE GINSBURG: It means if you  
7 raise it, it's mandatory. But a mandatory  
8 claim-processing rule can be waived, so that's  
9 the difference. What's mandatory is if the  
10 point is made, then the -- the mandatory rule  
11 applies. But if a defendant doesn't or a  
12 opposing party doesn't -- doesn't range --  
13 raise it, it can be waived.

14 MR. HERSTOFF: Yes, Your Honor. That  
15 -- that's my understanding. And what I -- what  
16 I understood Justice Alito's question to be was  
17 whether, by rule -- a federal rule could say  
18 that -- that there's no forfeiture or waiver  
19 allowed, that we don't consider forfeiture or  
20 waiver. Certainly, that's possible, but that  
21 -- that was not done here with Rule 4(a)(5)(C).

22 And certainly, this Court has long  
23 interpreted the Federal Rules to facilitate  
24 disposition of cases on their merits. For  
25 example, in Surowitz, the Court said that. In

1 Foman versus Davis, the Court held that an  
2 appeal had to proceed despite the fact that  
3 there was a defect in the notice of appeal. So  
4 there's been a long history of the Federal  
5 Rules being interpreted to maximize the  
6 resolution of cases on their merits, and we  
7 submit that Rule 4(a)(5)(C) is no different.

8 JUSTICE GINSBURG: But -- but if a  
9 court were by rule to say no waiver, no  
10 forfeiture, then it would be the same thing, in  
11 effect, as declaring the rule jurisdictional.

12 MR. HERSTOFF: It would have the same  
13 effect, yes. It might not be a --

14 JUSTICE GINSBURG: And the rules are  
15 not supposed to do that.

16 MR. HERSTOFF: They -- they generally  
17 do not. They certainly haven't in the history  
18 of the rules. My understanding of Justice  
19 Alito's question was that hypothetically, if  
20 the rules were changed to make that kind of  
21 provision, whether that would be permissible.  
22 We'd have to look certainly to see if that  
23 would be consistent with the Rules Enabling  
24 Act, which -- and whether such a no-forfeiture  
25 rule would be consistent with that.

1 JUSTICE ALITO: Well, for whose -- for  
2 whose benefit do you think something like the  
3 30-day rule was adopted? Solely for the  
4 benefit of the -- of the appellee?

5 MR. HERSTOFF: For the -- it is for  
6 the benefit of the appellee. It's also for the  
7 benefit of the -- of the courts.

8 JUSTICE ALITO: Ah, well, if it's at  
9 least partly for the benefit of the court, then  
10 why is the court stuck with whatever the  
11 appellee does on the issue of forfeiture?

12 If the appellee is asleep and this  
13 rule was supposed at least in part to protect  
14 the jurisdiction of the court of appeals, why  
15 can't the court of appeals put some teeth in  
16 this? Not by treating it as strictly  
17 jurisdictional, but as having -- putting a  
18 thumb certainly on the scale in -- in applying  
19 the doctrines that you're relying on.

20 MR. HERSTOFF: Well, I think that's  
21 where this Court's case law regarding  
22 extraordinary circumstances comes in. Under  
23 extraordinary circumstances, a court of appeals  
24 can raise a violation sua sponte. My argument  
25 --

1 JUSTICE KAGAN: What -- what would  
2 those circumstances be?

3 MR. HERSTOFF: Generally, the Court  
4 has found those kinds of circumstances in the  
5 habeas corpus context where there are  
6 federalism concerns. Certainly, although I  
7 haven't seen a case like this, there could be a  
8 situation where there's clearly bad faith on  
9 the part of the appellant and for some reason  
10 the appellee doesn't notice the error. And the  
11 court of appeals can look past that and say  
12 there's bad faith here and we're going to  
13 enforce the rule. But, certainly, nothing like  
14 that has happened here.

15 So because Rule 4(a)(5)(C) is  
16 non-jurisdictional, we'd submit that it is  
17 subject to forfeiture, waiver, and equitable  
18 considerations based on this Court's case law,  
19 based upon federal statutes, and based upon the  
20 Federal Rules.

