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IN THE SUPREME COURT OF THE UNITED STATES
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NUTRACEUTICAL CORPORATION,)
Petitioner,)
v.) No. 17-1094
TROY LAMBERT,)
Respondent.)
- - - - -

Washington, D.C.

Tuesday, November 27, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

JOHN HUESTON, ESQ., Los Angeles, California; on behalf of the Petitioner.

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

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-1094,
5 Nutraceutical Corporation versus Lambert.

6 Mr. Hueston.

7 ORAL ARGUMENT OF JOHN HUESTON

8 ON BEHALF OF THE PETITIONER

9 MR. HUESTON: Mr. Chief Justice, and
10 may it please the Court:

11 In the proceedings below, Respondent
12 filed his Rule 23(f) petition months late, and
13 Nutraceutical timely objected. Although this
14 Court has held that mandatory claim processing
15 rules are unalterable when properly invoked,
16 the Ninth Circuit in this case created broad
17 and unprecedented equitable exceptions to
18 excuse Lambert's late filing.

19 Critically, in this case, this Court
20 has twice considered language in a federal rule
21 that is virtually identical to the federal
22 rules at issue in this case. And in both those
23 cases, in the Carlisle and the Robinson cases,
24 this Court rejected equitable exceptions, even
25 when faced with facts far more empathetic than

1 those presented here.

2 JUSTICE GINSBURG: Counsel, I thought
3 that both sides agreed that if the motion for
4 reconsideration is filed within 14 days, within
5 that period, then there is tolling until the
6 motion is decided. Is that -- is that so?

7 MR. HUESTON: That is correct, Justice
8 Ginsburg. And --

9 JUSTICE GINSBURG: And isn't that a
10 form of equitable tolling?

11 MR. HUESTON: It is not a form of
12 equitable tolling, Your Honor. Instead, as
13 held by this Court in U.S. v. Dieter, it's
14 based on a traditional and virtually
15 unquestioned practice that is premised upon
16 three main policy points: to prevent premature
17 appeals, to develop and strengthen the record,
18 and to respect the authority of the district
19 court.

20 It's important to realize that this
21 doctrine could not open the door to equitable
22 exceptions for claim processing rules because,
23 in the Ibarra, Dieter, and Healy cases, those
24 dealt with a statute, 3731, establishing the
25 deadline in a criminal case, and, thus, it was

1 a jurisdictional case. So the application of
2 that rule in the context of a criminal case
3 with jurisdictional rules, in fact, tolled
4 those jurisdictional deadlines. And so,
5 therefore, pursuant to the Court's holdings in
6 Hamer and elsewhere, that is not an equitable
7 exception.

8 JUSTICE KAGAN: Mr. Hueston, given the
9 reasons that you just stated for that rule, why
10 is the rule limited to a motion for
11 reconsideration that's filed during the 14-day
12 window?

13 In other words, suppose the motion for
14 reconsideration was filed in a timely manner
15 for such a motion but after the 14-day period.
16 Why wouldn't the same reasons apply?

17 MR. HUESTON: Because, Your Honor, if
18 that reasoning applied, in this instance, for
19 instance, there was actually no deadline for
20 filing of a motion for reconsideration in the
21 Central District of California, but let's
22 assume for purposes of your question we had a
23 30-day deadline.

24 If that 30-day deadline were imposed
25 in this case and one could file on the 30th day

1 and begin tolling, that would render the 14-day
2 deliberately small window that the advisory
3 committee drafters created in order to minimize
4 the disruption and delay in the context of
5 class action cases a nullity because, in any
6 instance where you would have a longer deadline
7 for a motion for reconsideration, you could
8 wait out that period and avoid the window that
9 was intentionally created by the drafters.

10 And I would like to direct the Court's
11 attention specifically to the advisory
12 committee notes to the 1998 amendment to Rule
13 23(f), where they specifically stated the
14 importance of the short window to deliberately
15 keep the time as short as possible.

16 JUSTICE KAGAN: It just seems as
17 though the -- the exception that you admit,
18 which is the exception for filing a motion for
19 reconsideration within the 14-day period, also
20 effectively renders that 14-day period a
21 nullity, right, because it stops it in its
22 tracks and then, once the motion for
23 reconsideration has been dealt with, as I
24 understand the agreement between the parties,
25 the -- the clock goes all the way back to the

1 beginning.

2 So given that -- that what you -- the
3 exception you admit renders the 14-day period a
4 nullity, again, I just wonder why the exact
5 same reasons, practices, traditions don't
6 suggest that, for example, as in -- as -- as
7 what -- the example you gave, if the motion for
8 reconsideration is timely filed within 30 days,
9 that as long as you do that, it should have the
10 same effect.

11 MR. HUESTON: Justice Kagan, there is
12 no doubt that if the motion for reconsideration
13 is filed, for instance, on the 14th day, there
14 would then be a longer period of time. But we
15 must presume that the advisory committee
16 considered that.

17 And as I have thought about the
18 timing, the 14 days creates a shorter window at
19 which then is hooked the potentially later
20 motion for reconsideration period.

21 If we apply Lambert's rule and extend
22 that out to 30 days or potentially longer, and
23 in the Central District no deadline at all, it
24 truly renders the 14-day period a nullity in
25 that instance.

1 Your Honors, I would like to direct
2 your attention particularly to the Carlisle
3 case. That case involved very similar language
4 in former Criminal Rule 45(b). And in that
5 instance, the trial court was faced in a
6 situation where there was a motion for judgment
7 of acquittal and the trial judge found legal
8 innocence.

9 And the judge granted additional time.
10 The petition was filed just one day late. The
11 trial judge found that it was appropriate to
12 grant an extension for just a single day
13 because a grave injustice would occur.

14 And yet, faced with legal innocence
15 and excusable neglect, this Court looked at the
16 language of former federal Criminal Rule 45(b),
17 which has virtually identical language to
18 Appellate Rule 26(b), which is applicable in
19 this case; namely, "the court may not enlarge"
20 -- sorry -- "the Court may not extend the time
21 for the filing."

22 JUSTICE KAVANAUGH: On that --

23 JUSTICE BREYER: What happens if
24 there's -- what happens if Hurricane Katrina
25 comes along and no one can reach the

1 courthouse?

2 MR. HUESTON: Your Honor, Hurricane
3 Katrina -- so the answer is, Your Honor, the
4 situation in Carlisle was far more grave than
5 Hurricane Katrina. In that instance --

6 JUSTICE BREYER: In other words, if
7 Hurricane Katrina comes along and all the
8 courthouses are shut, nobody can get there,
9 everybody loses their motion?

10 MR. HUESTON: Your Honor, in this
11 instance, when you have with Rule 26(f) the
12 emphatic language without the harsh
13 consequences at issue that you do in Carlisle
14 and others, then, if the deadline cannot be
15 abided by within the 14 days, then the
16 opportunity to pursue the petition for
17 permission for interlocutory appeal is lost.

18 Now that may seem like a harsh
19 consequence --

20 JUSTICE GINSBURG: Well, didn't the --

21 JUSTICE BREYER: I'm not saying harsh
22 consequence.

23 JUSTICE GINSBURG: -- same Justice say
24 in Carlisle that it wasn't utterly
25 exception-less, so it may be that Hurricane

1 Katrina would fall into that category?

2 MR. HUESTON: Well, Your Honor, the
3 language in the plurality opinion is that it
4 was plain and unambiguous, and there was simply
5 no room in the text for even legal innocence to
6 justify a single day's delay.

