

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DONTE PARRISH,)
)
 Petitioner,)
)
 v.) No. 24-275
)
 UNITED STATES,)
)
 Respondent.)

Pages: 1 through 66
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4 Petitioner,)

5 v.) No. 24-275

6 UNITED STATES,)

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10 Washington, D.C.

11 Monday, April 21, 2025

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 11:31 a.m.

16

17 APPEARANCES:

18 AMANDA RICE, ESQUIRE, Detroit, Michigan; on behalf of
19 the Petitioner.

20 AIMEE BROWN, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Respondent in support of the Petitioner.

23 MICHAEL R. HUSTON, Phoenix, Arizona; Court-appointed
24 amicus curiae in support of the judgment below.

25

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P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 24-275, Parrish versus United States.

Ms. Rice.

ORAL ARGUMENT OF AMANDA RICE

ON BEHALF OF THE PETITIONER

MS. RICE: Good morning, Mr. Chief Justice, and may it please the Court:

Courts have long recognized that notices of appeal that are filed early take effect when an appeal clock starts running so long as they're otherwise sufficient and no one's prejudiced. That principle is consistent with the functional approach this Court takes to notices of appeal. It was applied in FirstTier, Lemke, and Luckenbach. And no one disputes, not the Fourth Circuit, not Mr. Huston, not any other court to my knowledge, that it's consistent with 2107(a), which sets the notice of appeal requirement and the default deadline for filing. The Fourth Circuit was wrong to read subsection (c) as displacing the ripening principle and requiring a second notice in the

1 reopening context only.

2 The principle applies to notices filed
3 after final judgment, just like it does to
4 notices filed before. That's why courts have
5 consistently held that notices of appeal ripen
6 when an extension is granted under 2107(c)'s
7 first sentence. Nothing in the second sentence
8 suggests that notices of appeal work differently
9 for reopening. And requiring a duplicative
10 notice of appeal would serve no conceivable
11 purpose.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: So you don't think
14 that there's a material difference between
15 filing a notice of appeal prematurely as opposed
16 to too late?

17 MS. RICE: I do think there's a
18 difference, Justice Thomas. I think filing a
19 notice of appeal too late, as this Court held in
20 Bowles, is a jurisdictional problem. But --

21 JUSTICE THOMAS: So why isn't this
22 notice of appeal too late?

23 MS. RICE: The notice of appeal is
24 certainly too late with respect to the original
25 appeal period. If nothing else had happened,

1 there'd be no argument that the notice of appeal
2 was timely. But there was another appeal
3 period. Reopening was granted here. And it's
4 too early with respect to that reopening period
5 in the same sense that a prejudgment notice of
6 appeal is too early with respect to the original
7 appeal period.

8 JUSTICE JACKSON: So I -- I'm
9 struggling with your argument, and the reason is
10 because I'm not sure that ripening is really the
11 best way to think about what is happening here.

12 In my view, the notice of appeal was
13 not actually premature. I mean, it was late
14 with respect to the initial -- the initial
15 period, but lateness doesn't necessarily doom
16 your position because, in this context, we have
17 a separate set of rules that allows for a
18 late-filed notice of appeal to be deemed timely
19 if certain conditions are satisfied.

20 And I guess what I keep coming back to
21 in my mind is what happens in district courts
22 every day when people file late, let's say it's
23 a motion or a brief or whatever, and they have a
24 motion for an extension of time attached to it.
25 It comes in together, the motion of -- for

1 extension of time and the brief they want to
2 file late.

3 And when the court grants the motion,
4 the clerk docket the brief. There's not, like,
5 an extra determination that the person needs to
6 refile the brief or it needs to come in, you
7 know, in certain -- it's there already because
8 they submitted it along with.

9 So, in that situation, I guess I just
10 don't understand, nobody thinks of it as
11 ripening. These things arrived at the same
12 time, which is sort of what's happening here.
13 The notice of appeal came in, and it was
14 construed as having a motion to reopen as a part
15 of it or construed as being a motion to reopen.
16 So why do we even need ripening to get to the
17 result that you are seeking in this case?

18 MS. RICE: I -- I think I agree with
19 just about everything you said, Justice Jackson.
20 I don't know that the -- there's anything to the
21 concept as ripe -- of ripening as magic words.
22 This Court used that language in FirstTier. It
23 also talked about the notices of appeal relating
24 forward. But -- but I don't think there's
25 anything magic about those words.

1 I -- I think the logic that you're
2 articulating is similar to what this Court said
3 in Lemke, which is just that a premature notice
4 of appeal is filed within the time for --

5 JUSTICE JACKSON: But I guess what I'm
6 saying, it's not premature. Like, the -- these
7 things happened at the same time. The reason
8 why ripening is confusing --

9 MS. RICE: Mm-hmm.

10 JUSTICE JACKSON: -- is because that
11 is a scenario like the one that we talk about --
12 gosh, I don't have the -- the name of the case
13 right in front of me -- but, you know, there
14 are -- there are times when something will come
15 in before the judgment --

16 MS. RICE: Mm-hmm.

17 JUSTICE JACKSON: -- for example, and
18 we have to wait for the judgment in order for
19 the notice to take effect, and you say, okay, it
20 ripens at the time that the judgment happens.

21 Here, we don't have a separate
22 action --

23 MS. RICE: Yeah.

24 JUSTICE JACKSON: -- that we're
25 waiting for this notice of appeal to be

1 cognizable relative to. Do you understand what
2 I'm saying?

3 MS. RICE: I -- I do. It was the same
4 document in this case.

5 JUSTICE JACKSON: The mode -- it was
6 the same document.

7 MS. RICE: It was the same document.

8 JUSTICE JACKSON: It was the same
9 document. So I can't understand why ripening is
10 at play --

11 MS. RICE: Is the concept.

12 JUSTICE JACKSON: -- in this
13 situation.

14 MS. RICE: Yeah. I think it's not
15 always the same document. You could file a
16 notice of appeal and then realize you needed to
17 file an extension motion or a motion to reopen.
18 I think that happens too. You're certainly
19 right that these -- this often arises in the
20 context of pro se litigants. It's often one
21 document. But it doesn't have to be if it's
22 filed before a motion to reopen, at least before
23 the motion to reopen is granted.

24 I think, you know, another way to
25 think about it is the prematurity is -- it's not

1 with respect to the motion. It's with respect
2 to the granting of the motion. So the motion is
3 filed at the same time as the notice, that's
4 absolutely right. But reopening isn't granted
5 until after the motion is filed.

6 JUSTICE JACKSON: No, I understand,
7 but in -- for a motion for extension of time for
8 late-filed documents, the same dynamic exists.
9 The motion comes in stapled to the document, and
10 the court has to grant the motion in order for
11 the document to be deemed timely.

12 I mean, what we're doing here is just
13 deciding whether this notice of appeal is --
14 should be deemed timely. And we have rules
15 related to it. It's not timely with respect to
16 the first set of rules.

17 MS. RICE: Mm-hmm.

18 JUSTICE JACKSON: But it could be if
19 the court finds the conditions related to
20 motions for reopen exist, and they do.

21 So, I mean, I just wonder why the
22 court of appeals didn't just docket this when it
23 came back to them, having had the district court
24 find that the motion to reopen was -- the
25 conditions were granted.

1 MS. RICE: I -- I wonder that too,
2 Justice Jackson. I think every other court of
3 appeals would have. These are ordinarily just
4 treated as notices of appeal that have become
5 effective, in your language, have been deemed
6 timely.

7 JUSTICE JACKSON: They're deemed
8 timely as a result of the conditions.

9 JUSTICE KAVANAUGH: And you --

10 MS. RICE: I -- I think that's exactly
11 right.

12 JUSTICE KAVANAUGH: -- you rely
13 heavily on the background principle. And, of
14 course, amicus says, well, if that background
15 principle controlled throughout, you wouldn't
16 have 4(a)(2) and 4(a)(4), I think, in the rules,
17 and, therefore, there really is -- that defeats
18 the concept of a overriding background
19 principle. You want to respond to that?