21 And if there are no further questions,  
22 I'd like to reserve the balance of my time,  
23 please.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 Counsel.

1 Mr. Stewart.

2 ORAL ARGUMENT OF DAMIEN G. STEWART

3 ON BEHALF OF THE RESPONDENTS

4 MR. STEWART: Mr. Chief Justice, and  
5 may it please the Court:

6 There's one fact that's undisputed in  
7 this case, and that is that Ms. Hamer filed her  
8 notice of appeal outside of the 30-day  
9 limitation that's set forth within Rule 4.

10 And there are two approaches that the  
11 Court can take in this situation. One, the  
12 route taken by the Seventh Circuit below, which  
13 held that Rule 4(a)(5)(C) is jurisdictional.  
14 And, alternatively, the Court can do what it  
15 did the last term in the Manrique case and  
16 decline to rule on the jurisdictional issue and  
17 instead find that, at minimum, this is a  
18 mandatory claims-processing rule, that the  
19 Respondents timely raised the issue in  
20 pre-merits briefing to the Seventh Circuit, and  
21 that the district court was --

22 JUSTICE GINSBURG: But it was not  
23 raised in the district court, and that's the  
24 problem. That is, the judge says, fine, I'll  
25 give you 60 days because you have to find a new



1 counsel. The defendant is well aware of that  
2 time extension and, if the defendant had read  
3 the rules, would recognize that they say 30  
4 days, not 60 days. But on your view, the  
5 defendant could deliberately say nothing and  
6 then, on appeal, when it's too late for the  
7 district court to correct the error, say,  
8 sorry, mandatory, and under your rules, Court  
9 of Appeals, I don't waive anything.

10 It's -- it allows the defendant to  
11 create a trap.

12 MR. STEWART: That certainly isn't  
13 what happened in this case, Judge -- Justice  
14 Ginsburg.

15 And what I think the Petitioner's  
16 argument, that in -- in the question that  
17 you're interposing, it -- it ignores sort of  
18 the realities of litigation.

19 What -- there are certain occasions in  
20 a litigation where -- generally, we're all  
21 familiar with the rules, but there are certain  
22 occasions in litigation where you focus more  
23 clearly on the rules. And those instances  
24 usually occur when there's something to do,  
25 when there is something obligating us to do

1 something.

2 For instance, if we had to respond --  
3 if Petitioner's counsel, former counsel, had  
4 conferred with us, then we would have looked at  
5 -- perhaps may have looked at the rule to  
6 determine whether -- what is -- what is the  
7 rule? What is the time frames that -- in that  
8 case we may have been able to -- to do  
9 something.

10 JUSTICE GINSBURG: But you would have  
11 been able to if you got notice, even if you  
12 were not --

13 MR. STEWART: Right.

14 JUSTICE GINSBURG: -- you didn't --  
15 weren't consulted in advance. Once you know  
16 that there has been a 60-day order issued, you  
17 -- you are free to say: Judge, that was a  
18 mistake; you can't do more than 30 days.

19 MR. STEWART: And, again, so we were  
20 not -- we were not given the opportunity to --  
21 to look at the rules. We didn't have an  
22 opportunity to respond --

23 JUSTICE GINSBURG: You didn't have an  
24 opportunity to look at the rules?

25 MR. STEWART: Well, there was no

1 occasion for us to do so. In other words, once  
2 the motion was filed, usually you would have  
3 had an opportunity to object or interpose a  
4 response. That opportunity didn't come to  
5 pass. So the -- the untimeliness --

6 JUSTICE SOTOMAYOR: Sorry, could you  
7 slow down and tell me why not? You were served  
8 with notice of the motion, weren't you?

9 MR. STEWART: We were. And the order  
10 was entered hours after we received the motion.  
11 So we didn't have the opportunity really to  
12 look and then interpose an objection. But once  
13 that order was filed, then we were in a  
14 different place.

15 And there's no obligation, there's no  
16 rule, there's no statute or any guidance that  
17 suggests that once an order was filed, that we  
18 would have had a -- an obligation to file  
19 perhaps a motion for reconsideration, which is  
20 what the Petitioner says --

21 JUSTICE GINSBURG: But you first --  
22 you certainly, even in the court of appeals,  
23 you said no jurisdictional problem here, Court;  
24 we concede that the court of appeals has  
25 jurisdiction.