7 JUSTICE ALITO: How would we --

8 JUSTICE BREYER: But your answer to
9 Justice Ginsburg's question, I couldn't hear
10 it. What was it -- but I think it was along
11 the same line. What -- what -- what happens in
12 all these things where that courthouse burns
13 down, lightning strikes, Hurricane Katrina?
14 You see the point?

15 MR. HUESTON: Yes.

16 JUSTICE BREYER: In your opinion, does
17 everybody -- and, you know, there are dozens of
18 motions pending. Some fall within these. Some
19 don't. Anyone with a motion that falls within
20 this language, bad luck, you lose. Is that
21 what it is? Even though it isn't a
22 jurisdictional rule, it's -- is that -- is that
23 your position?

24 MR. HUESTON: It is our position
25 within this context of a mandatory claim

1 processing rule in the emphatic language that
2 is present here, more so than even in the
3 Carlisle and Robinson cases.

4 CHIEF JUSTICE ROBERTS: Isn't there --
5 I -- I may be misremembering this, but isn't
6 there a provision that extends the filing
7 period when the courthouse is closed?

8 MR. HUESTON: Your Honor, there is an
9 exception for accessibility of the courthouse
10 that would apply in that situation.

11 CHIEF JUSTICE ROBERTS: Now that
12 doesn't help you with intervening periods, I
13 gather that would not toll in that sense, but
14 if the due date is a date on which the court is
15 inaccessible or formally closed, that would get
16 at least that relief?

17 MR. HUESTON: Yes, Your Honor. And
18 the key point here, I believe, is that it is
19 properly within the province of the rule
20 drafters to consider when and in what
21 circumstances the court should have discretion.

22 And here, at both Rule 26(b), and then
23 to distinguish this as an even stronger example
24 of emphatic language, in Rule 2 in both --

25 JUSTICE GORSUCH: But before we leave

1 -- before we leave 26(b), there is a bit of a
2 complication, right? It says that we can
3 extend time or permit an act to be done after
4 the time expires.

5 And then what it -- after having given
6 that authority to the court, it then takes away
7 the authority to extend the time to file. It
8 doesn't take away both of those things and
9 they're disjunctive. So what do we do about
10 that?

11 MR. HUESTON: Your Honor, that very
12 issue was addressed in the Robinson case, and
13 that is, with that other issue, can an act be
14 allowed later, the Robinson case found that to
15 allow an act or a filing later would
16 effectively enlarge or extend the period of
17 time. And so, therefore, that would be
18 prohibited.

19 JUSTICE SOTOMAYOR: The problem with
20 Carlisle and Robinson is that they were well
21 before our explanation of there being a
22 difference between jurisdiction and
23 non-jurisdiction claim processing rules. And
24 we were a little bit loose back then in terms
25 of our textual approach to things.

1 MR. HUESTON: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: Justice Gorsuch's
3 question, though, is a fair one because it's
4 the practice of the Supreme Court with respect
5 to filing of amicus briefs that we don't grant
6 extensions but we take late amicus.

7 And so why can't we look at the exact
8 words of 26(b) and say, no, you can't extend
9 the time, but a court has, as it always has,
10 equitable discretion to take something that's
11 filed late because, assuming that the facts
12 qualify as equitable, and that's open to
13 question, I know, in this case, but assuming,
14 why don't we read the provision as it states, a
15 court can permit an act to be done after that
16 time expires?

17 MR. HUESTON: Justice Sotomayor, let
18 me address -- there were several parts to your
19 question. Let me try to address each in turn.

20 Undoubtedly, and as this Court has
21 stated repeatedly in recent decisions, that
22 there was a sort of loose use of the term
23 "jurisdictional." However, and, in fact, that
24 loose use of the word "jurisdictional" was, in
25 fact, improperly used in the Robinson case.

1 And that has been pointed out.

2 But the Court in more recent
3 decisions, particularly the Kontrick decision
4 and the Eberhart decision, specifically cites
5 Robinson as still good law, acknowledging,
6 though, the term "jurisdictional" was misused,
7 that, in fact, Robinson stands for, as Eberhart
8 said, observing clear limits of the rules.

9 So going back to the second part of
10 your question, the Robinson case specifically
11 addressed the issue that, well, if the Court
12 has not addressed that second portion, an act
13 that could be allowed, if we allowed a late
14 filing, that would, in fact, eviscerate the
15 first proscription and render, in fact, that
16 portion of Rule 26(b) a nullity.

17 JUSTICE GORSUCH: So what work does
18 that language then do to permit an act to be
19 done after the deadline?

20 MR. HUESTON: And I --

21 JUSTICE GORSUCH: Why doesn't your
22 interpretation itself render that language a
23 nullity?

24 MR. HUESTON: And, Justice Gorsuch,
25 I've been giving thought to that.

1 JUSTICE GORSUCH: I had hoped you
2 might.

3 (Laughter.)

4 MR. HUESTON: Thank you.

5 JUSTICE GORSUCH: So have I.

6 (Laughter.)

7 MR. HUESTON: And, Your Honor, I
8 believe what that may open the door to are
9 other acts that do not effectively enlarge or
10 extend the period of time. So there could be
11 other categories of actions that the Court
12 might consider and allow.

13 JUSTICE GORSUCH: Give me an example,
14 though, because 26(b) is entitled extension,
15 extending time. So I would have thought that
16 it would have had to do something about time.

17 And I'm just struggling to come up
18 with an example of what work that language does
19 under your interpretation.

20 MR. HUESTON: Your Honor, it might,
21 for instance, countenance some other related
22 proceeding or action, other than an extension
23 of time on the actual motion for petition for
24 permission to appeal that would be filed. That
25 might be an instance where that would apply.

1 But I --

2 JUSTICE SOTOMAYOR: I'm sorry, you'll
3 need to explain that to me because I'm not
4 following you.

5 MR. HUESTON: Your Honor, I think the
6 language in 26(b) as construed by Robinson in
7 this instance would preclude an enlargement of
8 the time to file. But what another act that
9 might be allowed could be an act that relates
10 to another motion that might be filed in the
11 proceeding or something collateral but not the
12 actual motion itself.

13 If, in fact, we read it to include the
14 motion itself, the Court, and, of court --
15 course, the Court can revisit the thinking in
16 Robinson, the Court would be moving right into
17 the facts of Robinson and writing out the
18 prescription on the extension of time.

19 JUSTICE SOTOMAYOR: The problem is
20 that we really wouldn't -- yes, you're right,
21 we would be revisiting Robinson, but we would
22 be saying that the words of a statute have
23 meaning, and Robinson read out of that
24 permission the equitable considerations that
25 the very statute permitted.

1 MR. HUESTON: Your Honor, this case is
2 actually a stronger case with more emphatic
3 language considered collectively than Robinson
4 and Carlisle because we not only have the
5 equivalent of Rule 45(b) and 26(b), we also
6 have Appellate Rule 2 where there is, of
7 course, the notion of equity and suspending the
8 rules. And the drafters specifically accepted
9 the application of 26-2.

