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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 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  
23 then, to distinguish this as an even stronger  
24 example of emphatic language, in Rule 2 in both  
25 --

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

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

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

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

1 of our textual approach to things.

2 MR. HUESTON: Yes, Your Honor.

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

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

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

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

1 fact, improperly used in the Robinson case.

2 And that has been pointed out.

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

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

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

21 MR. HUESTON: And I --

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

25 MR. HUESTON: And, Justice Gorsuch,

1 I've been giving thought to that.

2 JUSTICE GORSUCH: I had hoped you  
3 might.

4 (Laughter.)

5 MR. HUESTON: Thank you.

6 JUSTICE GORSUCH: So have I.

7 (Laughter.)

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

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

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

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



1 might be an instance where that would apply.

2 But I --

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

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

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

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

1 the very statute permitted.

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

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

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

25 JUSTICE GINSBURG: It's the discretion

1 of the court of appeals, not the district  
2 court.

3 JUSTICE SOTOMAYOR: Yes.

4 JUSTICE GINSBURG: To give permission  
5 to appeal.

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

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

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

24 JUSTICE GINSBURG: Yes, it does.

25 MR. HUESTON: Because, in that

1 instance, we can clearly see the intent of the  
2 rule-makers in providing for a broad range of  
3 equitable discretion and then withdrawing it in  
4 the particular instance of 26(b).

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

13 MR. HUESTON: Your Honor --

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

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

19 (Laughter.)

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

1 incorrect, information.

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

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

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

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

24 JUSTICE BREYER: Yes? Okay.

25 MR. HUESTON: There has been an

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

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

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

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

22 MR. HUESTON: Yes.

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

1 MR. HUESTON: Yes, Your Honor.

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

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

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

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

21 (Laughter.)

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

1 tolling, and unique circumstances is a species  
2 of equitable tolling? Doesn't that have to be  
3 your argument?

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

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

11 (Laughter.)

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

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

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



1 and it factually does not apply, then the  
2 decision below must be reversed.

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

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

17 (Laughter.)

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

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

24 JUSTICE BREYER: Well, it's rather  
25 hard to -- what is -- what is the answer to

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

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

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

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

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

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

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

17           (Laughter.)

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

21           JUSTICE GINSBURG: Yes. In other  
22 words, we can say never, and that's one answer;  
23 another is equitable discretion without any  
24 tight boundaries, and another is what -- what  
25 my opinion in Carlisle -- Carlisle referred to

1 as sharply honed, not utterly exception-less.  
2 So it's not never, but hardly ever.

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

9 JUSTICE KAVANAUGH: What -- what --

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

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

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

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

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

24 JUSTICE KAVANAUGH: If it's not  
25 written in the rules, doesn't it have to be

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

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

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

1           Mr. Chief Justice, if I could reserve  
2 the remaining time for rebuttal.

3           CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5           Mr. Herstoff.

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

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

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

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

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

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

23           Rule 59(e) provides that a motion to  
24 alter or amend the judgment may be filed within  
25 28 days.

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

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

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

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

24           JUSTICE KAVANAUGH: You read -- just  
25 to clarify, you read -- you read Rule 54 to

1 apply to appeals not just as of right?

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

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

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

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

24 JUSTICE KAVANAUGH: Can I just ask on  
25 the Rule 59 question, again, suppose a local



1 rule gave you 45 days for a motion for  
2 reconsideration, but Rule 59 has the 28-day.  
3 What's your position on that?

4 MR. HERSTOFF: If -- if Rule 59 were  
5 determined to apply here, then that would not  
6 work because Rule 59 has a non-extendable  
7 28-day period.

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

13 JUSTICE ALITO: Why would that be --  
14 why would that even be permitted?

15 MR. HERSTOFF: Why -- why would it be  
16 permitted to --

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

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

1           And in the Dieter, Healy, and Ibarra  
2 line of cases, those dealt with the criminal  
3 rules, where there is no specific provision for  
4 reconsideration motions.