20 MS. RICE: Sure. I -- I think part of
21 the -- the confusion there is rules are a little
22 bit different than statutes. Rulemakers
23 sometimes just codify existing practice.
24 Sometimes they just codify statutes almost
25 exactly or decisions by this Court. It doesn't

1 mean that the rules are superfluous or aren't
2 doing anything. There's real value added even
3 just by pulling them all together in one place.
4 It's much easier to go look at the rules for
5 appellate procedure than to try to search
6 through all the statutes for the relevant rules.

7 So I think what the committee was
8 doing was codifying common applications of this
9 principle, both in the prejudgment context. The
10 rules just don't speak to this distinct context,
11 which is notices of appeal filed after --

12 JUSTICE KAGAN: And is there any
13 background as to why they codified those
14 particular applications and not other
15 applications? Do we know anything about that?

16 MS. RICE: Sure. So Rule 4(a)(2) was
17 adopted at the same time as the old version of
18 Rule 4(a)(4), which displaced ripening for a
19 short period of time. It said ripening actually
20 doesn't apply in this post-judgment motion
21 context. There were concerns that there might
22 be confusion, who has control of the case, the
23 appellate court or the district court.

24 So, at the time the committee created
25 an express exception to ripening, I think it

1 made sense to make clear that it actually was
2 preserving that concept in a -- in a closely
3 related context. Rule 4(a)(2) survived when the
4 committee changed its mind. It said that hadn't
5 actually worked very well, and it changed Rule
6 4(a)(4) back in 1993. So I think that's a
7 little bit of historical context.

8 None of that had anything to do with
9 this post-final judgment context, which doesn't
10 have the kind of interlocutory appeal/final
11 judgment issues that the committee was dealing
12 with in the prejudgment context.

13 JUSTICE GORSUCH: Well, on -- on -- on
14 that score, Mr. Huston suggests that background
15 ripening principles were historically confined
16 to the judgment context, (a)(2), (a)(4), but not
17 to (a)(6), the reopening context. I wanted to
18 give you a chance to address that.

19 MS. RICE: Yeah, I don't think that's
20 right. This Court hasn't had a chance to
21 address it in the post-judgment context, but
22 there are cases going back to the '60s where
23 it's been -- it's been applied in the extension
24 context, which works just like reopening.

25 I don't have old reopening cases for

1 you, Justice Gorsuch, just because reopening
2 wasn't created until 1991.

3 JUSTICE GORSUCH: Yeah.

4 MS. RICE: So -- so we can't go back
5 further than that, but extension, I think, is a
6 pretty good analog, and -- and those cases go
7 back to the '60s. And I don't -- I don't
8 believe that there's any case that's rejected
9 ripening in the extension context.

10 JUSTICE SOTOMAYOR: In that regard --
11 in that regard, you spoke about interpreting
12 federal rules of procedure being different than
13 interpreting statute.

14 MS. RICE: Mm-hmm.

15 JUSTICE SOTOMAYOR: Rules themselves
16 say that we have to consider efficiency and not
17 to read the rules literally but with a view to
18 what's just, correct?

19 MS. RICE: That's -- that's exactly
20 right.

21 JUSTICE SOTOMAYOR: I was taken -- not
22 taken -- but you pointed out that in Scarborough
23 versus Principi in your reply brief that we
24 rejected the argument that background principle
25 for pleadings codified in Rule 15(c) of the

1 Federal Rules of Civil Procedure foreclosed
2 application of background principles to other
3 filings, like fee applications, correct?

4 MS. RICE: That's exactly right. I
5 think Chambers --

6 JUSTICE SOTOMAYOR: And so we -- we --
7 that's in support of your argument that Congress
8 usually with rules is paying attention to just
9 one thing at a time?

10 MS. RICE: I think that's exactly
11 right, Justice Sotomayor. Scarborough --
12 Scarborough is, I think, the best example.
13 Chambers is another, where the Court held that
14 statutes and rules that address sanctions in
15 certain contexts doesn't displace broader
16 background authority that courts have to
17 sanction litigants.

18 JUSTICE GORSUCH: Well, and we're not
19 really even addressing the rules here, are we?
20 Because, as I understand it, the government has
21 waived any -- any objection under Rule 4(a)(6).
22 And it's a claims processing rule. So, really,
23 the question turns on 2107 and the statutory
24 limit.

25 MS. RICE: Yep. I think that's

1 exactly right. You don't have to say anything
2 about the rules here if you don't want to,
3 Justice Gorsuch. The Fourth Circuit ruled on
4 jurisdictional grounds.

5 JUSTICE GORSUCH: Maybe leave that to
6 the Rules Committee. How about that?

7 MS. RICE: You could. You could. You
8 know, the rules just aren't jurisdictional, as
9 you held in Hamer, so it doesn't matter actually
10 if you -- if you thought that the rules might
11 require a second notice. And I think there's
12 every indication that the Rules Committee might
13 act on this. They formed a subcommittee to
14 consider it.

15 JUSTICE SOTOMAYOR: I'm sorry. You
16 took a step further than I had in my own
17 thinking, so let me go back to that answer.

18 MS. RICE: Mm-hmm.

19 JUSTICE SOTOMAYOR: If we answer it
20 the way that Justice Gorsuch just suggested, we
21 wouldn't reach the substantive question at all.
22 We would just say since it's a claim processing
23 rule --

24 JUSTICE GORSUCH: You still have --
25 sorry.

1 JUSTICE SOTOMAYOR: No, no.

2 JUSTICE GORSUCH: I don't want to
3 answer your question. You -- you -- you can do
4 it.

5 MS. RICE: Please.

6 (Laughter.)

7 MS. RICE: No. I -- I -- I expect
8 what Justice Gorsuch was about to say is that
9 you still need to answer the statutory question.
10 If the statute requires a second notice --

11 JUSTICE SOTOMAYOR: I see. Okay.

12 MS. RICE: -- in this context, as the
13 Fourth Circuit held, then the Rules Committee is
14 powerless to expand this Court's jurisdiction.

15 JUSTICE SOTOMAYOR: To -- to expand.

16 MS. RICE: So all you need to hold is
17 that the -- the statute doesn't preclude
18 ripening, and then the Rules Committee can
19 actually -- you know what? I don't think the
20 rules question's hard, so you could address it.

21 JUSTICE GORSUCH: You did a better
22 job --

23 JUSTICE KAVANAUGH: Why --

24 JUSTICE GORSUCH: -- with it than I
25 would have.

1 JUSTICE KAVANAUGH: I mean, why
2 wouldn't we answer the rules question as well?

3 MS. RICE: I -- I agree with that.

4 JUSTICE KAVANAUGH: Save a little
5 time, right?

6 MS. RICE: Save everybody a little
7 time at least, you know, as a --

8 JUSTICE KAVANAUGH: If you're correct
9 on your interpretation, it seems like.

10 MS. RICE: Yeah. I think it's a
11 pretty straightforward question. I think it
12 would be helpful to say, you know, as a -- as a
13 default matter, the rules don't address this,
14 and so it doesn't displace the common law
15 principle. You know, the Rules Committee could
16 act to displace it if it wants to, but absent
17 action from the Rules Committee, that's --
18 that's the principle the Court should apply.

19 CHIEF JUSTICE ROBERTS: Well, the
20 rules don't address it, but -- in this instance,
21 but they do in others. Others talk about
22 relation forward. And this one doesn't.
23 Shouldn't the expressio unius principle apply
24 here?

25 MS. RICE: You know, I don't think so,

1 Mr. Chief Justice. The -- these rules codify
2 common applications in a prejudgment context. I
3 thing expressio unius recognizes, when you're
4 looking at specific enumerations, there's a
5 context. So those rules address certain
6 post-judgment motions and other pre-judgment
7 issues. They don't speak to the separate
8 post-judgment context at all.

