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IN THE SUPREME COURT OF THE UNITED STATES

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ANDREW J. KONTRICK, :

Peti ti oner :

v. : No. 02-819

ROBERT A. RYAN :

- - - - -X

Washi ngton, D. C.

Monday, November 3, 2003

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:04 a.m

APPEARANCES:

E. KING POOR, ESQ., Chicago, Illinois; on behalf of  
the Petitioner.

JAMES R. FIGLIULO, ESQ., Chicago, Illinois; on behalf  
of the Respondent.

KENT L. JONES, ESQ., Assistant to the Solicitor General,  
Department of Justice, Washington, D.C.; as amicus  
curiae, supporting the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in No. 02-819, Andrew J. Kontrick v. Robert A. Ryan.

Mr. Poor.

ORAL ARGUMENT OF E. KING POOR  
ON BEHALF OF THE PETITIONER

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

This case presents a single question: Can the  
deadline for objecting to a bankruptcy discharge be  
altered by equitable exceptions? To answer that question,  
we start with the language of the rules. Bankruptcy Rule  
4004 states that an objection to discharge must be filed  
no later than 60 days after the first date set for the  
meeting of creditors. This rule also allows for an  
extension of the time, but only by motion and only if that  
motion is filed, quote, before the time expires.

QUESTION: Mr. Poor, may I suggest that the  
question you have raised is not the one that I understood  
this case to involve. It's not whether the provision  
allows for equitable exceptions, it's whether you  
forfeited that claim, the claim that it does not - whether  
you forfeited it by letting the thing go past your answer.  
You didn't raise it in your answer. You let the case go

1 off on summary judgment on the merits and remained silent  
2 until after there was an adverse judgment against you. So  
3 at least in my thinking, the forfeiture question, whether  
4 you forfeited, the argument that you would now like us to  
5 treat as the question presented, that is the threshold  
6 question.

7 MR. POOR: And I - and I would agree with Your  
8 Honor that the question of waiver, or sometimes referred  
9 to as forfeiture, is - is part of - that is the question  
10 that's before your Court, whether that - the fact that we  
11 had not raised it until some later date is something that  
12 can be waived or forfeited.

13 QUESTION: Well, Mr. Poor -

14 QUESTION: I - I would agree with Justice  
15 Ginsburg that that's the way that the question reads on  
16 the petition for writ of certiorari. It's helpful that  
17 you did set forth, that the parties did set forth in the  
18 joint appendix the chronology here. I take it that the  
19 first time your client raised the late filing issue was  
20 June 23, 2000, or am I wrong about that?

21 MR. POOR: No, Your Honor. We raised it in March  
22 of 2000 in a motion to reconsider, but we also have  
23 maintained -

24 QUESTION: Oh, that was in the motion to  
25 reconsider?

1           MR. POOR: Correct, but I would hasten to add  
2 that we have steadfastly maintained that we raised it in  
3 opposition to the motion for summary judgment in that we  
4 specifically said that the family account claim was not in  
5 the original complaint, and that to be timely, a claim had  
6 to be in that - that original complaint.

7           QUESTION: But in that very pleading you asked  
8 the court to strike a number of things in the complaint,  
9 and yet you did not ask to strike the family account  
10 claim

11           MR. POOR: Well, Your Honor, we have maintained  
12 that we did and in the context of this -

13           QUESTION: But you didn't - did you expressly say  
14 that you wanted those certain allegations struck?

15           MR. POOR: Well, we did as best we could at the  
16 time because this was part of a -

17           QUESTION: Did you - did you say, court, strike  
18 these allegations?

19           MR. POOR: Yes.

20           QUESTION: Yes, the answer is yes?

21           MR. POOR: Yes, we believe we - we did, Your  
22 Honor.

23           QUESTION: And you did not say, strike with  
24 respect to this allegation?

25           MR. POOR: Not specifically as to that, and

1 that's - and that's what the - what the bankruptcy court  
2 found. However, at the time this was part of a mass of  
3 other allegations, and we felt that we had raised it  
4 sufficiently by -

5 QUESTION: What was your reason for  
6 distinguishing the two, for saying strike others, but as  
7 to this one all that you did was mention that it wasn't in  
8 the original complaint?

9 MR. POOR: Well, we felt that that was - at the -  
10 in the opposition we raised the 4004 untimeliness issue.  
11 There were just a number of others that were not even in  
12 the - any complaint.

13 QUESTION: Well, if we're going to get into all  
14 of that, then they would say there's a relation back and  
15 none of those issues are really before. We took the issue  
16 on the pure question of whether or not, assuming that you  
17 were late in objecting that that - that that's a bar.

18 MR. POOR: That's correct, Your Honor, and I -

19 QUESTION: Mr. Poor, there are cases with which  
20 I'm sure you're familiar where a statute of limitations  
21 has been held to be deemed waived, even though there's  
22 nothing in the statute itself talking about waiver.