10 JUSTICE SOTOMAYOR: That's a -- that's
11 a circle with no out because 2 refers to 26(b),
12 and if we read 26(b) the way I suggest, that
13 already builds in the equitable exception.

14 But, in terms of the purpose of the
15 rule, we have previously said that 26(b) gives
16 -- 26(f) gives the court, the trial court,
17 almost unfettered discretion whether to grant
18 the motion to appeal. And if that's the case,
19 wouldn't the natural reading of this be that
20 the court should have unfettered discretion to
21 decide if a late filing makes it think that the
22 issue is more important than it might otherwise
23 have thought?

24 JUSTICE GINSBURG: It's the discretion
25 of the court of appeals, not the district

1 court.

2 JUSTICE SOTOMAYOR: Yes.

3 JUSTICE GINSBURG: To give permission
4 to appeal.

5 MR. HUESTON: Justice Sotomayor, to
6 answer your question, the court of appeals has
7 discretion to accept a timely petition but does
8 not have the discretion to accept an untimely
9 petition because the rule-makers specifically
10 removed that discretion in the language of
11 26(b) and 2, and there's one other rule that's
12 applicable, and that is Appellate Rule 5(a)(2),
13 which further reinforces that a petition must
14 be filed within 14 days.

15 JUSTICE GINSBURG: And Rule 26(b), it
16 says generally the court may grant an extension
17 of time, but there's a category of cases in
18 which it can't, and that is for permission to
19 appeal, the time to appeal or the time to seek
20 permission to appeal.

21 MR. HUESTON: Yes. Yes, Justice
22 Ginsburg, but that supports our point.

23 JUSTICE GINSBURG: Yes, it does.

24 MR. HUESTON: Because, in that
25 instance, we can clearly see the intent of the

1 rule-makers in providing for a broad range of
2 equitable discretion and then withdrawing it in
3 the particular instance of 26(b).

4 JUSTICE BREYER: What do you think in
5 -- I think it was Justice Ginsburg's
6 concurrence in Carlisle, where she said that
7 the Court had recognized one "sharply honed
8 equitable exception" -- it doesn't have the
9 word "equitable," but it means it -- "to
10 mandatory claim processing rules." The unique
11 circumstances exception.

12 MR. HUESTON: Your Honor --

13 JUSTICE BREYER: Is that -- do you
14 agree with that?

15 MR. HUESTON: -- I agree that Justice
16 Ginsburg filed a concurring opinion and
17 described --

18 (Laughter.)

19 MR. HUESTON: -- the unique
20 circumstances doctrine as, indeed, a sharply
21 honed exception that covers cases in which the
22 trial judge misled a party who could have and
23 probably would have taken timely action had the
24 trial judge conveyed correct, rather than
25 incorrect, information.

1 JUSTICE GINSBURG: I believe the
2 example was the trial judge, you have until X
3 date to file, and the litigant filed on X date,
4 but, in fact, the judge was wrong and it should
5 have been an earlier date.

6 MR. HUESTON: That's right. When
7 there is a specific assurance by the trial
8 judge and a mistaken one that the party
9 reasonably relies on to its detriment,
10 factually, that simply does not apply here, and
11 this Court need not reach the applicability of
12 the unique circumstances doctrine.

13 JUSTICE BREYER: But that's -- that's
14 different. I mean, if you -- you agree -- I
15 take it you agree that there is one sharply
16 honed exception, whatever that might be, called
17 unique circumstances. You know, I can -- I can
18 make up weird examples, probably you can too,
19 but -- but is there such an exception? I take
20 it your answer is yes or no? Is it yes or no?

21 MR. HUESTON: Your Honor, there has --
22 yes.

23 JUSTICE BREYER: Yes? Okay.

24 MR. HUESTON: There has been an
25 exception generally in several cases that has

1 been described, the unique circumstances
2 doctrine. However, we have not been presented
3 squarely with the question of whether -- when
4 you have mandatory claim processing rules with
5 emphatic language, whether that might preclude
6 even the unique circumstances.

7 JUSTICE BREYER: Well, that's what I
8 wonder because I could see -- would you agree
9 or not agree? Holding 1, this is not
10 jurisdictional. Holding 2, it is very limited.
11 Holding 3, there is a unique circumstances
12 exception. Holding 4, this doesn't fall within
13 it.

14 MR. HUESTON: Yes, Your Honor, if --
15 if I understand Holding 2, we are addressing
16 not the facts here but claim processing rules
17 that would be other than this sort of
18 emphatic --

19 JUSTICE BREYER: I'm address -- I'm
20 just saying in general --

21 MR. HUESTON: Yes.

22 JUSTICE BREYER: -- with claim
23 processing rules, there are equitable
24 exceptions.

25 MR. HUESTON: Yes, Your Honor.

1 JUSTICE BREYER: At least for unique
2 circumstances. And then this is not one.
3 That's what you're about -- you could argue
4 that or you could say never. And I'm not sure
5 what you think is correct.

6 MR. HUESTON: Your Honor, I am arguing
7 in this case that the Court need not reach the
8 application of the unique circumstances
9 doctrine, and, factually, if we attempt to
10 apply it, it does not apply here.

11 JUSTICE GORSUCH: Well, are we slicing
12 the baloney pretty thinly? I mean, what's
13 unique, right?

14 A judge misinforming a party about the
15 time remaining to appeal sounds pretty
16 terrible. But I can imagine a lot more
17 terrible things than that. Hurricanes,
18 lightning, all of Justice Breyer's wonderful
19 parade of horrors, all right?

20 (Laughter.)

21 JUSTICE GORSUCH: Why aren't those all
22 unique circumstances too? Don't you really
23 have to argue that Thompson's wrong and that,
24 in fact, the rules here preclude any equitable
25 tolling and unique circumstances is a species

1 of equitable tolling? Doesn't that have to be
2 your argument?

3 MR. HUESTON: Your Honor, doctrinally,
4 that is our argument, that when you have
5 language as we do at issue here, emphatic and
6 mandatory, it precludes the reading of all
7 equitable exceptions.

8 JUSTICE KAGAN: Well, Mr. Hueston, you
9 can't please everyone here.

10 (Laughter.)

11 MR. HUESTON: I'm trying my best, Your
12 Honor.

13 JUSTICE KAGAN: I think you're going
14 to have to choose between nothing, no time,
15 never, and, sure, you can reserve some -- the
16 possibility of an equitable exception in
17 circumstances that are different from the ones
18 here. So which is it?

19 MR. HUESTON: Your Honor, again, we
20 don't believe the Court needs to reach the
21 application of the unique circumstances
22 doctrine. And if that's the only one, the one
23 sharply honed exception recognized to apply
24 within the context of claim processing rules,
25 and it factually does not apply, then the

1 decision below must be reversed.

2 But, to answer your question, I do
3 believe that the language here is sufficiently
4 emphatic and clear that it does not admit to
5 equitable exceptions.

6 JUSTICE ALITO: I mean, it's not clear
7 that you face this binary choice. The problem
8 with unique circumstances, a potential problem,
9 is that every lawyer who is in trouble thinks
10 that the circumstances of that lawyer's case
11 are unique and every judge who wants to get to
12 a particular result can characterize the facts
13 of the case before the judge as unique. But
14 maybe there's such a thing as the catastrophic
15 exception or the apocalyptic exception.

16 (Laughter.)