1           So -- and that was long after you  
2           could have looked at the rules. You said twice  
3           in your docketing statement that the court of  
4           appeals had jurisdiction. And it was only  
5           Seventh Circuit, by raising the question, that  
6           then you latched onto it.

7           MR. STEWART: Right. And so we made  
8           those statements in a docketing statement,  
9           which is a tool used by the Seventh Circuit for  
10          administration of the courts. And, certainly,  
11          there is a preliminary statement on  
12          jurisdiction where we made the representations  
13          to the court that we did.

14          That was a mistake. But there was no  
15          consequence to that mistake. In other words,  
16          the way the Seventh Circuit -- the Seventh  
17          Circuit's practitioner's handbook, it gives an  
18          opportunity for the appellees to correct any  
19          mistakes that are contained in a docketing  
20          statement. That is exactly what happened in  
21          this case.

22          The very next day, the Seventh Circuit  
23          required the Respondents to brief the issue of  
24          jurisdiction. We responded seven or eight days  
25          later, notified the Seventh Circuit that, at

1 minimum, this was a mandatory claims-  
2 processing --

3 JUSTICE SOTOMAYOR: Just so we  
4 understand the purpose of a docketing  
5 statement, I think, unless the Seventh Circuit  
6 is different than others, that its intent is  
7 for the Court to be able to identify the legal  
8 questions that will be implicated by the case,  
9 correct?

10 MR. STEWART: Correct.

11 JUSTICE SOTOMAYOR: And that also  
12 gives the Court the power to decide whether  
13 some sort of mediation or some sort of  
14 bifurcated briefing or whatever else is  
15 necessary, so it serves a function, doesn't it?

16 MR. STEWART: It does. It does.

17 JUSTICE SOTOMAYOR: All right. So the  
18 fact that you made these statements didn't  
19 notify the Seventh Circuit that you had not  
20 forfeited this claim, correct?

21 MR. STEWART: Correct.

22 JUSTICE SOTOMAYOR: So why didn't you  
23 forfeit it by making the statement?

24 MR. STEWART: Because the Seventh  
25 Circuits are not binding. In the Seventh --

1 the docketing statements are not binding.

2 They -- the rules, they specifically  
3 spell out that if there are any inaccuracies,  
4 any mistakes made in the docketing statement,  
5 the Court will look at that docketing statement  
6 and require the parties to correct it, which is  
7 -- which is exactly what happened in this case.

8 JUSTICE SOTOMAYOR: I'm sorry, I don't  
9 know that correction -- what correction means,  
10 when that may be a reason for us to remand this  
11 issue to the circuit.

12 MR. STEWART: Right, right.

13 JUSTICE SOTOMAYOR: But I take  
14 correction to mean there's an error in the  
15 record, not an error in my concessions.

16 MR. STEWART: So there was -- we made  
17 -- we -- we made a mistake in describing that  
18 the Petitioner had filed their notice of appeal  
19 in a timely manner. She didn't.

20 The Seventh Circuit required us to  
21 brief that issue. We did in the -- in our  
22 initial -- in our pre-merits briefing to the  
23 Seventh Circuit. We corrected it and notified  
24 the Court that there was a problem with the  
25 timeliness of her notice of appeal, that this

1 was a violation of a mandatory claims  
2 processing.

3 JUSTICE GINSBURG: Well, the Second --  
4 the Seventh Circuit said -- tipped you off to  
5 this. You didn't tell the -- that you suddenly  
6 discovered this. The Seventh Circuit  
7 interjected it into the case.

8 But if the rule is mandatory, but not  
9 jurisdictional, then the Seventh Circuit had no  
10 business tipping you off. We follow the  
11 principle of party presentation, and it was up  
12 to you to raise it, not up to the Court of  
13 Appeals to tell you.