9 JUSTICE GORSUCH: Yeah. I think the
10 Chief -- the Chief's point, though, is relation
11 forward is mentioned now in two other rules in
12 Rule 4, in Rule 4, and that -- doesn't that tell
13 us something?

14 I mean, maybe it should -- maybe --
15 maybe it's wrong. Maybe the Rules Committee
16 wants to change its mind. Maybe it's irrelevant
17 in this case since the government's waived it,
18 but, gosh, normally, expressio unius means
19 something in these kinds of contexts, doesn't
20 it?

21 MS. RICE: It -- it -- it means
22 something. I think, if there were
23 another post-judgment motion, for example, that
24 was not covered by Rule 4(a)(4), you might read
25 into that an intention by the committee to not

1 cover that motion. But this is a different
2 context, and expressio unius usually understands
3 that the decisionmaking body or the person
4 writing the statute or the rule is addressing
5 the context at hand. And I just don't think
6 that post-judgment notices are --

7 JUSTICE GORSUCH: So we should look at
8 (a)(6) in a vacuum without looking at (a)(2) and
9 (a)(4)?

10 MS. RICE: No, I -- I think (a)(2) and
11 (a)(4) are relevant and they -- they reflect the
12 Rules Committee's recognition of this background
13 principle, but the fact that there's no rule
14 addressing 4(a)(5), addressing extensions,
15 doesn't mean that ripening doesn't operate in
16 that context. The Rules Committee just hasn't
17 codified that.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 Justice Alito?

23 JUSTICE ALITO: Do we have any
24 information about the frequency with which the
25 situations addressed by 4(a)(2) and 4(a)(4)

1 arise and the frequency with which the situation
2 present here arises?

3 MS. RICE: My -- I don't have any
4 empirical data on that. My sense is that the
5 4(a)(2) and 4(a)(4) situation arises more
6 frequently. That's part of what prompted the
7 committee to address that issue and to make a
8 rule.

9 This issue, the reopening issue,
10 didn't come to the committee's attention until
11 recently because it doesn't arise very often.
12 And every court had treated it the same way. I
13 don't have any -- any data to back that up, but
14 that's my sense from looking at the cases.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 Justice Kagan?

19 Justice Gorsuch, anything further?

20 Justice Kavanaugh?

21 Justice Jackson?

22 Thank you, counsel.

23 Ms. Brown.

24

25

1 ORAL ARGUMENT OF AIMEE BROWN
2 ON BEHALF OF THE RESPONDENT
3 IN SUPPORT OF THE PETITIONER

4 MS. BROWN: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 Permitting a premature notice of
7 appeal to ripen when the appeal period reopens
8 is consistent with Section 2107, the rules of
9 appellate procedure, and this Court's precedent.

10 Section 2107 doesn't address premature
11 notices of appeal, but this Court has already
12 recognized that the statute doesn't preclude
13 them. FirstTier held that even though
14 Section 2107 requires filing a notice of appeal
15 after the entry of judgment, a notice filed
16 before judgment relates forward to the day the
17 judgment is entered.

18 Rule 4 likewise confirms that
19 premature notices of appeal can relate forward
20 and requires such treatment in multiple
21 contexts. And this Court's precedents have long
22 instructed courts to disregard technical
23 deficiencies in notices of appeal.

24 Amicus's contrary position would
25 require the Court to hold that filing too early

1 has the same jurisdictional consequences as
2 filing too late. But that's flatly inconsistent
3 with FirstTier, with Rule 4, and common sense.

4 Unlike filing too late, filing too
5 early doesn't disrupt finality or risk prejudice
6 to others. Petitioner's premature filing
7 provided adequate notice here, and there's no
8 basis to require a duplicative filing.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Is there any
11 difference between your argument and that of
12 Petitioners?

13 MS. BROWN: So not really and not in
14 any respect that should affect the outcome of
15 the case today. I think Petitioner's argument
16 with respect to the way 4(a)(2) and 4(a)(4) are
17 interpreted might be slightly different. We do
18 take those two rules to be the only
19 circumstances in which prejudgment notices of
20 appeal could relate forward or in which a notice
21 of appeal filed while certain prejudgment
22 motions are pending can relate forward.

23 I think, in -- in some parts at least
24 of the Petitioner's reply brief, they suggested
25 that those rules may not cover the waterfront

1 even in the circumstances that they address. We
2 do take those rules to be codifying and -- and
3 displacing any inconsistent practices within
4 those two contexts, but when the rules do not
5 address the particular context, which is the
6 case here, we think that that background
7 judicial principle that promotes ripening or
8 that preserves this kind of ripening in relation
9 forward continues in effect.

10 JUSTICE BARRETT: You mean so if there
11 were another post-judgment motion that wasn't on
12 this list, that's where you're distinguishing
13 your position?

14 MS. BROWN: So I -- I do take the
15 Petitioner this morning to have said or my
16 friend this morning to have said that if there
17 were another post-judgment motion, then maybe
18 4(a)(4) wouldn't apply and ripening wouldn't
19 apply.

20 JUSTICE BARRETT: Okay. And that's
21 where you're distinguishing your position?

22 MS. BROWN: We agree with that.

23 JUSTICE BARRETT: Okay.

24 MS. BROWN: But I understood the --
25 the reply brief --

1 JUSTICE BARRETT: Okay.

2 MS. BROWN: -- the Petitioner's reply
3 brief, to indicate that in certain contexts
4 where there's a prejudgment --

5 JUSTICE BARRETT: Prejudgment.

6 MS. BROWN: -- that there might be
7 additional circumstances not covered by the rule
8 where relation forward or ripening would still
9 be permissible.

10 JUSTICE BARRETT: And, Ms. Brown, what
11 do you think about Justice Gorsuch's point that
12 we don't need to address Rule 4 because the
13 government has -- has waived that, that we
14 should just address the statute? Do you have a
15 view?

16 MS. BROWN: So I -- I do think that
17 that is correct that this Court could take a
18 very narrow approach to this decision and just
19 hold that -- that -- that Section 2107 does not
20 itself preclude relation forward in this context
21 and that to the extent the rules might suggest
22 that relation forward is not permissible here,
23 those aren't jurisdictional.

24 The government waived any argument
25 about relation forward in this context or about

1 the need for a duplicative notice of appeal,
2 and, therefore, that waiver controls and -- and
3 could reverse.

4 We do think it would be helpful for
5 the Court to recognize the existence of this
6 background principle. It has been the rule
7 that's been applied in five circuits. We don't
8 see any issues with that. And, of course, so
9 long as the Court holds that the statute doesn't
10 preclude relation forward, the Advisory
11 Committee can continue its work and can continue
12 studying this issue and propose a rule that this
13 Court could then do as well.

14 JUSTICE SOTOMAYOR: What does it do to
15 amici's argument that it's a matter of
16 discretion for the Fifth Circuit, that even
17 though you waived it, that they could still say
18 we just won't accept the waiver?

19 MS. BROWN: So that's inconsistent
20 with this Court's precedent. In Wood versus
21 Milyard, the Court has held that it would be an
22 abuse of discretion for a court to disregard the
23 government's waiver of any non-jurisdictional
24 defense. And so we -- we don't think that that
25 is an available alternative argument for

1 affirmance in this case.

2 JUSTICE SOTOMAYOR: But not addressing
3 the rule question leaves open the possibility
4 that in the future the government could refuse
5 to waive?

6 MS. BROWN: That's correct, and we
7 think that that would be another basis for the
8 Court to just ensure, to just clarify to the
9 extent that there is any lack of clarity,
10 although, you know, the other circuits have all
11 held, consistent with what we've said today,
12 that -- that relation forward here is
13 permissible and -- and is the -- the correct
14 result.