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

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

22           MR. HERSTOFF: Well, I think the --  
23 this Court's decision in Ibarra explains this  
24 well. And the Court explained that the reason  
25 that reconsideration motions toll the time to

1 appeal is to give the district court an  
2 opportunity to correct their own alleged errors  
3 and to prevent unnecessary burdens from being  
4 placed on the court of appeals.

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

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

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

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

1           MR. HERSTOFF:  It's true that you  
2           could do both, but then you'd have the district  
3           court and the court of appeals considering the  
4           exact same order at the same time.  And this  
5           Court has long held that the district courts  
6           and the courts of appeals should not be --

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

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

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

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

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

1 did it tell you about timing deadlines?

2 MR. HERSTOFF: Well, the district  
3 court said --

4 JUSTICE KAGAN: And what did you infer  
5 from what it said?

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

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

15 MR. HERSTOFF: That is true, they did  
16 not specifically say that.

17 JUSTICE KAGAN: And why doesn't that  
18 matter?

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

1 required to be considered on the merits, even  
2 though a post-trial motion was not filed in  
3 ample time.

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

8 JUSTICE GORSUCH: Well, but in -- in  
9 Thompson, we --

10 CHIEF JUSTICE ROBERTS: What --

11 JUSTICE GORSUCH: I'm sorry, please.

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

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

21 JUSTICE GINSBURG: But in the cases --

22 CHIEF JUSTICE ROBERTS: But we were --  
23 I'm sorry.

24 JUSTICE GINSBURG: In the cases that  
25 said mandatory, Kontrick, Eberhart, it said

1 strictly applied, but the party who would  
2 benefit from the rule can waive the rule or  
3 forfeit it, but -- but both cases said, if it's  
4 properly raised, as it was here, then it  
5 applies.

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

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

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

1 sense that Justice Ginsburg has just talked  
2 about.

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

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

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

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

25 JUSTICE GORSUCH: Is -- is the upshot



1 of your argument, though, counsel, that so long  
2 as it's a non-jurisdictional rule, equitable  
3 tolling must always apply? Congress couldn't  
4 authorize a truly mandatory statutory deadline?

5 MR. HERSTOFF: No, that is not our  
6 position. We do not go that far.

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

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

22 JUSTICE GORSUCH: Well, we have  
23 Robinson that takes care of that problem, he  
24 says, so we have precedent there. So, again,  
25 how -- how much clearer could the rules have

1     been but for maybe that one example, the  
2     precedent plugs that hole?

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

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

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

23            Now that's quite broad. But there's  
24    an exception for our case, which says you can't  
25    extend it for good cause. So here we have for

1 good cause, here we have zero, and I thought  
2 perhaps that Justice Ginsburg proposed a narrow  
3 exception that would, in fact, make it not for  
4 good cause but not zero. And that's the unique  
5 circumstances sharply honed, which I guess  
6 covers Justice Alito's Mars attack --

7 (Laughter.)

8 JUSTICE BREYER: -- and various others  
9 that are unusual but cry out, okay?

10 Now what about that? I'm not  
11 advocating it. I want to know your opinion.

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

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

20 JUSTICE BREYER: If, in fact, we are  
21 at sharply honed, special, unique  
22 circumstances, how do you win this case?  
23 Because what seemed to happen here is it was --  
24 I don't know if it was you, but whatever lawyer  
25 went in for your side, within the 14 days, did

1 not even ask the judge to extend the time, at  
2 least not in writing. And so it's pretty hard  
3 to say you are, from an equitable point of  
4 view, in a unique circumstance.

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

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

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

23 JUSTICE SOTOMAYOR: Exactly.

24 MR. HERSTOFF: So the -- when the  
25 Ninth Circuit said that, it included within

1 that language a reconsideration motion that's  
2 filed within the 14 days. So what the court of  
3 appeals said was that the decertification order  
4 was made on February 20. There was no Rule  
5 23(f) petition filed within that 14-day period.  
6 And, therefore, unless an exception applies, it  
7 would be untimely.