14 MR. STEWART: So this Court's  
15 jurisprudence from Kontrick, Eberhart and  
16 especially in Manrique, the issue of raising  
17 the -- the issue that the violation of a  
18 mandatory claims processing rule is timely when  
19 it's raised at the initial brief in the Circuit  
20 Court, we did better than that here. We raised  
21 it in pre-merits briefing to the circuit.

22 JUSTICE GINSBURG: And where -- I know  
23 that's a Seventh Circuit rule that you can  
24 raise it before the brief -- anytime before the  
25 briefing on the merits, but where else is it

1 the rule?

2 MR. STEWART: In -- in the Manrique  
3 case. In Manrique, the government raised the  
4 issue of the timeliness of the notice -- of the  
5 untimeliness of the notice of appeal in merits  
6 briefing before the 11th Circuit.

7 JUSTICE KAGAN: Mr. Stewart, do I  
8 understand you to no longer be relying on the  
9 argument that this is a jurisdictional rule?

10 MR. STEWART: No, we do believe that  
11 this is a jurisdictional rule.

12 JUSTICE KAGAN: Because you've been  
13 standing up there for a while now making  
14 arguments that would be true if it weren't a  
15 jurisdictional rule.

16 MR. STEWART: Yes. Right.

17 JUSTICE KAGAN: I mean, so which is  
18 it? Do you think that this is a jurisdictional  
19 -- that this is a jurisdictional rule or that  
20 it wasn't but still we should accept what the  
21 Seventh Circuit did?

22 MR. STEWART: So our argument is that  
23 this is -- this is a jurisdictional rule. And  
24 because of that, you don't consider any of the  
25 equities.



1           But in the alternative, if this Court  
2 declines to determine that this rule is still  
3 jurisdictional, at minimum, it is a mandatory  
4 claims processing rule and that the petition  
5 should be dismissed on that basis.

6           JUSTICE KAGAN: But I think what  
7 Justice Ginsburg said a while ago is that when  
8 we have used that term in the past, what we've  
9 meant is that it's -- it's a -- it's a  
10 mandatory claims processing rule that you have  
11 to follow unless the party, the other party  
12 forfeits the issue --

13           MR. STEWART: There was no --

14           JUSTICE KAGAN: -- or unless there's a  
15 very good reason, you know, there's some kind  
16 of extra special excuse that you have.

17           MR. STEWART: Right.

18           JUSTICE KAGAN: But, you know, where  
19 there is a forfeiture and where the -- that's  
20 the end of the matter, you can call it a  
21 mandatory claims processing rule or not, but  
22 you forfeited it.

23           MR. STEWART: So this -- we believe  
24 that the rule is jurisdictional because it has  
25 a statutory basis. Rule 4(a)(5)(C), the 30-day

1 limitation that is contained in Rule 4(a)(5)(C)  
2 was present in the rule and the statute when  
3 the rule was promulgated.

4 And although the 30-day, the specific  
5 limiting language of 30 days is no longer in  
6 the statute, we do not believe that there was  
7 any intention by Congress to strip the rule of  
8 the jurisdictional nature that it enjoyed for  
9 decades.

10 JUSTICE GINSBURG: But it was never in  
11 the statute with respect to a case like this.  
12 The only provision in the statute was when  
13 there was a failure to get notice of the entry  
14 of judgment.

15 There was nothing in the statute  
16 covering a case where there was a reason other  
17 than failure -- just the statute was blank on  
18 that.

19 It's no longer blank. It gives  
20 permission for an extension.

21 MR. STEWART: But the way the pre-1991  
22 statute read, it provided the district courts  
23 authority to extend the time to file a notice  
24 of appeal upon a showing of excusable neglect.

25 Now, it's true, there was only one

1 condition that Congress deemed to constitute  
2 excusable neglect in the prior-1991 statute,  
3 and that was if a party did not receive notice.

4 But the idea and the concept that the  
5 30-day -- that a 30-day limitation was premised  
6 on a showing of excusable neglect still remains  
7 in the statute today.

8 JUSTICE GINSBURG: Did excusable --  
9 well, what was the text of the statute? I  
10 thought it was clear that it only applied in  
11 the case of a failure to receive notice of the  
12 entry of judgment.