15 JUSTICE SOTOMAYOR: Is the background
16 principle --

17 MS. BROWN: Exactly.

18 JUSTICE SOTOMAYOR: -- that governs
19 the interpretation of the rule? Okay. Thank
20 you.

21 JUSTICE GORSUCH: Well, your -- your
22 difference is, I just want to clarify, on
23 what -- you're saying other rules that don't
24 expressly mention relation forward don't contain
25 a relation forward element?

1 MS. BROWN: No. That's -- I'm -- I
2 apologize for the confusion. My --

3 JUSTICE GORSUCH: No, I'm sure it's
4 me.

5 MS. BROWN: What I was trying to
6 clarify is that we do think that with respect to
7 Rule 4(a)(2) and the way that this Court
8 interpreted that rule in FirstTier, those are the
9 only circumstances in which relation forward can
10 apply for prejudgment notices of appeal.

11 I take Petitioner's reply brief to
12 state that courts have continued to apply a
13 broader kind of background interpretation of --
14 or a broader background principle allowing
15 relation forward even in contexts that wouldn't
16 be directly covered by 4(a)(2). And we think
17 that Rule 4(a)(2) does cover the waterfront --

18 JUSTICE GORSUCH: So how do we --

19 MS. BROWN: -- at least for -- for
20 prejudgment.

21 JUSTICE GORSUCH: And can you give me
22 an example of the differences?

23 MS. BROWN: Sure. So the court in --
24 this comes, I think -- or the -- the opinion
25 from the D.C. Circuit in Outlaw really kind of

1 lays this out. Before the Court adopted --
2 before Rule 4(a)(2) was adopted, there was a
3 preexisting line of precedents that had applied
4 this background principle that had held that
5 anytime there's a notice of appeal after kind of
6 any decision, that would be permitted to relate
7 forward to final judgment so long as final
8 judgment had occurred before the court of
9 appeals acted.

10 And FirstTier limited that in some ways
11 to suggest that the decision had to be one that
12 would be appealable so long as judgment were
13 entered right after that. And so we think that
14 that narrower class of decisions is the -- is
15 the class that's covered by Rule 4(a)(2) and
16 that the background principle is displaced as to
17 the earlier precedents in that --

18 JUSTICE GORSUCH: Do you think that
19 the rules committee might have something
20 profitable to say about how far this relation
21 forward principle might obtain in 4(a)(6)
22 contexts too?

23 MS. BROWN: I certainly think that
24 the --

25 JUSTICE GORSUCH: I mean the --

1 MS. BROWN: -- the Rules Advisory
2 Committee will have the ability to study this
3 issue and can take into account any comments
4 that come from practitioners or can look at the
5 different contexts in which this is -- this
6 arises and may well choose to provide a more
7 limited relation forward principle or to
8 displace it altogether. But, unless and until
9 the Rules Committee acts, I do think that that
10 background principle that provides for ripening
11 should be applied.

12 JUSTICE GORSUCH: They -- they can't
13 overrule what we do. So -- so --

14 MS. BROWN: So long as the Court
15 doesn't say that it's compelled by the statute,
16 I think that they -- they actually can
17 displace --

18 JUSTICE GORSUCH: I see.

19 MS. BROWN: If you recognize this as a
20 background principle, that doesn't mean that
21 it's a background principle that can't be
22 replaced by the -- by the rules themselves.

23 JUSTICE GORSUCH: By the rules, yeah.
24 Fair enough.

25 JUSTICE JACKSON: Ms. Brown --

1 JUSTICE GORSUCH: Thank you.

2 JUSTICE JACKSON: -- I guess I'm just
3 really hung up on the characterization of this
4 as a premature notice of appeal. And I totally
5 see relation forward and all of that analysis in
6 a situation in which the notice of appeal is
7 filed before the judgment. The judgment has to
8 be forthcoming in order for us to give any --
9 you know, any life to the notice of appeal. And
10 so then you have a whole analysis as to what
11 happens once the judgment occurs.

12 Can you help me to see how that is
13 analogous to what is happening here, where the
14 motion to reopen and the notice of appeal are
15 the same document --

16 MS. BROWN: Mm-hmm.

17 JUSTICE JACKSON: -- and I think it's
18 filed late? The notice of appeal in this case
19 is outside the window of when you're supposed to
20 file a notice of appeal.

21 MS. BROWN: Right. So I think that
22 the best way to understand this is that it's
23 both too late and potentially too early. It's
24 too late with respect to the appeal period that
25 has, of course, already expired, but it's too

1 early with respect to the possible, potential
2 reopened appeal period that might occur.

3 JUSTICE JACKSON: I understand. That
4 part --

5 MS. BROWN: Right.

6 JUSTICE JACKSON: -- is confusing to
7 me because it came in at the same time.

8 MS. BROWN: The same time as the
9 motion.

10 JUSTICE JACKSON: Yes.

11 MS. BROWN: But not at the same time
12 that the motion is granted. And so, once the
13 motion is granted, the idea of relation forward
14 is that we think of the date on which the motion
15 was filed --

16 JUSTICE JACKSON: Right.

17 MS. BROWN: -- and the notice of
18 appeal was filed, and we allow for it to relate
19 forward to the date of the motion for an answer.

20 JUSTICE JACKSON: No, I understand,
21 but we don't do that with respect to other
22 motions that are filed potentially too early
23 relative to when they are granted. I mean,
24 my -- you know, we don't do that.

25 MS. BROWN: Sure.

1 JUSTICE JACKSON: And so it's just a
2 weird thing to suddenly say that even though
3 this motion and the document to which it relates
4 were filed at the same time, we're going to
5 somehow give, you know, life to the notion that
6 you don't grant the motion until later and so
7 then we say the document has to catch up with
8 that in some way.

9 MS. BROWN: So I think that this
10 probably comes from the statutory text here,
11 which holds -- or which -- which states that the
12 motion to reopen grants an appeal period for
13 the -- for 14 days from the date on which the
14 motion was granted.

15 JUSTICE JACKSON: I understand, but
16 wouldn't -- wouldn't the simplest, most
17 straightforward way to deal with this is just to
18 clarify in interpreting the statute in a
19 situation like this one in which the motion and
20 the document arrive at the same time, that
21 14-day period is obviously satisfied. It's
22 here.

23 MS. BROWN: I -- I think that's
24 consistent with what we're saying with respect
25 to the relation forward principle. It may just

1 be different in -- in kind of the terminology
2 that you're using. The way I've thought about
3 it is that any defect of prematurity in this
4 area is effectively cured by the fact that
5 you're just holding on to the premature notice
6 of appeal until the motion to reopen is granted,
7 and it's only given effect when that motion is
8 granted.

9 And so any defect that existed prior
10 to that point disappears at that -- at the -- at
11 that later date.

12 JUSTICE KAVANAUGH: I guess they seize
13 on the literal text, right?

14 MS. BROWN: Correct. Right.

15 JUSTICE KAVANAUGH: Time to file --

16 MS. BROWN: Right.

17 JUSTICE KAVANAUGH: -- an appeal.

18 MS. BROWN: Right. And -- and we --
19 we don't dispute that that may be the
20 circumstance that Congress had foreseen that --
21 that may happen in these contexts, but now this
22 rule is a rule that operates almost exclusively
23 for pro se litigants and really almost
24 exclusively for pro se prisoners who are filing
25 by mail versus filing electronically.

1 And for those litigants, I think it is
2 a more common circumstance to be filing both of
3 the documents at the same time. Sometimes, in
4 fact, you have a litigant who does exactly, I
5 think, what Justice Jackson was suggesting and
6 files the motion to reopen, attaches a notice of
7 appeal to that, and says please hold this notice
8 of appeal and allow for it to be effective only
9 if and when you grant the motion to reopen.

10 We don't think that there is any
11 problem with that kind of practice, but we also
12 don't think there's a basis to distinguish that
13 practice from a scenario where you have a
14 litigant who just isn't sophisticated enough to
15 specifically ask for that kind of treatment.