8 So the court was saying, even if a  
9 motion for reconsideration was filed within the  
10 14-day period, it would be untimely. So they  
11 considered that an exception as well. So --

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

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

25 So, if you're going to say unique

1 circumstances, what exactly does it mean, if it  
2 doesn't mean what the dictionary says?

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

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

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

23 MR. HERSTOFF: Well, I think that  
24 applying this doctrine is consistent with the  
25 federal rules, though, for instance, on Rule 1,

1 and the rules are derived from the old equity  
2 rules, so it makes sense that there is some  
3 flexibility there when a district court  
4 misinforms litigants about the time that they  
5 have to file, especially in the context of a  
6 non-jurisdictional rule like we have --

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

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

21 JUSTICE KAGAN: Yeah, Mr. Herstoff, I  
22 don't think this is your fault, right? This is  
23 the court's fault in -- in putting a bad label  
24 on something that it actually meant when it  
25 meant -- meant something else. But my

1 understanding of what the court has meant when  
2 it's done this is not the attack from Mars or  
3 Hurricane Katrina.

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

9 MR. HERSTOFF: Yes, I agree, Justice  
10 Kagan.

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

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

18 JUSTICE KAGAN: Yes. So he said a  
19 reconsideration motion could be filed. He was  
20 right about that. A reconsideration motion  
21 could have been filed.

22 What he didn't say anything about  
23 was -- was -- was what that meant for your  
24 appeal right.

25 MR. HERSTOFF: That's true. But I



1 think there is a basic understanding that when  
2 a reconsideration motion is pending, a party  
3 does not need to seek appellate review on top  
4 of that.

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

13 JUSTICE GINSBURG: Has this Court cast  
14 any doubt on Thompson?

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

20 And I think with good reason, because  
21 non-jurisdictional rules, I think, presumably  
22 should be subject to or at least presumptively  
23 subject to equitable considerations, such as  
24 tolling, such as the -- what the Court has  
25 referred to as the unique circumstances

1 doctrine, which I think is a subspecies of  
2 tolling or estoppel.

3 JUSTICE GORSUCH: Well --

4 JUSTICE GINSBURG: I thought mandatory  
5 -- the Court has said in -- in the Kontrick  
6 line of cases mandatory means inflexible?

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

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

20 JUSTICE GORSUCH: Counsel --

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

25 JUSTICE GORSUCH: -- I -- I think -- I

1 think you have two possible lines of response  
2 to Justice Ginsburg's question, and I'm curious  
3 which you choose.

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

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

18           Which of those choices should we make  
19 and why?

20           MR. HERSTOFF: I do think that -- that  
21 these rules presumably should be subject to  
22 equitable tolling and not necessarily just for  
23 the district court misleading the parties.  
24 However, either way, the judgment should be  
25 affirmed because here, in fact, the -- the

1 court did mislead Mr. Lambert into thinking  
2 that he had --

3 JUSTICE GINSBURG: How? The court  
4 didn't say one word about permission to appeal.

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

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

15 MR. HERSTOFF: Well, then I think that  
16 --

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

24 MR. HERSTOFF: Well, I think on that  
25 --

1 JUSTICE KAVANAUGH: How would you  
2 distinguish what happened here from a local  
3 rule that's longer than 14 days?

4 MR. HERSTOFF: Well, I think here the  
5 district court did set this -- this specific  
6 deadline. And I think it does --

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

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

19 JUSTICE KAVANAUGH: And the Rule 59  
20 argument, just to reiterate, depends on your  
21 Rule 54 interpretation, correct?

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

1 JUSTICE KAVANAUGH: You could have the  
2 same confusion of a local rule that gives  
3 longer than 28 days, for example, the local  
4 rule here for motion for reconsideration, but  
5 then you're not within the 28 days of Rule 59,  
6 right?