13 MR. STEWART: I'll read the text to  
14 you, Your Honor. "The district court may  
15 extend the time for appeal not exceeding 30  
16 days from the expiration of the original time  
17 herein prescribed upon a showing of excusable  
18 neglect, based upon a failure of a party to  
19 learn of the entry of the judgment."

20 JUSTICE GINSBURG: So it was based  
21 upon. So that was the only condition.

22 MR. STEWART: That was the only  
23 condition. But the idea and the concept was  
24 you had to demonstrate excusable neglect.

25 Now, certainly in the rule, you know,

1 the rule did morph over time and evolve to take  
2 into account other things, good cause, for  
3 instance, and eventually Rule 4(a)(6) came into  
4 being, which is what the 1991 amendments were  
5 conforming thereto.

6 But there is no evidence that any  
7 member of Congress ever criticized the 30-day  
8 limitation in Rule 4(a) -- 4(a)(5) --

9 JUSTICE GINSBURG: So you disagree  
10 with the D.C. -- when this issue was before the  
11 D.C. Circuit, the D.C. Circuit says the 30-day  
12 limit on extension appears nowhere in the U.S.  
13 Code. And that is true. It doesn't appear in  
14 the U.S. Code.

15 MR. STEWART: The -- the limiting 30  
16 days is no longer in the -- in the U.S. Code,  
17 that is correct. We believe that it was  
18 inadvertently omitted in the 1991 amendments.  
19 That's our position.

20 JUSTICE SOTOMAYOR: Tell me --

21 MR. STEWART: I didn't hear you.

22 JUSTICE SOTOMAYOR: Is there any  
23 direct legislative history saying that it was  
24 inadvertent?

25 MR. STEWART: No, it is not. And I

1 think the issue that we have is the silence now  
2 informs -- the silence is informed by --

3 JUSTICE SOTOMAYOR: So where else have  
4 we ever -- give me your best authority for us  
5 reading into a statute omitted language.

6 MR. STEWART: Your Honor, I can't give  
7 you a precise case that comes up with a  
8 situation like this. But I think the history  
9 of this rule, going back nearly a century, that  
10 note that deadlines regarding notices of  
11 appeals have been treated as jurisdictional in  
12 American courts for a century.

13 If Congress intended to change the  
14 jurisdictional nature of the rule, it would  
15 have said so. And there's nothing in this  
16 legislative history that suggests Congress  
17 intended to do that.

18 JUSTICE SOTOMAYOR: Well, there is a  
19 problem with that because it did change the  
20 rule fundamentally when it permitted the  
21 opening of a judgment for six months, if you  
22 didn't receive notice of it. That's a fairly  
23 radical change from the norm.

24 And so why would it be inappropriate  
25 to assume that Congress intended for a district

1 court to exercise its discretion and judgment  
2 in deciding how much was a reasonable time for  
3 excusable neglect or for good cause?

4 MR. STEWART: So you look at the  
5 inconsistency that was established then, right?  
6 If a party -- a district court could extend the  
7 time up to 14 days once a party, who never  
8 received notice of the final order, the  
9 district court could extend the time to file  
10 that notice of appeal for 14 days.

11 Under the Petitioner's theory, if the  
12 30-day limitation was removed, the district  
13 court would have the authority to extend the  
14 time to file a notice of appeal, as the Chief  
15 Justice articulated, up to three years, a year.

16 There is no limitation. There's no  
17 limitation in the statute. That inconsistency  
18 is why we believe Congress never intended to  
19 remove it.

20 JUSTICE SOTOMAYOR: Well, there is a  
21 limitation. It has to be for good cause.

22 MR. STEWART: Right, for good cause.

23 JUSTICE SOTOMAYOR: It has teeth. So  
24 it's self-limiting in -- in that way.

25 MR. STEWART: It -- it is, Your Honor,

1 but it is -- it is at best, it is ambiguous.  
2 And that's why we believe that history can  
3 inform this.

4 JUSTICE KAGAN: So suppose there is a  
5 congressional statute which does set forth a  
6 jurisdictional rule, and Congress wakes up one  
7 day and decides, you know what, we don't think  
8 that this rule should be jurisdictional  
9 anymore.