16 JUSTICE GORSUCH: What do you say
17 about the differences between 4(a)(2) and (4),
18 which expressly mention relation forward, and
19 (a)(6), which just doesn't?

20 MS. BROWN: So I -- I take the same
21 position on that as I -- I think my friend did.
22 I do think that when the Rules Advisory
23 Committee and when the rulemakers were adopting
24 Rule 4(a)(2) and 4(a)(4), they were doing so
25 against the preexisting backdrop of this

1 ripening principle and of this relation forward
2 principle, and they acted when they wanted to
3 displace that in certain respects with respect
4 to 4(a)(4) specifically and I think for 4(a)(2),
5 when they wanted to adopt -- to codify some of
6 those practices but maybe not necessarily all of
7 the practices. But where they're not acting,
8 that we -- we, I think, read that to mean that
9 the preexisting judicial practice remains in
10 place. And I do think that's consistent with
11 the Scarborough case that Justice Sotomayor
12 was -- was referencing as well.

13 JUSTICE GORSUCH: Even though
14 expressio -- what about expressio unius?

15 MS. BROWN: So I -- I -- I take the
16 expressio unius point, and I think that that
17 supports our reading of 4(a)(2) to provide the
18 exclusive option -- opportunities for relation
19 forward in the context that it's speaking to,
20 which is the context of prejudgment notices of
21 appeal.

22 But this is not a prejudgment notice
23 of appeal. And I don't take the rulemakers to
24 have -- have disrupted or displaced the
25 preexisting practice in that area.

1 JUSTICE GORSUCH: And then, as you
2 point out, (a)(6) applies predominantly to
3 prisoners and pro se litigants.

4 MS. BROWN: At this point, yes.

5 JUSTICE GORSUCH: At this point. And
6 the government waived compliance with (a)(6) --

7 MS. BROWN: Yes.

8 JUSTICE GORSUCH: -- in this case.
9 And it's really only one circuit we're talking
10 about where this is an issue. Is it the
11 government's practice in that circuit to -- to
12 waive --

13 MS. BROWN: I'm not familiar with --
14 this honestly doesn't come up that frequently
15 even for us. I do think it's a very rare set of
16 circumstances that has to occur in order for
17 this to be the -- the --

18 JUSTICE GORSUCH: Yeah, but is this a
19 one-off waiver, or is this the government's
20 view?

21 MS. BROWN: I mean, I think, as far as
22 I know, our position has been in this area that
23 we don't think a duplicative notice of appeal is
24 required when we feel like we've got sufficient
25 notice --

1 JUSTICE GORSUCH: Okay. Yeah.

2 MS. BROWN: -- where we're happy to
3 move forward with the merits of the appeal.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas, anything further?

8 Justice Alito?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: The 4(a) language
11 was necessary in part because the rule actually
12 required a filing of the notice of appeal after
13 judgment, correct?

14 MS. BROWN: That's correct.

15 JUSTICE SOTOMAYOR: And we don't have
16 similar language here.

17 MS. BROWN: The -- I don't take -- so
18 it's true that Section 2107(c) does not
19 specifically require filing anything within that
20 14-day period. I think --

21 JUSTICE SOTOMAYOR: Exactly.

22 MS. BROWN: I think it is implicit in
23 that language that there will be a notice of
24 appeal filed at some point.

25 JUSTICE SOTOMAYOR: Well, but I'm

1 thinking of, which happens all the time,
2 employment applications. I get notices all the
3 time you have X number of days to apply the day
4 after there's an announcement there's been an
5 extension. I don't think anybody reads that as
6 requiring all the pre-deadline applications to
7 be resubmitted, correct?

8 MS. BROWN: So I agree with that. I
9 do think that there's a very common-sense
10 understanding here that something that comes in
11 too early just shouldn't be treated the same way
12 as something that comes in too late. You don't
13 have the same concerns with disrupting finality
14 or with prejudice to other parties.

15 JUSTICE SOTOMAYOR: Because what's
16 being appealed is that judgment and it's known
17 what it is?

18 MS. BROWN: Correct.

19 JUSTICE SOTOMAYOR: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?
21 Justice Gorsuch, anything?

22 Justice Kavanaugh?

23 Justice Barrett?

24 Justice Jackson?

25 MS. BROWN: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Huston.

4 ORAL ARGUMENT OF MICHAEL R. HUSTON

5 COURT-APPOINTED AMICUS CURIAE

6 IN SUPPORT OF THE JUDGMENT BELOW

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

9 Section 2107(c) is unmistakably clear
10 about what a litigant must do when he misses
11 both the regular notice of appeal window and the
12 time to request an extension. That would-be
13 appellant must proceed in two steps: first,
14 file a motion in the district court to reopen
15 and demonstrate the relevant factors; and,
16 second, after entry of the order on that motion,
17 file a notice of appeal within the next 14 days.

18 The Solicitor General agrees in their
19 reply brief that that process is the plain
20 meaning of the statutory text, and that text
21 does not permit Petitioner here to be excused
22 from the second step, filing the notice of
23 appeal after the reopening window, just because
24 he filed the wrong document at step 1.

25 The lower courts exercised discretion

1 to overlook Petitioner's step 1 mistake, and
2 they created a window for Petitioner to file a
3 timely notice of appeal, but Petitioner did not
4 take advantage of that reopened window, and he
5 has never offered a justification for failing to
6 do so.

7 The court of appeals thus correctly
8 determined that it lacked appellate jurisdiction
9 because Petitioner never filed a timely notice
10 of appeal during any window when Congress
11 authorized that notice to be filed. Any other
12 conclusion would violate Rule 26(b)(1)'s
13 instruction that courts "may not extend the time
14 to file a notice of appeal except as
15 specifically authorized by Rule 4."

16 Now Rule 4, as we've discussed, does
17 contain two enumerated exceptions validating
18 premature notices of appeal in certain limited
19 circumstances, but as the Court explained in
20 FirstTier, those exceptions codify a much more
21 limited practice than the one advocated
22 certainly by Petitioner.

23 A reopening -- they codify a practice
24 of excusing reasonable mistakes about when the
25 notice of appeal should be filed. A reopening

1 situation does not give rise to any similar
2 reasonable doubt because the statutory text is
3 incredibly clear about the process for filing
4 notices of appeal here.

5 The judgment of the court of appeals
6 should be affirmed.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Would you comment
9 briefly on the government's and Petitioner's
10 characterization of this as the notice of appeal
11 being premature?

12 MR. HUSTON: Yes, Justice Thomas. So
13 I think I agree with my friend, Ms. Brown from
14 the Solicitor General's office, that the notice
15 was both too late and too early. And, again, I
16 think that the statutory text sets up a process
17 here, not -- not the rule text, we're not
18 relying on the rule, we're relying on the
19 statutory text.

20 The statutory text sets up a process
21 of proceeding in two steps. It was, I think,
22 you know, the notice was premature only in the
23 sense that the Petitioner filed the wrong
24 document. He ignored the statutory instruction
25 to file a motion to reopen and instead filed a

1 notice of appeal.

2 But I think that just reinforces the
3 point that in order to file a time -- a notice
4 of appeal, going all the way back to Curry in
5 1848, you must file the notice of appeal in
6 accord with the statutory process. And, here,
7 the statute is very specific about when that
8 notice of appeal must be filed. When? During
9 the period after entry of the order on reopening
10 but before the next 14 days.

11 JUSTICE JACKSON: So, to be clear, are
12 you quibbling with the Court's decision to
13 construe the notice of appeal as a motion to
14 reopen?

15 MR. HUSTON: Not at all, Justice
16 Jackson.

17 JUSTICE JACKSON: All right. So you
18 say there are two steps. And he clearly, you
19 know, messed up on the first step. The court
20 cured it by saying we're going to treat this as
21 a motion to reopen.