17 JUSTICE ALITO: So, if there's a
18 Martian invasion, there would be an exception
19 for that. But something short of that, you
20 know, like the attorney is sick, wouldn't work.

21 MR. HUESTON: That's right, Your
22 Honor.

23 JUSTICE BREYER: Well, it's rather
24 hard to -- what is -- what is the answer to
25 what Justice Alito says? We have the answer,

1 as the Chief Justice points out, where the
2 courthouse is closed, but one can think of
3 epidemics or fires in the north -- and, you
4 know, that's exactly right -- and what -- what
5 do we write about that? What, in your opinion,
6 do we write? A forest fire keeps the lawyer
7 from the courthouse, which is open. What --
8 what do we write?

9 MR. HUESTON: All right. So, in that
10 instance, within the context of this case, Rule
11 23(f), the court, in fact, would not be allowed
12 to admit an equitable exception in that
13 circumstance. That appears harsh, but it is
14 not, and the drafters, I submit, had this in
15 mind.

16 A Rule 23(f) petition for permission
17 to seek interlocutory appeal, if that cannot
18 proceed, they have their full right of appeal
19 at the end of the case. No catastrophic or
20 harsh consequence ensues. And so --

21 JUSTICE KAVANAUGH: Well, that's going
22 to be too late in the real world of how the
23 litigation transpires, though, you would admit?
24 Too -- too late as a practical matter.

25 MR. HUESTON: Well, in the -- Justice

1 Kavanaugh, in the context of class action
2 cases, typically -- and, of course, the rules
3 allow this -- you can continue to challenge the
4 class certification or decertification order.

5 So, practically, there is no
6 catastrophic lost ability. And having that
7 fully retained appellate right puts the
8 Petitioner in a far better circumstance than
9 the party in Carlisle, who was faced with a
10 plain error review on appeal, or a habeas
11 route, one of the most difficult pathways in
12 the law.

13 JUSTICE GINSBURG: Would it be fair to
14 say that your position is not necessarily never
15 but not more than hardly ever?

16 (Laughter.)

17 MR. HUESTON: Repeat the question,
18 Your Honor. More than hardly? I missed the
19 last --

20 JUSTICE GINSBURG: Yes. In other
21 words, we can say never, and that's one answer;
22 another is equitable discretion without any
23 tight boundaries, and another is what -- what
24 my opinion in Carlisle -- Carlisle referred to
25 as sharply honed, not utterly exception-less.

1 So it's not never, but hardly ever.

2 MR. HUESTON: That could be the
3 pathway, obviously, the Court does take. And
4 one sharply honed exception, as Your Honor
5 described in your concurrence, was the hardly
6 ever one exception that the Court was
7 describing.

8 JUSTICE KAVANAUGH: What -- what --

9 MR. HUESTON: Here, it factually does
10 not apply.

11 JUSTICE KAVANAUGH: Picking up on
12 Justice Kagan's question at the beginning, is
13 the exception for a motion for reconsideration
14 that's filed within 14 days, is that equitable,
15 or what is that exception?

16 MR. HUESTON: No, it is not an
17 equitable exception, Your Honor.

18 JUSTICE KAVANAUGH: Well, it's not
19 written in the rules.

20 MR. HUESTON: It is based, according
21 to U.S. v. Dieter -- it is not written in the
22 rules, but it is instead based on --

23 JUSTICE KAVANAUGH: If it's not
24 written in the rules, doesn't it have to be
25 characterized as equitable? I'm still not

1 understanding where that comes from, and -- and
2 I'm also not understanding what sense that
3 makes, really, because, if you filed a timely
4 motion for reconsideration, you have filed a
5 timely motion for reconsideration. It
6 shouldn't be circumscribed based on some other
7 rule that has nothing to do with motions for
8 reconsideration. What's wrong with that
9 thinking?

10 MR. HUESTON: What's -- what's wrong
11 with that, Your Honor, is that it departs, and
12 the Court can revisit, the teaching of Healy
13 that to keep the appellate right alive, the
14 motion for reconsideration has to be filed
15 within the applicable time, in this case 14
16 days, and that has been the rule that has
17 applied here.

18 And motions for reconsideration have
19 not been described as equitable exceptions.
20 And, again, the point I made earlier that they
21 have been applied to delay in the context of
22 the application of jurisdictional rules shows
23 that they are not regarded by this Court
24 historically as equitable in nature.

25 Mr. Chief Justice, if I could reserve

1 the remaining time for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Herstoff.

5 ORAL ARGUMENT OF JONATHAN A. HERSTOFF
6 ON BEHALF OF THE RESPONDENT

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

9 For three main reasons the court of
10 appeals properly decided to consider this
11 appeal on the merits.

12 First, the appeal was timely within
13 the plain language of the federal rules.

14 Second, the court of appeals properly
15 determined that Rule 23(f) is subject to
16 equitable tolling.

17 And, third, the appeal was properly
18 considered based upon this Court's decisions in
19 Harris Truck Lines and Thompson. And I'd like
20 to start with timeliness under the federal
21 rules.

22 Rule 59(e) provides that a motion to
23 alter or amend the judgment may be filed within
24 28 days.

25 JUSTICE GINSBURG: Rule 59(e) deals

1 with final judgment at the end of the case, the
2 final judgment on the merits. It doesn't deal
3 with interlocutory rulings. You can't turn
4 every ruling in the case into a judgment
5 covered by Rule 59. 59 is the end of the case,
6 the final judgment.

7 MR. HERSTOFF: I submit that the --
8 the language of Rule 59(e) refers to judgments,
9 which are defined as orders from which an
10 appeal lies under Rule --

11 JUSTICE GINSBURG: Yes, but -- but
12 those words, an order from which the appeal --
13 an appeal lies, means an appeal as a right.
14 And the one thing I think we can all agree on
15 here is permission to appeal the grant or
16 denial of class action is not an appeal of
17 right.

18 MR. HERSTOFF: And I agree with that.
19 It is a permissive appeal. But once the court
20 of appeals grants permission to appeal, the
21 appeal does lie from that certification order.
22 But even if the Court finds that the --

23 JUSTICE KAVANAUGH: Just to clarify,
24 you read -- you read Rule 54 to apply to
25 appeals not just as of right?

1 MR. HERSTOFF: That's right, Justice
2 Kavanaugh, I do. And in the yellow brief, the
3 Illinois Petitioner said that an appeal does
4 not lie because it is not an appeal as of
5 right, but Black's Law Dictionary defines "lie"
6 as to exist or to reside. And once the --

7 JUSTICE GINSBURG: But in the context
8 of 59(a) -- 54(a), it is an appeal of right.
9 If you segment out one party and a judgment is
10 finalized to that party or a particular claim,
11 the judgment can be made final as to that claim
12 even though other claims are pending. I
13 thought that's what 54 deals with.

14 MR. HERSTOFF: Well, Rule 54(b) does
15 permit a district court to enter final judgment
16 with respect to certain claims. And for -- and
17 for that, that is a final judgment as of right
18 once the district court certifies that for --
19 for appeal.

20 But even if this were not a Rule 59
21 motion, the -- this appeal still was timely for
22 several reasons.

23 JUSTICE KAVANAUGH: Can I just ask on
24 the Rule 59 question, again, suppose a local
25 rule gave you 45 days for a motion for

1 reconsideration, but Rule 59 has the 28-day.
2 What's your position on that?