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

17 So that clarification is important  
18 here to -- to consider that.

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

24 MR. HERSTOFF: I think, under those  
25 circumstances, it becomes a question of

1     reasonableness.  Now if upon -- if the  
2     litigation goes on and a year later you're  
3     asking the court to reconsider its decision  
4     based upon the exact same evidence that was  
5     before the court a year earlier, I think that,  
6     as an initial matter, the Rule 23(f) petition  
7     is very unlikely to be granted because the  
8     court of appeals is going to see that as  
9     causing an unreasonable delay.

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

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

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

1 say, well, let me research it and see if the  
2 time is expired by then.

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

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

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

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



1 all about that.

2 MR. HERSTOFF: Well, then -- well,  
3 what's the --

4 JUSTICE KAVANAUGH: What's misleading,  
5 I guess, is, in context, when you roll in Rule  
6 23(f), which the district court said nothing  
7 about, correct?

8 MR. HERSTOFF: The district court did  
9 not say anything --

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

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

18 MR. HERSTOFF: The Rule 23(f) was not  
19 brought up at the status conference, that's  
20 true.

21 JUSTICE SOTOMAYOR: So how was the  
22 judge supposed to play lawyer? He's supposed  
23 to tell you -- you ask him, let me file a  
24 motion for reconsideration, he's supposed to  
25 protect you and be your lawyer and tell you,

1 you know, if you file it next week, you're  
2 going to lose your time to appeal?

3 I don't know of any case we've ever  
4 held where a judge has to tell you something  
5 when you don't ask the judge about that.

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

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

17 JUSTICE GINSBURG: It is --

18 JUSTICE KAGAN: But can --

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

25 MR. HERSTOFF: And let -- let me

1 clarify. When I say it's non-final, I mean it  
2 renders it not the district court's last word  
3 on decertification based upon the evidence in  
4 front of the district court. The district  
5 court is going to reconsider this order, and  
6 it's our position that, under those  
7 circumstances, it doesn't make sense to seek  
8 appellate review when the order might be  
9 changing based upon the pendency of that  
10 reconsideration motion more fully.

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

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

25 MR. HERSTOFF: Well, the rules

1 actually do not specifically address  
2 reconsideration motions, and it has been long  
3 understood that a timely reconsideration motion  
4 will suspend the time to appeal.

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

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

23           JUSTICE SOTOMAYOR: If we reject that,  
24 do you lose?

25           MR. HERSTOFF: If you reject --

1 JUSTICE SOTOMAYOR: That you -- that  
2 you didn't file a motion within the time,  
3 within the 14 days?

4 MR. HERSTOFF: May I -- may I answer  
5 the question?

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. HERSTOFF: No, because we still  
8 have equitable tolling and the Harris Truck  
9 Lines and Thompson line of cases, so in either  
10 circumstance the judgment should be affirmed.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Hueston, you have a minute left.

15 REBUTTAL ARGUMENT OF JOHN HUESTON  
16 ON BEHALF OF THE PETITIONER

17 MR. HUESTON: Your Honor, in this  
18 remaining minute, let me emphasize and direct  
19 the Court's attention to PA 69 to 77, where the  
20 short status conference took place.

21 And in that status conference, it is  
22 notable that not only did the court not mention  
23 Rule 23(f), not mention any sort of appellate  
24 right, but counsel did not even mention 23(f),  
25 nor even say the word appeal.

1           And, in fact, no mistake at all was  
2           made by the judge in that case.

3           To have the rule that Lambert is  
4           urging today would have a judge effectively  
5           need to conduct a Rule 11 criminal colloquy  
6           with counsel, asking if they're aware of all  
7           sorts of potential related rights.

8           That is asking an impossible task for  
9           a district court judge and an unfair one and  
10          goes well beyond the acknowledged sharply honed  
11          exception, which does not apply factually in  
12          this case. Thank you.

13          CHIEF JUSTICE ROBERTS: Thank you,  
14          counsel. The case is submitted.

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

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## Official - Subject to Final Review

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