22 I guess I don't understand why they
23 also can't treat the second step as having been
24 satisfied by the early filing of the document?

25 MR. HUSTON: I think it's because of

1 Bowles, Your Honor. Recall that in Bowles, the
2 petitioner there filed a motion to reopen but
3 then ultimately filed the notice of appeal too
4 late, after the 14-day period, and the Court
5 said it's a very harsh result, but the statutory
6 text simply dictates the period when that notice
7 of appeal must be filed.

8 JUSTICE JACKSON: No, I understand.
9 But he didn't file a notice of appeal. In this
10 case, he did, and it was the court that
11 construed it as the -- as the threshold motion
12 to reopen. And it just seems odd to me that
13 having construed a document as a motion to
14 reopen for the purpose of allowing for a
15 document to be filed called a notice of appeal,
16 when you have the document there, why couldn't
17 the court also then say, okay, we have the
18 notice of appeal within the window that we've
19 just opened and we're done?

20 MR. HUSTON: Because that's not --
21 there's no general practice. Your Honor, as you
22 were describing in the colloquy with my friends
23 is exactly right, that with lots of different
24 kinds of documents, courts do file this
25 procedure. You -- you -- you make a motion to

1 lodge an amicus brief and you attach the brief,
2 motion to file an amended complaint, but it
3 doesn't happen with jurisdictionally significant
4 documents like a notice --

5 JUSTICE JACKSON: A complaint is not a
6 jurisdictionally --

7 MR. HUSTON: It has --

8 JUSTICE JACKSON: -- significant
9 document?

10 MR. HUSTON: It has jurisdictional
11 significance obviously in some respects, Your
12 Honor.

13 JUSTICE JACKSON: No. I mean, let --
14 let's explore this because this is, I think,
15 really the key to it, right? Suppose that
16 instead of filing a single document called the
17 notice of appeal, Mr. Parrish had filed a notice
18 of appeal and stapled to the front of it was a
19 motion to reopen.

20 In that situation, if the district
21 court had found that the criteria to open were
22 satisfied, are you saying that Mr. Parrish would
23 have had to send in a new notice of appeal?

24 MR. HUSTON: As presently constituted,
25 yes, because the rules are clear about that, but

1 I think this is actually in the interest --

2 JUSTICE JACKSON: The one that the
3 district court got to begin with would not be
4 enough?

5 MR. HUSTON: Yes. I -- I --

6 JUSTICE JACKSON: Because it was filed
7 too early?

8 MR. HUSTON: Presently, because of the
9 way the rule text is written. But I think this
10 is very important. And I think that perhaps the
11 best thing that this Court could do in this case
12 would be to instruct the Rules Committee to
13 adopt a new rule that would look very much like
14 that one. I do think that's consistent with the
15 statutory text, and the reason why is this
16 Court's decision in FirstTier.

17 FirstTier explains that you cannot
18 change the -- the jurisdictional period when a
19 notice of appeal must be filed. That's always
20 jurisdictional. But, importantly, the Rules
21 Committee does have the power to enact rules
22 that change how documents get filed. The best
23 example is Rule 4(c).

24 JUSTICE JACKSON: I guess what I don't
25 understand is that if you can construe this very

1 document as a motion to reopen for the purpose
2 of all of the jurisdictional consequences that
3 you're describing, I don't understand why you
4 can't also construe that very document as a
5 timely filed notice of appeal?

6 MR. HUSTON: It's because, Your Honor,
7 this Court has said over and over again that the
8 rule of liberal construction for pro se filers
9 can accommodate looking at what -- at the
10 substance of a document and understanding it to
11 be something else. But, importantly, the court
12 cannot reconstrue when something is filed.

13 That's the whole point of the Court's
14 holding in Bowles, is that there are limitations
15 on the judicial discretion of -- of -- of
16 construing something. And you can't just
17 construe the thing to have been filed at a
18 different time.

19 So, in a situation where the rules
20 describe when the document must be filed for
21 jurisdictional purposes, and 2107(c) is such an
22 instruction, it must actually be filed during
23 that period.

24 But, again, consider the prison
25 mailbox rule. The prison mailbox rule, which we

1 have no problem with, is a rule whereby the
2 Rules Committee has provided an opportunity for
3 certain filers to ensure that their filing gets
4 made during the jurisdictional period. And I
5 think actually, importantly, Rule 4(a)(2) also
6 works this way.

7 I would urge the Court to take a look
8 at the way in which Rule 4(a)(2) is written.
9 It's written awkwardly and very precisely. It
10 says that the document will become -- the notice
11 of appeal will become effective on and after the
12 relevant -- the entry of the judgment that
13 authorizes the notice of appeal. It's written
14 that way, I think, precisely because the purpose
15 of the rule is to transport the filing into the
16 jurisdictional period.

17 And we think that is within the Rules
18 Committee's power for the same reason why the
19 prison mailbox rule is within the Rules
20 Committee's power. But we don't have any rule
21 like that as we sit here today. Perhaps the
22 Rules Committee should enact one. And I think
23 that, as we've discussed this morning, there's
24 every reason to think that the Rules Committee
25 will carefully study this issue.

1 And if the rule that my friends
2 advocate is a good one, they may well adopt a
3 rule very much like the one that Justice Jackson
4 has suggested: file a motion to reopen and
5 attach a notice of appeal and then an
6 instruction to the clerk to file that notice of
7 appeal during the jurisdictional window.

8 But the Rules Committee, with all
9 respect, is much better suited than this Court
10 to undertake the process of developing those
11 rules -- this Court, I mean, just acting by sort
12 of one-off judicial decisions to -- to deal with
13 sympathetic litigants in individual situations.

14 The Committee undertakes, as the Court
15 is aware, a complicated process of study.
16 Congress has the opportunity to weigh in. We're
17 going to get a better -- a better overall rule
18 if the Rules Committee is allowed to do its
19 work.

20 CHIEF JUSTICE ROBERTS: Counsel, you
21 make much of the expressio unius doctrine in
22 your brief. You heard counsel's effort to
23 distinguish that. Do you have any comments on
24 that?

25 MR. HUSTON: Yes, Your Honor. So

1 I'm -- I -- I think that the -- Your Honor's
2 opinion for the D.C. Circuit in Outlaw is
3 exactly right in two important respects.
4 Outlaw --

5 CHIEF JUSTICE ROBERTS: I wasn't
6 fishing for that, but you can go ahead.

7 (Laughter.)

8 MR. HUSTON: Outlaw is important most
9 of all because of what it had to say about this
10 Court's opinion in FirstTier. So, as I think the
11 Solicitor General helpfully explained here
12 today, the reopening principle is not as broad
13 as Petitioner advocates. And I think it's
14 really quite important that this Court's
15 decision in this case reject the sort of
16 universal ripening principle whereby it's okay
17 to file something too early.

18 The reason that -- FirstTier is very
19 clear about that. FirstTier says that, yes,
20 although there was at common law a certain
21 ripening principle, it was never as broad as the
22 one advocated by the Petitioner. Instead,
23 the -- that ripening principle existed only to
24 excuse reasonable mistakes about when a notice
25 of appeal should be filed.

1 And, as I mentioned, because the
2 statutory text is -- here is so clear, there's
3 really no corresponding situation where a
4 petitioner makes a reasonable mistake about when
5 the notice of appeal is supposed to be filed.
6 The Solicitor General agrees that our
7 understanding of that statutory text is clearly
8 the best one.

9 So -- and that's -- that is what I
10 take to be the core thrust of the Court's
11 opinion in -- in FirstTier, and this Court's and
12 Your Honor's opinion in Outlaw recognized that.
13 It said, precisely because FirstTier recognized
14 that the principle, the common law principle, is
15 more limited and has been codified in a more
16 limited way, we, as judicial officers in
17 individual cases, are not free to embrace a sort
18 of universal ripening principle.