3 MR. HERSTOFF: If I -- if Rule 59 were
4 determined to apply here, then that would not
5 work because Rule 59 has a non-extendable
6 28-day period.

7 If it is not a Rule 59 motion, though,
8 I think in your example there would be a local
9 rule that gives -- I think you said 45 days,
10 that would be a timely reconsideration motion.

11 JUSTICE ALITO: Why would that be --
12 why would that even be permitted?

13 MR. HERSTOFF: Why -- why would it be
14 permitted to --

15 JUSTICE ALITO: Yeah. Why would that
16 -- why would the filing of a motion for
17 reconsideration, which is nowhere mentioned in
18 the Rules of Civil Procedure, toll the time for
19 filing an appeal?

20 MR. HERSTOFF: Because there this
21 Court has long held that a timely
22 reconsideration motion will suspend the time to
23 appeal.

24 And in the Dieter, Healy, and Ibarra
25 line of cases, those dealt with the criminal

1 rules, where there is no specific provision for
2 reconsideration motions.

3 JUSTICE ALITO: Well, it might be that
4 -- that filing it within the period allowed
5 under the particular rule at issue here would
6 toll the time to appeal, but I don't see where
7 anything -- I'm not sure the basis for the idea
8 that filing a motion -- forget about Rule 23
9 for the moment -- filing a motion for
10 reconsideration, so-called, tolls the time to
11 appeal.

12 As I said, there's no mention of that
13 in the Rules of Civil Procedure. And the Rules
14 of Appellate Procedure set out quite clearly
15 the particular motions that toll the time for
16 filing a notice of appeal, and there's no
17 mention there of a motion for reconsideration.
18 There's a motion -- it mentions the motion to
19 alter or amend the judgment.

20 MR. HERSTOFF: Well, I think the --
21 this Court's decision in Ibarra explains this
22 well. And the Court explained that the reason
23 that reconsideration motions toll the time to
24 appeal is to give the district court an
25 opportunity to correct their own alleged errors

1 and to prevent unnecessary burdens from being
2 placed on the court of appeals.

3 I think that's -- that's shown here,
4 where you have a record on the class
5 certification. The district court is familiar
6 with the record. The district court here
7 specifically said only 10 days after the
8 decertification order that it was going to
9 entertain reconsideration briefing.

10 And during that time, the court agreed
11 to suspend summary judgment proceedings, other
12 pretrial proceedings, and trial. So this was a
13 considerable pause in the proceedings so that
14 the district court would have a chance to
15 reconsider before the case went up on appeal.

16 And that -- I think that makes a lot
17 of sense. And I think the courts should not be
18 discouraged from reconsidering before it goes
19 up to the court of appeals.

20 JUSTICE GINSBURG: But there's nothing
21 inconsistent with the 14-day limit of seeking
22 permission to appeal and making a motion to
23 reconsider. You could do both.

24 MR. HERSTOFF: It's true that you
25 could do both, but then you'd have the district

1 court and the court of appeals considering the
2 exact same order at the same time. And this
3 Court has long held that the district courts
4 and the courts of appeals should not be --

5 JUSTICE GINSBURG: Well, the court of
6 appeals says we'll wait -- we'll wait on the
7 district court's decision on the motion for
8 reconsideration.

9 MR. HERSTOFF: The court of appeals
10 would have the discretion to stay their
11 proceedings, just like district courts have
12 discretion to stay their proceedings.

13 But -- but, still, you'd have the same
14 on the order that's up at both the court of
15 appeals and at the district court.

16 And I think it makes more sense to say
17 that when the reconsideration motion is pending
18 at the district court, there should be no need
19 to file a petition for permission to appeal.

20 JUSTICE KAGAN: What -- what did you
21 understand the district court to be saying when
22 it set the motion for reconsideration? What --
23 what was -- what were the -- what's the -- what
24 did it tell you about timing deadlines?

25 MR. HERSTOFF: Well, the district

1 court said --

2 JUSTICE KAGAN: What did you infer
3 from what it said?

4 MR. HERSTOFF: So I -- I infer from
5 that that the district court was, indeed, going
6 to reconsider this decertification order and,
7 indeed, they suspended, the district court
8 suspended further proceedings. So the case was
9 effectively stayed while this was --

10 JUSTICE KAGAN: The district court,
11 though, didn't say anything about a time for
12 appeal, is that correct?

13 MR. HERSTOFF: That is true, they did
14 not specifically say that.

15 JUSTICE KAGAN: And why doesn't that
16 matter?

17 MR. HERSTOFF: Okay. It doesn't
18 matter in the -- in the same -- in the same way
19 that in Thompson, there was no mention of
20 anything about an appeal. The district court
21 said that the post-trial motion was filed in
22 ample time, and this Court held that that
23 representation meant that the appeal was
24 required to be considered on the merits, even
25 though a post-trial motion was not filed in

1 ample time.

2 I don't think that the fact that the
3 district court did not specifically mention
4 appeal really makes a difference here,
5 especially --

6 JUSTICE GORSUCH: Well, but in -- in
7 Thompson, we --

8 CHIEF JUSTICE ROBERTS: What --

9 JUSTICE GORSUCH: I'm sorry, please.

10 CHIEF JUSTICE ROBERTS: What did you
11 understand us to be saying when we described
12 these types of provisions as mandatory claims
13 processing rules?

14 MR. HERSTOFF: I think, in general, it
15 -- it is strict. It -- it is, however, subject
16 to forfeiture and waiver. And the Court has
17 held open several times whether it's subject to
18 equitable exceptions and --

19 JUSTICE GINSBURG: But in the cases --

20 CHIEF JUSTICE ROBERTS: But we were --
21 I'm sorry.

22 JUSTICE GINSBURG: In the cases that
23 said mandatory, Kontrick, Eberhart, it said
24 strictly applied, but the party who would
25 benefit from the rule can waive the rule or

1 forfeit it, but -- but both cases said, if it's
2 properly raised, as it was here, then it
3 applies.

4 MR. HERSTOFF: That's true. But
5 Kontrick also left open the possibility that
6 these rules could be softened on inequitable
7 grounds, I think was the language that was used
8 in Kontrick. And it makes sense. And this --
9 I'm sorry.

10 CHIEF JUSTICE ROBERTS: I'm just
11 trying to figure out. I mean, when we did sort
12 of tighten up the use -- loose use of the term
13 "jurisdiction," we -- we said that these are,
14 nonetheless, mandatory.

15 And for some of us at least, that made
16 sense. But if it -- if the alternative to a
17 stricter application of the jurisdictional term
18 was that equitable claims are going to be
19 available across the board, I for one would
20 want to reconsider our loosening of the use of
21 "jurisdiction" because there ought to be some
22 area, I thought, where the claims -- where the
23 claim procedures were -- were mandatory in the
24 sense that Justice Ginsburg has just talked
25 about.

1 MR. HERSTOFF: So I -- I -- I don't
2 think the claim processing rules are
3 necessarily subject to any equitable exception.
4 It's not necessarily subject to good cause
5 exceptions or excusable neglect like -- like
6 most softer deadlines would be.

7 Equitable tolling is different,
8 though. Equitable tolling has been a part of
9 American jurisprudence since the beginning and
10 even in England prior to that.