10 How does it change that?

11 MR. STEWART: Through legislation  
12 Congress can change any -- any statute.

13 JUSTICE KAGAN: Yes. So Congress  
14 would presumably pass a piece of legislation  
15 which no longer included the rule, right?

16 MR. STEWART: They could, but you  
17 would think that they would have done so,  
18 especially in a situation like this where --

19 JUSTICE KAGAN: But that's what  
20 Congress did here, I guess. I mean, what else  
21 do you expect Congress to do if it changes its  
22 mind?

23 MR. STEWART: I would expect them,  
24 given the history of the deadlines regarding  
25 notice of appeal to at least said that that's

1 what they were going to do.

2 JUSTICE KAGAN: Like --

3 MR. STEWART: There was not --

4 JUSTICE KAGAN: -- we're taking away  
5 this jurisdictional rule and we really mean it?

6 MR. STEWART: There was no -- in this  
7 instance, there was no mention of Rule  
8 4(a)(5)(C), and there was no mention of the  
9 30-day limitation. But at the end of the day,  
10 we get to the same place.

11 If the Court is not inclined to rule  
12 that Rule 4(a)(5)(C) is jurisdictional, at  
13 minimum, it is a mandatory claims processing  
14 rule.

15 CHIEF JUSTICE ROBERTS: In what -- in  
16 what way has your client been prejudiced by the  
17 Seventh Circuit's decision, I mean, other than  
18 not enforcing the -- the rule? Is there any  
19 way, you know, witnesses, documents, anything  
20 else that is different in the appeal on the --  
21 on the merits in light of the fact that they  
22 got this extension?

23 MR. STEWART: No, Your Honor. I can't  
24 say that we have. Right.

25 JUSTICE GORSUCH: And, Mr. Stewart, if



1 it isn't jurisdictional, one of the questions  
2 raised is whether you would have needed to file  
3 a cross-appeal.

4 MR. STEWART: Sure.

5 JUSTICE GORSUCH: And there's another  
6 Circuit split on that question in two very fine  
7 opinions, one by Judge Hartz and another by  
8 Judge Sutton disagreeing over that.

9 Can you tell me why you don't think  
10 you needed to file an appeal yourself if you  
11 wished to challenge a district court order --

12 MR. STEWART: Sure.

13 JUSTICE GORSUCH: -- given that's the  
14 normal course?

15 MR. STEWART: Sure, Judge Gorsuch.

16 This Court, in the Jennings case,  
17 described the instances where an appellee would  
18 be required to file a cross-appeal, and there  
19 are two instances.

20 One, if the appellee is seeking to  
21 enlarge its own rights. We weren't doing that  
22 here because we won the case at summary  
23 judgment.

24 The other instance would be if you're  
25 seeking to lessen the rights of the appellant,

1 and we were not doing that either. To the  
2 extent Ms. Hamer --

3 JUSTICE GORSUCH: Well, isn't that  
4 exactly what you wanted to do, is lessen the  
5 rights of the appellant by kicking the  
6 appellant out of court?

7 MR. STEWART: To the extent Ms. Hamer  
8 had any right, it was limited to the initial 30  
9 days under Rule 4(a)(1). She would have filed  
10 her notice to proceed.

11 JUSTICE GORSUCH: She would argue, I  
12 think, just to put her argument in the best  
13 light and let you respond to it is I -- I  
14 obtained this additional right from the  
15 district court of an extension of time, which  
16 allowed me to pursue this appeal in -- in the  
17 Court of Appeals.

18 And Judge Sutton would say that is an  
19 extension of a new right by the district court  
20 that you wish to extinguish and, therefore,  
21 need a notice of appeal. That's the line of  
22 reasoning he follows.

23 What's -- what's wrong with that?

24 MR. STEWART: So the problem with that  
25 reasoning is that the district court providing

1 the additional time gave her some right. The  
2 district court didn't have the authority in the  
3 first place to give that time. And that's  
4 because of Rule 4 and Rule 26.