19 JUSTICE ALITO: Well, if there is a
20 ripening principle of some scope, some limited
21 scope, what argument would there be that it
22 should not encompass the situation here? What
23 reason might there be for holding or concluding
24 as a matter of policy if this were sent back to
25 the Rules Committee that the principle should

1 not apply in this situation?

2 MR. HUSTON: So I think there are two,
3 Your Honor. The first is that -- and this is a
4 situation that has actually played out in the
5 real world in several of the cases that give --
6 gave rise to this circuit split. You've seen
7 two principal problems: false start appeals,
8 number one, and, second, sort of
9 misunderstanding about court clerks -- court
10 administrative staff in the docketing and
11 processing of the appeals. Both of them
12 happened here. Both of them happened in the
13 Winters case from the Sixth Circuit and the
14 Holden case for the Third Circuit.

15 So, if you file a premature notice of
16 appeal, recall that it divests the district
17 court of jurisdiction. The case will in many
18 cases be transferred out of the -- of the
19 district court immediately and into the court of
20 appeals.

21 But that's a mistake. Why? Because,
22 under the statute, it has to be the district
23 court that decides the motion to reopen. So you
24 get this sort of circuitous process where the
25 court of appeals has to send it back, and then

1 we have to put the appeal back on track.

2 Now I'm not trying to say that's
3 impossible -- that's an impossible problem to
4 solve, but it should be discouraged.
5 Petitioners should be discouraged from
6 proceeding as this Petitioner did here.

7 JUSTICE ALITO: But those are
8 different situations from the situation in this
9 case, right?

10 MR. HUSTON: Well, that's what
11 happened in this case, Your Honor. Because the
12 Petitioner filed a notice of appeal instead of a
13 motion to reopen, the case got sent to the court
14 of appeals, and the court of appeals had to send
15 it back for a rule.

16 JUSTICE SOTOMAYOR: Doesn't every
17 other circuit -- and that's everyone but this
18 one -- say that the -- the sent-in early notice
19 of appeal ripens upon reopening?

20 MR. HUSTON: Yes.

21 JUSTICE SOTOMAYOR: So it -- it's a
22 pretty straightforward rule. Every other
23 circuit has it. It's pretty clear when the
24 process starts.

25 MR. HUSTON: Well, but, Your Honor, I

1 think the problem is, again, in order to get to
2 those decisions, a couple of the courts of
3 appeals had to first sort of reroute the process
4 that the statute lays out, where the district
5 court decides the motion to reopen first.
6 Courts of appeals had to grab the case, decide
7 what to do with the mistaken filing, and then a
8 couple --

9 JUSTICE SOTOMAYOR: But they won't
10 now.

11 MR. HUSTON: Well, I think -- but that
12 only -- that only reinforces the point, I think,
13 that the --

14 JUSTICE SOTOMAYOR: Well, it
15 reinforces the point that you would like the
16 Rules Committee --

17 MR. HUSTON: Yes.

18 JUSTICE SOTOMAYOR: -- to decide this
19 and not us. But, in the interim, what you're
20 asking us to do is to make the rules unfair to
21 pro se litigants, who already didn't get timely
22 notice to appeal because they didn't get notice
23 within the 30 days, all right? And now they're
24 supposed to get notice within 14, and given the
25 way the post office is working, it's unlikely

1 they're going to receive any notice in 14 days.

2 MR. HUSTON: So, Justice Sotomayor,
3 it's --

4 JUSTICE SOTOMAYOR: Give it to the
5 post office, give it to the prisons, but the
6 likelihood of a prisoner receiving timely
7 notice, enough to file in time, is next to
8 nothing.

9 MR. HUSTON: So if I might make two
10 points in response to that. The first is it's
11 not me who's seeking to make the rule unfair.
12 It's -- I'm -- I'm here advocating that the
13 court be --

14 JUSTICE SOTOMAYOR: Yes, but you could
15 advocate a reading that's totally consistent
16 with background principles, not addressed
17 directly by 4(a). And so you're -- I know. We
18 appointed you as amici.

19 JUSTICE BARRETT: I was going to say
20 but he was appointed to defend the judgment
21 below.

22 (Laughter.)

23 MR. HUSTON: Justice Sotomayor, look,
24 the -- I don't think --

25 JUSTICE SOTOMAYOR: I don't think

1 we've ever had an amici come in and say the
2 judgment was wrong.

3 (Laughter.)

4 MR. HUSTON: No, the judgment was not
5 wrong. Certainly, the judgment -- the judgment
6 should be affirmed, but the principal reason why
7 is the text -- the operative statutory text here
8 in 2107(c), as the Solicitor General agrees,
9 does not allow what Petitioner did here.

10 So, in order to get there, you have to
11 say we're going to sort of excuse noncompliance
12 with 2107(c) because we're going to incorporate
13 this background principle. I think the
14 fundamental back -- problem with that is that
15 the background principle is actually not nearly
16 as broad as the one that Petitioner needs in
17 order to justify what happened here. It has
18 all --

19 JUSTICE KAGAN: If -- if you're right
20 about what 2107 means, doesn't that mean that
21 the Rules Committee is going beyond what the
22 statute says even with respect to the provisions
23 in Rule 4 now, let alone to any that they might
24 issue with respect to this situation?

25 MR. HUSTON: The answer is no, Your

1 Honor. We think Rule 4(a)(2) is faithful to the
2 statutory text, and it's because the Rules
3 Committee has been careful to write the rule in
4 a way that respects the jurisdictional nature of
5 2107(a). And, again, that just gets back to
6 that text and the way that that rule is written.

7 FirstTier discusses this. I mean, the
8 argument presented to the Court in FirstTier was:
9 Rule 4(a)(2) exceeds the jurisdiction -- the --
10 Rule 4(a)(2) is improper because it goes beyond
11 what the statutory jurisdiction conferred by
12 2107(a). The Court said no, it doesn't do that
13 because it's not a rule that changes the time in
14 which the document must be filed. That's the
15 jurisdictional period. Instead, it -- it's a --
16 Rule 4(a)(2) is a rule about how that document
17 gets filed, akin to, again, the prison mailbox
18 rule that enables a -- you know, decides when
19 something -- when and how something is being --

20 JUSTICE KAGAN: So I think I'm not --
21 I'm not understanding. Are you saying that the
22 Rules Committee could or could not issue a rule
23 that's similar to the one that the Petitioner
24 asks us to reach?

25 MR. HUSTON: I think that the

1 committee could enact a rule that is similar,
2 but it has --

3 JUSTICE KAGAN: Consistent with 2107?

4 MR. HUSTON: Consistent with 2107 and
5 consistent with its text so long as that rule is
6 crafted in a way that respects the
7 jurisdictional period. So --

8 JUSTICE KAGAN: Well, I don't
9 understand. What does that mean? What is --
10 what -- what could the Rules Committee do that
11 we can't do right now?

12 MR. HUSTON: So I -- I think the Rules
13 Committee could enact a rule that would say that
14 you can file a motion for reopen in the -- a
15 motion for reopening in the district court,
16 which is clearly what 2107(c) instructs, and
17 then you can attach to that a conditional notice
18 of appeal or a proposed notice of appeal.

19 And the court clerk -- the Rules
20 Committee would direct the court clerk to file
21 that notice of appeal within the jurisdictional
22 window. That's going to solve the problems of
23 this case and all of the ones that gave rise to
24 the circuit split.

25 But it's not -- that's not a principle

1 that we have in the law and the rules at present
2 for jurisdictional filings that divest the court
3 of appeals of jurisdiction. We typically don't
4 allow notices of appeal to sort of lie in wait.

5 Maybe it would be a good idea to
6 authorize this filing in this circumstance for
7 partly the reasons that Justice Sotomayor
8 describes.