11 CHIEF JUSTICE ROBERTS: Well, yes, at
12 a time where "jurisdiction" meant what we used
13 to think it meant. In other words, yes, there
14 was equitable tolling but not across the board,
15 and the areas in which it did not apply were
16 much more expansive than they are now today.

17 MR. HERSTOFF: I think, back then when
18 equitable tolling did not apply, that those
19 were in circumstances, from my understanding,
20 where the time limit is what the Court today
21 would refer to as jurisdictional. Now, here,
22 we have a non-jurisdictional provision.

23 JUSTICE GORSUCH: Is -- is the upshot
24 of your argument, though, counsel, that so long
25 as it's a non-jurisdictional rule, equitable

1 tolling must always apply? Congress couldn't
2 authorize a truly mandatory statutory deadline?

3 MR. HERSTOFF: No, that is not our
4 position. We do not go that far.

5 JUSTICE GORSUCH: Okay. So if -- if
6 there is room for what the Chief Justice
7 suggests remains, why isn't this the paradigm
8 case? I mean, how -- how clear could Congress
9 through the rule-making committee have been?
10 In multiple places, in multiple ways making
11 clear through language like "must" and
12 expressly excluding times for appeal, I mean,
13 gosh, if this isn't good enough, what is?

14 MR. HERSTOFF: Well, I think that --
15 that as Your Honor referred to with my -- with
16 my co-counsel, Rule 26(b) specifically draws a
17 distinction between extending the time, on the
18 one hand, and, on the other hand, permitting a
19 late filing. And here, if anything --

20 JUSTICE GORSUCH: Well, we have
21 Robinson that takes care of that problem, he
22 says, so we have precedent there. So, again,
23 how -- how much clearer could the rules have
24 been put for maybe that one example, the
25 precedent plugs that hole?

1 MR. HERSTOFF: Well, I think the --
2 the rules committee actually was a lot clearer
3 in another example where I think the rule would
4 not be subject to equitable exceptions, and
5 that's in Appellate Rule 4(a)(4), specifically
6 the 2016 amendment to 4(a)(4).

7 There, the Court changed the rule to
8 make clear that only a timely Rule 50 or Rule
9 59 motion, and it's not an untimely Rule 50 or
10 Rule 59 motion, would suspend the time to
11 appeal regardless of what the district court --

12 JUSTICE BREYER: Well, what do you
13 think as a standard we should use? That is to
14 say, if it's a jurisdictional rule, I guess
15 that's pretty unwaivable and nothing. If it's
16 a non-jurisdictional rule, then equitable
17 grounds, but, certainly, Congress can stop
18 that, or the rules committee. And the way it
19 stopped it was it said, normally, you can
20 extend the time for good cause.

21 Now that's quite broad. But there's
22 an exception for our case, which says you can't
23 extend it for good cause. So here we have for
24 good cause, here we have zero, and I thought
25 perhaps that Justice Ginsburg proposed a narrow

1 exception that would, in fact, make it not for
2 good cause but not zero. And that's the unique
3 circumstances sharply honed, which I guess
4 covers Justice Alito's Mars attack --

5 (Laughter.)

6 JUSTICE BREYER: -- and various others
7 that are unusual but cry out, okay? Now what
8 about that? I'm not advocating it. I want to
9 know your opinion.

10 MR. HERSTOFF: I -- I agree
11 completely, Justice Breyer, with -- with what
12 you're saying. It is true that a good cause
13 extension is not permitted for petitions for
14 permission to appeal.

15 Rule 26 does not say anything about
16 equitable tolling. Equitable tolling requires
17 much more than simple good cause.

18 JUSTICE BREYER: If, in fact, we are
19 at sharply honed, special, unique
20 circumstances, how do you win this case?
21 Because what seemed to happen here is it was --
22 I don't know if it was you, but whatever lawyer
23 went in for your side, within the 14 days, did
24 not even ask the judge to extend the time, at
25 least not in writing. And so it's pretty hard

1 to say you are, from an equitable point of
2 view, in a unique circumstance.

3 MR. HERSTOFF: Well, I do think that
4 the -- the Thompson rule applies here because
5 10 days after the decertification order, the
6 district court held a status conference during
7 -- during which we asked for permission to file
8 a motion for reconsideration in writing. And
9 at that time --

10 JUSTICE SOTOMAYOR: Counsel, on what
11 ground would we overrule the circuit's
12 rejection of that argument? You raised it
13 below. It explicitly didn't rule on that
14 basis. It held that you had filed the motion
15 after the 14 days. What ground do we have to
16 disagree with the circuit court on that?

17 MR. HERSTOFF: Well, you're talking
18 about with the Ninth Circuit saying -- saying
19 that unless an exception applies, the petition
20 would be barred?

21 JUSTICE SOTOMAYOR: Exactly.

22 MR. HERSTOFF: So the -- when the
23 Ninth Circuit said that, it included within
24 that language a reconsideration motion that's
25 filed within the 14 days. So what the court of

1 appeals said was that the decertification order
2 was made on February 20. There was no Rule
3 23(f) petition filed within that 14-day period.
4 And, therefore, unless an exception applies, it
5 would be untimely.

6 So the court was saying, even if a
7 motion for reconsideration was filed within the
8 14-day period, it would be untimely. So they
9 considered that an exception as well. So --

10 CHIEF JUSTICE ROBERTS: The -- the
11 unique -- we've talked about unique
12 circumstances. Unique is defined as the only
13 one. There have been many hurricanes, there
14 have been many fires, there hasn't been a
15 Martian invasion yet, but what do you think it
16 is? Unique is not unusual, right?

17 So, if you're going to create an
18 exception for unique circumstances, it can't
19 mean the situation where judges misadvise
20 litigants about how much time they have. That
21 doesn't happen all the time, but we've
22 certainly seen more than one case of that.

23 So, if you're going to say unique
24 circumstances, what exactly does it mean, if it
25 doesn't mean what the dictionary says?

1 MR. HERSTOFF: Well, I think it -- it
2 is a unique circumstance where the district
3 court misadvises the party on how much time --

4 CHIEF JUSTICE ROBERTS: I mean, I've
5 seen dozens of cases where that has happened.
6 In some, if it's an equitable tolling
7 situation, it's typical that equitable tolling
8 is appropriate, although not always. So that's
9 not unique.

10 Now, if you're going to say it's an
11 unusual circumstance, then I think you've
12 opened the barn door. If you're going to say
13 it's a circumstance where the judge is the main
14 villain in the missing of the deadline, well,
15 then that's something else, and maybe that's
16 better or -- or worse than unusual. But it
17 just seems to me that if you're -- you're using
18 "unique" -- perhaps the Court has used "unique"
19 as kind of a wiggle word that shouldn't have
20 any wiggle in it.

21 MR. HERSTOFF: Well, I think that
22 applying this doctrine is consistent with the
23 federal rules, though, for instance, on Rule 1,
24 and the rules are derived from the old equity
25 rules, so it makes sense there is some

1 flexibility there when a district court
2 misinforms litigants about the time that they
3 have to file, especially in the context of a
4 non-jurisdictional rule like we have --

5 CHIEF JUSTICE ROBERTS: Well, then I
6 think you do have to say the exception is when
7 the district court misadvises the litigants,
8 rather than saying "unique" but not really
9 meaning unique, because then you get in a
10 situation that Justice Alito was talking about.
11 Most lawyers consider their case unique when
12 they run into something like this, and the
13 judges gives them a lot more flexibility than
14 perhaps the rules committee wanted as well.