5 Rule 4 says that a party has 30 days  
6 to file a notice of appeal. Rule 4(a)(5)(C)  
7 allows the district court to extend that period  
8 to an additional 30 days but no more. And Rule  
9 26 says that courts have the authority to  
10 extend the time to comply with the rules, with  
11 the exception of Rule 4.

12 So there was no opportunity for the  
13 district court to provide any further days,  
14 other than what is set forth in Rule 4. So the  
15 Court didn't have the authority to give her the  
16 time that it did. Ms. Hamer didn't have a  
17 right to file the notice of appeal when she  
18 did. That's why it's mandatory.

19 If there are no further questions.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 Counsel.

22 Mr. Herstoff, 10 minutes.

23 REBUTTAL ARGUMENT OF JONATHAN A. HERSTOFF

24 ON BEHALF OF THE PETITIONER

25 MR. HERSTOFF: Thank you. Just a

1 couple of quick points.

2           Regarding, on the Kontrick and the  
3 argument that there's no forfeiture if the  
4 issue is raised in the merits brief, that  
5 argument rests on a misreading of Kontrick.

6           Kontrick held that there was a  
7 forfeiture where, among other things, the issue  
8 had not been raised in the brief. Kontrick did  
9 not say that anytime it is raised in the merits  
10 brief, then there's no forfeiture.

11           Similarly, in Manrique, there was --  
12 it was held that there was no forfeiture, but  
13 there the first possible opportunity to address  
14 the -- the issue was in the merits brief  
15 because the appellee there had no idea what the  
16 appellant was going to raise in their opening  
17 brief.

18           JUSTICE ALITO: At what point in time  
19 do you think the issue was -- was waived?

20           MR. HERSTOFF: I think the issue was  
21 -- was waived when -- when they said in the  
22 docketing statement twice that the appeal was  
23 timely. I think --

24           JUSTICE ALITO: So not before that?  
25 Nothing that occurred in the district court

1 waived the --

2 MR. HERSTOFF: For -- for affirmative  
3 waiver, no. There was certainly forfeiture,  
4 though.

5 JUSTICE ALITO: When was it -- when  
6 was it forfeited?

7 MR. HERSTOFF: It was forfeited no  
8 later than 30 days after the district court  
9 granted the extension of time.

10 JUSTICE ALITO: So it wasn't forfeited  
11 on the day when the district court entered the  
12 order.

13 MR. HERSTOFF: No, no, no, Your Honor,  
14 I'm not arguing that.

15 JUSTICE ALITO: It was -- because you  
16 -- the order didn't preclude the filing of the  
17 notice of appeal prior to the expiration of the  
18 time in the order.

19 MR. HERSTOFF: That's right. And  
20 we're certainly not arguing that there was a  
21 forfeiture based upon the -- the one-day -- the  
22 one-day period between the filing of the motion  
23 and the granting of the motion.

24 JUSTICE ALITO: So you -- so you think  
25 that the appellee had on pain of forfeiture,

1 they had an obligation to inform the other side  
2 and the court just prior to the running out of  
3 the time, you know, you're going to run --  
4 you're going to have a problem here under the  
5 rule if you don't file your notice of appeal  
6 right away? They had that obligation to do  
7 that?

8 MR. HERSTOFF: They did have an  
9 obligation to do that if they wanted Rule  
10 4(a)(5)(C) to be enforced. They also forfeited  
11 by not appealing or cross-appealing and  
12 didn't -- just wanted to address --

13 JUSTICE ALITO: How is that consistent  
14 with the adversary system? I mean, this isn't  
15 the other side -- the -- did she have an  
16 attorney at that point?

17 MR. HERSTOFF: No, she was pro se then  
18 at the time that the district court granted the  
19 motion for extension of time because the  
20 district court granted that along with the  
21 motion for withdrawal, so Ms. Hamer proceeded  
22 pro se from then on.

23 And so the appellees, the Respondents  
24 here, forfeited their right to rely on Rule  
25 4(a)(5)(C) by not objecting to the extension.

1 They also, to go to Justice Gorsuch's point,  
2 forfeited by failing to appeal or cross-appeal.

3 The Respondents argued that -- that  
4 their -- their rights were not being enlarged  
5 because they got everything that they wanted  
6 from the district court summary judgment order.  
7 However, that focuses on the wrong order from  
8 the district court.