9 But I think that's -- again, that's a
10 thing that the Rules Committee needs to do. And
11 the -- the important reason why it's not just
12 better as a policy matter for the Rules
13 Committee to undertake that but why I think it's
14 actually compelled to be the Rules Committee
15 that does it is that remember that when we're
16 talking about a rule, we're talking about
17 something that's been authorized by another Act
18 of Congress, the Rules Enabling Act.

19 So you have two different sources of
20 authority. You've got a jurisdictional
21 limitation set out in 2107(a), but you've also
22 got an authority from Congress to make rules to
23 implement that. That doesn't happen in a
24 situation where the court is just hearing
25 individual cases.

1 JUSTICE JACKSON: Maybe I'm looking at
2 the wrong statute, but I -- 2107 doesn't say
3 anything about what the defendant has to do.
4 Isn't it only speaking to the district court?
5 The district court may extend the time for
6 appeal. The district court may reopen the time
7 for appeal for a period of 14 days from the date
8 of entry or the order reopening the time for
9 appeal.

10 MR. HUSTON: Yes, of course, Your
11 Honor, that's right. The district court has to
12 reopen the time for appeal. The only --

13 JUSTICE JACKSON: For a period of 14
14 days.

15 MR. HUSTON: Precisely.

16 JUSTICE JACKSON: So what -- what
17 about that precludes the district court from
18 considering a notice of appeal that has been
19 filed as timely within that 14 days?

20 MR. HUSTON: I think it's because, as
21 the Solicitor General agrees, 2107(c), the
22 provision that you were just reading --

23 JUSTICE JACKSON: Yes.

24 MR. HUSTON: -- incorporates the
25 general principle of 2107(a) that an appeal

1 within the time for appeal -- that's the
2 statutory text of 2107(c) -- an appeal must
3 always be taken by the would-be -- you know, the
4 appellant filing a notice of appeal. That's
5 2107(a). That's, of course, the general way
6 that notice -- that's the only way that notices
7 of appeal can -- or that appeals can ever be
8 taken under 2107(a), is that the appellant must
9 file a notice of appeal.

10 And then 2107(c) describes when that
11 notice of appeal has to be filed, within a
12 period of 14 days that has both an end point and
13 a beginning point. It runs from entry of the
14 order on the motion for reopening.

15 No other provisions of 2107 are
16 written in this specific way. And I think the
17 specificity that Congress used to reference the
18 period of 14 days is among the strongest
19 evidence that Congress, when it thought of this
20 particular situation, was -- was intentionally
21 reaching a balance. Yes, Congress wanted to
22 create an opportunity for a litigant who
23 missed -- who did not receive notice of the
24 judgment to file a notice of appeal.

25 But it only created a very limited and

1 particular window in which to do that, and
2 that's because, obviously, the judgment
3 prevailing party's interests in the finality of
4 that judgment go stronger and stronger as we
5 move further and further away from entry of the
6 judgment. So --

7 JUSTICE KAVANAUGH: Well, isn't that
8 the reason for a 14-day limit? And so it can't
9 be filed months later, obviously. But, if
10 something's already been filed or filed within
11 the 14 days, that concern that you just raised,
12 I don't think, is present.

13 MR. HUSTON: I think it's the -- I
14 think it's the reason for both of the 14-day
15 periods that are referenced in 2107(c), Your
16 Honor.

17 I think, clear -- clearly, Congress
18 was attempting to strike a balance, and it was
19 attempting to be quite demanding on, you know, a
20 situation like the one facing Petitioner about
21 what you must do when you get notice and when
22 you must do it.

23 And Bowles is the surest proof of
24 that. You know, obviously, the Court is saying
25 in Bowles that if you fail to scrupulously

1 apply -- or comply with the 14-day deadline,
2 even in, arguably, like, the most sympathetic
3 circumstance that I can think of, we, the court,
4 are going to enforce that jurisdictional term.

5 I think our point is just simply that
6 the jurisdictional nature of this statute runs
7 both at its end point and at its beginning point
8 because of the particular text that Congress
9 used in this provision.

10 CHIEF JUSTICE ROBERTS: Counsel, your
11 argument throughout most of your brief sort of
12 puts emphasis on turning square corners in this
13 area because it's jurisdictional. And then, on
14 page 42, you said: Well, if you don't like
15 that, we'll leave it up to the discretion of the
16 district -- district court.

17 Do you want to say a little bit more
18 about the discretionary approach?

19 MR. HUSTON: Your Honor, I mean, this
20 is an argument in the alternative. Our point --
21 we think -- you know, we absolutely contend
22 that, just as in Bowles, there's a
23 jurisdictional period that Congress created.
24 And, by default, there is no judicial discretion
25 to sort of forgive it in individual cases.

1 If the Court rejected that, I do think
2 that in order for Petitioner to win the case,
3 they need an exercise -- they need a deeming of
4 one thing to happen at a different time. And I
5 think that is very much an argument that sounds
6 to me in judicial discretion.

7 So Petitioner needs to go to the court
8 of appeals or the district court, as the case
9 may be, and say: Please take my document that
10 was untimely and deem it to have been filed at
11 another time.

12 It's -- they analogize it to the
13 common law nunc pro tunc authority. But that
14 was always an equitable authority.

15 And I think our point is just simply
16 that on the particular facts here, where the
17 court of appeals said: Not only did you fail to
18 file the statutory text and the rule text, you
19 also disregarded the specific instructions that
20 were given by the district court to file a
21 notice of appeal. On that basis, we're not
22 going to allow your -- your notice of appeal to
23 ripen.

24 I think that would be a reasonable and
25 not -- not an abuse of the court of appeals'

1 discretion on the particular facts here if the
2 Court concluded that the deeming authority is --
3 is available at all, in which case, again, I
4 think it's something that sounds in judicial
5 discretion.

6 CHIEF JUSTICE ROBERTS: Justice
7 Thomas, anything?

8 Justice Alito? No? Anything further?
9 Thank you, counsel.

10 MR. HUSTON: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Rebuttal,
12 Ms. Rice?

13 REBUTTAL ARGUMENT OF AMANDA RICE
14 ON BEHALF OF THE PETITIONER

15 MS. RICE: There's been quite a bit of
16 focus today on the rules, for understandable
17 reasons. I think the rules question is
18 straightforward and this Court should answer it.
19 The rules don't speak to ripening in the
20 postjudgment context, and so it doesn't -- they
21 don't displace settled practice in that area.

22 But the main question before this
23 Court is about the statute. The Fourth Circuit
24 read the statute to impose a jurisdictional
25 second notice requirement. I take my friend's

1 statutory two-step to be functionally the same
2 thing.

3 That's wrong. Nothing in the text of
4 subsection (c) displaces the background rule.
5 We usually construe statutes to incorporate
6 background rules unless they say otherwise.

7 We also usually construe provisions
8 that operate across multiple subsections to work
9 the same way. I think that's true of
10 subsection (a) here, the notice of appeal
11 requirement.

12 We also don't usually construe
13 statutes to defeat their purpose. This was
14 about creating a mechanism for litigants who
15 don't get notices of judgments to reopen their
16 time for appeal. It was not about setting a
17 trap for the unwary.

18 So we're not excusing compliance with
19 a jurisdictional requirement here. There just
20 is no jurisdictional requirement to begin with.
21 Were it otherwise, I think FirstTier was wrong
22 and Rules 4(a)(2) and 4(a)(4) have to be
23 invalid.

24 My friend's concession that the rules
25 committee could enact a ripening rule for this

1 context, I think, effectively acknowledges as
2 much. I don't see how the rules committee could
3 do that if the statute jurisdictionally required
4 a second notice here.

5 If there are no further questions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Huston, this Court appointed you
9 to brief and argue this case as an amicus curiae
10 in support of the judgment below. You have ably
11 discharged that responsibility, for which we are
12 grateful.

13 The case is submitted.

14 (Whereupon, at 12:25 p.m., the case
15 was submitted.)

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