15 MR. HERSTOFF: I agree. I mean, I
16 think this term "unique circumstances doctrine"
17 does refer specifically to the district court
18 misinforming it --

19 JUSTICE KAGAN: Yeah, Mr. Herstoff, I
20 don't think this is your fault, right? This is
21 the court's fault in -- in putting a bad label
22 on something that it actually meant when it
23 meant something else. But my understanding of
24 what the court has meant when it's done this is
25 not the attack from Mars or Hurricane Katrina.

1 My understanding is that it was meant
2 to label a category of cases where the court
3 had misled the party into doing something, into
4 missing some kind of deadline. Is that your
5 understanding?

6 MR. HERSTOFF: Yes, I agree, Justice
7 Kagan.

8 JUSTICE KAGAN: So -- but -- but I
9 don't see where that is here.

10 MR. HERSTOFF: Where that is? Well,
11 the district court paused the proceedings and
12 specifically said that you -- that a
13 reconsideration motion could be filed by
14 March 12, 2015.

15 JUSTICE KAGAN: Yes. So he said a
16 reconsideration motion could be filed. He was
17 right about that. A reconsideration motion
18 could have been filed.

19 What he didn't say anything about
20 was -- was -- was what that meant for your
21 appeal right.

22 MR. HERSTOFF: That's true. But I
23 think there is a basic understanding that when
24 a reconsideration motion is pending, a party
25 does not need to seek appellate review on top

1 of that.

2 I mean, that's really what happened in
3 Thompson. The district court did not say
4 anything about an appeal. It simply said that
5 the motion was filed in ample time. And the
6 Court held that that was -- that was
7 sufficiently misleading such that the appeal
8 was required to be considered on the merits,
9 even though --

10 JUSTICE GINSBURG: Has this Court cast
11 any doubt on Thompson?

12 MR. HERSTOFF: In the -- in the
13 context of jurisdictional rules, yes, the Court
14 overruled Thompson for jurisdictional deadlines
15 and this Court's decision in Bowles but left it
16 intact for non-jurisdictional rules.

17 And I think with good reason, because
18 non-jurisdictional rules, I think, presumably
19 should be subject to or at least presumptively
20 subject to equitable considerations such as
21 tolling, such as the -- what the Court has
22 referred to as the unique circumstances
23 doctrine, which I think is a subspecies of
24 tolling or estoppel.

25 JUSTICE GORSUCH: Well --

1 JUSTICE GINSBURG: I thought mandatory
2 -- the Court has said in -- in the Kontrick
3 line of cases mandatory means inflexible?

4 MR. HERSTOFF: And that, I mean,
5 generally is inflexible. I mean, we're not
6 advocating for a good cause standard here.
7 There has to be something more than that.

8 I think that a district court
9 misleading a party is more than simple
10 excusable neglect or good cause. Equitable
11 tolling is as well. I mean, in this Court's
12 decision in Irwin, the Court said that statutes
13 of limitations are presumptively entitled to
14 equitable tolling and then went on to hold that
15 in the facts of that case, equitable tolling
16 was not established because the party --

17 JUSTICE GORSUCH: Counsel --

18 MR. HERSTOFF: -- had established at
19 most a garden variety claim of excusable
20 neglect, so I think tolling is on a different
21 level.

22 JUSTICE GORSUCH: -- I -- I think -- I
23 think you have two possible lines of response
24 to Justice Ginsberg's question, and I'm curious
25 which you choose.

1 So, if Thompson doesn't apply to
2 jurisdictional statutes, one could say it does
3 apply to mandatory but inflexible claims
4 processing rules because it's not a species of
5 equitable tolling at all; it is, in fact, a
6 rule of judicial administration that, when it's
7 our fault, shame on us.

8 Or one could say, yeah, let's be
9 honest, it's a form of equitable tolling and,
10 therefore, shouldn't apply, just as it doesn't
11 to jurisdictional rules, it shouldn't apply to
12 mandatory claims processing rules, but should
13 remain a viable option otherwise. And that
14 would harmonize Bowles with this line of cases.

15 Which of those choices should we make
16 and why?

17 MR. HERSTOFF: I do think that -- that
18 these rules presumably should be subject to
19 equitable tolling and not necessarily just for
20 the district court misleading the parties.
21 However, either way, the judgment should be
22 affirmed because here, in fact, the -- the
23 court did mislead Mr. Lambert into thinking
24 that he had --

25 JUSTICE GINSBURG: How? The court

1 didn't say one word about permission to appeal.

2 MR. HERSTOFF: The court didn't, but I
3 think this is just like Thompson, where --
4 where the court said you had this amount of
5 time to seek reconsideration.

6 JUSTICE KAVANAUGH: Don't the local
7 rules of many courts then miss -- also mislead
8 counsel because the local rules of many courts
9 would have motions for reconsideration that
10 could be filed within periods longer than 14
11 days?

12 MR. HERSTOFF: Well, then I think that
13 --

14 JUSTICE KAVANAUGH: Under your
15 position, all the district court did here was
16 identify a date that was longer than 14 days.
17 The local rule for motions for reconsideration,
18 the local rules of many courts similarly
19 identify a date that's longer than 14 days for
20 motions for reconsideration.

21 MR. HERSTOFF: Well, I think on that
22 --

23 JUSTICE KAVANAUGH: How would you
24 distinguish what happened here from a local
25 rule that's longer than 14 days?

1 MR. HERSTOFF: Well, I think here the
2 district court did set this -- this specific
3 deadline. And I think it does --

4 JUSTICE KAVANAUGH: How would you
5 distinguish a local rule that has a date longer
6 than 14 days, a period longer than 14 days in
7 which you can file a motion for
8 reconsideration?

9 MR. HERSTOFF: Well, I do think that
10 -- that really Rule 59 comes into play here,
11 which says 28 days, but I think it is very
12 unreasonable to interpret Rule 59 to apply
13 here, but even if the Court concludes that it
14 does not, it's at least a reasonable
15 interpretation to say --

16 JUSTICE KAVANAUGH: And the Rule 59
17 argument, just to reiterate, depends on your
18 Rule 54 interpretation, correct?

19 MR. HERSTOFF: That's right, yes. So
20 I -- I do think that at -- at the very least,
21 if a local rule gives up to a 28-day period
22 seek reconsideration.

23 JUSTICE KAVANAUGH: You could have the
24 same confusion of a local rule that gives
25 longer than 28 days, for example, the local

1 rule here for motion for reconsideration, but
2 then you're not within the 28 days of Rule 59,
3 right?

4 MR. HERSTOFF: I think that's true.
5 The Court has not really had occasion to
6 address the precise contours of when a motion
7 for reconsideration is going to suspend the
8 time to appeal. The Court's cases that have
9 decided that have been in the context where the
10 reconsideration motion was filed within the
11 time to appeal. So it hasn't had occasion to
12 consider it when the -- when it's been filed
13 outside, say, this 14-day time period.

14 So that clarification is important
15 here to -- to consider that.

16 JUSTICE KAVANAUGH: What do you do
17 with a local rule that has no time limit, as
18 the one here in a motion for reconsideration, a
19 motion is filed a year later or something like
20 that?