9 The order granting the extension of  
10 time said that she had two months to extend --  
11 to file the notice of appeal, two months extra.  
12 And here the Respondents are seeking, in  
13 essence, a reversal of the district court's  
14 order granting the extension of time and an  
15 order, or decision saying that she was not  
16 entitled to that extension of time.

17 That is --

18 JUSTICE ALITO: Order from which the  
19 appeal -- the order from which the appeal had  
20 to be taken was summary judgment for the  
21 defendant. That's the judgment, right?

22 MR. HERSTOFF: That's the district  
23 court's judgment on the merits, yes.

24 JUSTICE ALITO: And the appellee wants  
25 an affirmance of that judgment?

1 MR. HERSTOFF: Yeah. Yes, they do.

2 But by --

3 JUSTICE ALITO: And that could be  
4 affirmed on the grounds that summary judgment  
5 was proper. It could also be affirmed on the  
6 ground that the -- the notice of appeal was  
7 untimely.

8 MR. HERSTOFF: Well, I respectfully  
9 submit that in the latter case it would not be  
10 an affirmance. It would just be a dismissal of  
11 the appeal. So what the -- what the  
12 Respondents are seeking is not an affirmance.

13 They're seeking an order and judgment  
14 from the appellate court saying that the  
15 district court's judgment is completely  
16 insulated from appellate review.

17 And in order for the appellate court  
18 to do that, they would need to reverse the  
19 district court's order granting the extension  
20 of time, so --

21 CHIEF JUSTICE ROBERTS: Well, that --  
22 that doesn't seem right to me. I mean, the  
23 relief they want is that they can't be sued,  
24 right, or they win. To say that the ground on  
25 which they get to that objective makes --



1 requires a cross-appeal, I don't think that's  
2 right.

3 MR. HERSTOFF: Well, I respectfully  
4 submit that the -- what the Respondents are  
5 seeking to do is to dismiss the appeal. So  
6 what they're seeking from the Seventh Circuit  
7 is not any kind of decision at all about  
8 whether the district court's judgment was  
9 correct.

10 CHIEF JUSTICE ROBERTS: Well, I don't  
11 think they care whether they -- the Seventh  
12 Circuit says you win or they say that your  
13 opponent's appeal is dismissed.

14 MR. HERSTOFF: They certainly might  
15 not -- might not care, I agree. I agree with  
16 that. However, if they're trying to get the  
17 appeal dismissed, that's lessening Ms. Hamer's  
18 rights because without -- without the  
19 Respondents' objecting to the extension of  
20 time, Ms. Hamer's granted the right to  
21 appellate review, which is usually what any  
22 appellant has, is the right to appeal a  
23 district court's judgment.

24 The Respondents --

25 JUSTICE ALITO: Every time the party

1 that wins in the district court wins on the  
2 merits in the district court, also thinks that  
3 it has a jurisdictional argument, they have to  
4 file a cross-appeal.

5 MR. HERSTOFF: A jurisdictional  
6 argument, no, because the jurisdiction can be  
7 raised --

8 JUSTICE ALITO: All right.

9 MR HERSTOFF: -- at any --

10 JUSTICE ALITO: A -- a -- a mandatory  
11 claims processing argument, they have to file a  
12 cross-appeal?

13 MR. HERSTOFF: If they're -- yeah, if  
14 they're seeking to alter what the district  
15 court did, in other words, if they're trying to  
16 get the appellate court to rule that the  
17 district court was wrong in -- in the way that  
18 they applied the claim processing rule, then --  
19 then, yes, an appeal -- cross-appeal would be  
20 required.

21 If there are no further questions. We  
22 respectfully request that the Court reverse the  
23 Seventh Circuit's judgment and remand for  
24 consideration of Ms. Hamer's appeal on the  
25 merits. Thank you.

1 CHIEF JUSTICE ROBERTS: The case is  
2 submitted. Thank you, counsel.

3 (Whereupon, at 10:51 a.m., the case  
4 was submitted.)

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## Official - Subject to Final Review

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