21 MR. HERSTOFF: I think, under those
22 circumstances, it becomes a question of
23 reasonableness. Now if upon -- if the
24 litigation goes on and a year later you're
25 asking the court to reconsider its decision

1 based upon the exact same evidence that was
2 before the court a year earlier, I think that,
3 as an initial matter, the Rule 23(f) petition
4 is very unlikely to be granted because the
5 court of appeals is going to see that as
6 causing an unreasonable delay.

7 And as was discussed earlier in this
8 argument, the courts of appeals have absolute
9 discretion whether to consider this appeal or
10 not.

11 CHIEF JUSTICE ROBERTS: You know,
12 sometimes in these unique circumstance, a
13 situation if you're focusing on judicial
14 conduct, what we find when we look into it,
15 it's a lot more ambiguous than you may think.

16 And I do think we have to be careful
17 about what we're requiring of the district
18 court judges. If somebody stands up in the
19 situation like this and says, Your Honor, I'd
20 like to file a motion to reconsider next week,
21 is that okay? The judge says, sure, fine with
22 me. I don't think he should have to stop and
23 say, well, let me research it and see if the
24 time is expired by then.

25 And then, if he says, well, if you're

1 going to file it next week, file it on Friday.
2 And it turns out Thursday's the deadline. I
3 mean, the judge has misled you, the lawyer
4 would say, because he said I could file it on
5 Friday. It turns out the rule says I couldn't.

6 So I'm not -- I'm not as comfortable
7 with an exception for cases where the court
8 misleads the parties because I'm not sure
9 that's as clear a case as you might think of
10 where the blame is justifiably placed on the
11 judge.

12 MR. HERSTOFF: Again, I'm not even
13 sure I'm calling it blame. I think it's just
14 the -- the parties' reasonable expectations
15 when a court -- when a district court has said
16 that they're going to reconsider.

17 JUSTICE KAVANAUGH: There's nothing
18 misleading about that, I guess is the point
19 here because the local rule had no time,
20 correct, for a motion for reconsideration? The
21 district court set a time for a motion for
22 reconsideration. There's nothing misleading at
23 all about that.

24 MR. HERSTOFF: Well, then -- well,
25 what's the --

1 JUSTICE KAVANAUGH: What's misleading,
2 I guess, is, in context, when you roll in Rule
3 23(f), which the district court said nothing
4 about, correct?

5 MR. HERSTOFF: The district court did
6 not say anything --

7 JUSTICE KAVANAUGH: I mean, I just
8 don't think it's fair to say the district court
9 misled here. I don't even think it falls into
10 that box necessarily.

11 JUSTICE SOTOMAYOR: The leave to file
12 a motion -- the motion for leave to file an
13 appeal, you didn't tell the judge you were
14 intending to do that, did you?

15 MR. HERSTOFF: The Rule 23(f) was not
16 brought up at the status conference, that's
17 true.

18 JUSTICE SOTOMAYOR: So how was the
19 judge supposed to play lawyer? He's supposed
20 to tell you -- you ask him, let me file a
21 motion for reconsideration, he's supposed to
22 protect you and be your lawyer and tell you,
23 you know, if you file it next week, you're
24 going to lose your time to appeal?

25 I don't know of any case we've ever

1 held where a judge has to tell you something
2 when you don't ask the judge about that.

3 MR. HERSTOFF: And it's really not our
4 position that we're placing any kind of blame
5 on the district judge. It is our position,
6 though, that when a district court says that
7 it's going to reconsider an order, that that
8 essentially renders the order non-final for
9 purposes of appeal.

10 And why would one file a petition for
11 permission to appeal when the district court
12 said we're going to take another look at this
13 order and perhaps change it.

14 JUSTICE GINSBURG: It is --

15 JUSTICE KAGAN: But can --

16 JUSTICE GINSBURG: It is a non-final
17 order. This motion granting or denying class
18 action status is the most non-final because the
19 rules tell us it can be changed any time up to
20 the entry of final judgment.

21 MR. HERSTOFF: And let me clarify.
22 When I say it's non-final, I mean it renders it
23 not the district court's last word on
24 decertification based upon the evidence in
25 front of the district court. The district

1 court is going to reconsider this order, and
2 it's our position that, under those
3 circumstances, it doesn't make sense to seek
4 appellate review when the order might be
5 changing based upon the pendency of that
6 reconsideration motion more fully.

7 JUSTICE KAGAN: You know, I suppose
8 I'm with you that it makes more sense to do the
9 motion for reconsideration before the appeal
10 and that that is true even when the appeal is
11 interlocutory, but, you know, not every rule we
12 have makes perfect sense.

13 And it just doesn't seem as though
14 you're off the hook from actually looking up
15 the rules and saying, well, look, this says 14
16 days. I better file this appeal within 14
17 days, or at least ask some further questions
18 about it, just because it sort of seems to make
19 sense to do a motion for reconsideration before
20 an appeal.

21 MR. HERSTOFF: Well, the rules
22 actually do not address reconsideration
23 motions, and it has been long understood that a
24 timely reconsideration motion will suspend the
25 time to appeal.

1 Now I think it would be a different
2 situation if, for instance, we were in a
3 bankruptcy appeal which specifically says that
4 the time to appeal stops running only if you
5 file within 14 days under the bankruptcy rules,
6 and there -- there it was clear. And here you
7 have rules that are silent with respect to
8 reconsideration motions.

9 So I think we go by the Healy, Dieter,
10 Ibarra line of cases that says a timely
11 reconsideration motion suspends the time to
12 appeal. And here the reconsideration motion
13 was, indeed, timely. And for that reason the
14 time to appeal should be suspended and
15 therefore runs from June 24th of 2015. The
16 Rule 23(f) petition was filed 14 days later,
17 and the appeal, therefore, was improperly
18 deemed timely.

19 JUSTICE SOTOMAYOR: If we reject that,
20 do you lose?

21 MR. HERSTOFF: If you reject --

22 JUSTICE SOTOMAYOR: That you didn't
23 file a motion within the time, within the 14
24 days?

25 MR. HERSTOFF: May I answer the

1 question?

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. HERSTOFF: No, because we still
4 have equitable tolling and the Harris Truck
5 Lines and Thompson line of cases, so in either
6 circumstance the judgment should be affirmed.
7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Hueston, you have a minute left.

11 REBUTTAL ARGUMENT OF JOHN HUESTON

12 ON BEHALF OF THE PETITIONER

13 MR. HUESTON: Your Honor, in this
14 remaining time let me emphasize and direct the
15 Court's attention to PA 69 to 77 where the
16 short status conference took place.

17 And in that status conference it is
18 notable that not only did the Court not mention
19 Rule 23(f), not mention any sort of appellate
20 right, but counsel did not even mention 23(f),
21 nor even say the word appeal.

22 And, In fact, no mistake at all was
23 made by the judge in that case.

24 To have the rule that Lambert is
25 urging today would have a judge effectively

1 need to conduct a Rule 11 criminal colloquy
2 with counsel asking if they're aware of all
3 sorts of potential related rights.

4 That is asking an impossible task for
5 a district court judge and an unfair one and
6 goes well beyond the acknowledged sharply-honed
7 exception which does not apply factually in
8 this case. Thank you, counsel.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 11:12 a.m., the case
12 was submitted.)

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