23 MR. POOR: That's correct, Your Honor.

24 QUESTION: And this is much like that, is it not?  
25 There's a provision in the rules for a deadline for making

1 a claim, but perhaps as in a statute of limitations case,  
2 it's not an extension of time to find a waiver. It's -  
3 it's a different concept, and maybe should be viewed much  
4 like a waiver of a statute of limitations.

5 MR. POOR: Well, in this case, Your Honor, this  
6 deadline is very much unlike a classic statute of  
7 limitations where you have a, say, a 2-year statute. This  
8 is different because here the language of the 60 days is  
9 modified or altered by Bankruptcy Rule 4 - 9006(b). The  
10 rulemakers didn't stop with the 60-day deadline. They  
11 stated that this rule will be incorporated into a special  
12 subgroup of other rules that may only be extended, quote,  
13 to the extent and under the conditions stated.

14 QUESTION: But what's your answer to the argument  
15 that a waiver is not an extension, it's a waiver? That's  
16 a different kettle of fish.

17 MR. POOR: Well, it - any - any attempt to excuse  
18 a late filing, whether it is waiver, equitable estoppel,  
19 and it could be waiver in the sense of it's an implied  
20 waiver where a debtor, by inaction, does not raise it, or  
21 it could be a situation where there's a stipulation by the  
22 debtor to - with the creditor and says, after the deadline  
23 the creditor goes to the debtor and says, I want you to  
24 stipulate to a late time period. In the language here, if  
25 you take the plain language of 4004 and 9006(b), that

1 plain language simply does not allow for any type of  
2 equitable exceptions, whether they're deemed to be waiver  
3 or forfeiture or if -

4 QUESTION: But you could make the same argument  
5 for an ordinary statute of limitations that doesn't talk  
6 about waiver or equitable alteration.

7 MR. POOR: You - and that's correct, Your Honor,  
8 for an ordinary statute of limitations. This one is  
9 different for this reason, that the presumption here is  
10 that when the drafters adopted 9006, what they did was  
11 they patterned it after Federal Rule of Civil Procedure  
12 6(b), almost - almost virtually identically, and the  
13 language of 6(b), on which 9006(b) is patterned, has had a  
14 long history of being - had an established meaning as  
15 setting jurisdictional deadlines and - for its own  
16 subgroup of rules, and those rules, as this Court held in  
17 the Robinson case, we must presume that rules that are  
18 based on that 6(b) rule are presumed to be - to have the  
19 same meaning, that is, in the words of the Robinson case,  
20 as mandatory and jurisdictional.

21 QUESTION: Well, do you think that Rule 4004(a)  
22 limits the Court's subject matter jurisdiction?

23 MR. POOR: Not in the least, Your Honor, and I  
24 think that's a very important distinction in this case,  
25 because I think that's where the court below got off the



1 trail in focusing on the concept of subject matter  
2 jurisdiction. This case does not deal with subject matter  
3 jurisdiction. That's the idea that - whether the court  
4 has the competency. We're not saying that the, for  
5 instance, the Circuit Court of Cook County was the proper  
6 court to hear this objection.

7 In this case we're talking about an entirely  
8 different concept, and that is jurisdiction used in the  
9 sense that a court may not extend a deadline beyond the  
10 plain meaning of the rule with any type of equitable  
11 exception, whether it's called -

12 QUESTION: Why do you pin the word jurisdiction  
13 on it at all when rules, whether bankruptcy rules or  
14 creditor rules, cannot alter or affect the Court's  
15 jurisdiction? That's what both rules' enabling acts say,  
16 so whatever it is, it - if it is jurisdiction, then it  
17 violates - the rule violates the statute. The rule isn't  
18 passed by Congress.

19 MR. POOR: I - and I - I, Your Honor, and as I  
20 recall in Your Honor's concurrence in the Carlisle case,  
21 you pointed out that to use the term subject matter  
22 jurisdiction for something like this, for a time  
23 prescription, is - is anomalous, where in - in this case  
24 if we're not - we're not dealing with subject matter  
25 jurisdiction, we're talking about jurisdiction as a

1 shorthand for a time -

2 QUESTION: You're talking about a rigid time  
3 limit, a time limit that cannot be extended for good  
4 cause.

5 MR. POOR: Exactly, and I - I know there are a  
6 number of courts that decline to even use the term  
7 jurisdiction, because they think that that's probably not  
8 the best term to use. It's used by many courts.

9 QUESTION: Could you - could you have, according  
10 to your analysis of what this animal is, here you made  
11 your motion to reconsider after the summary judgment  
12 motion was granted, but before judgment was entered -

13 MR. POOR: Correct.

14 QUESTION: - final judgment was entered.  
15 Suppose final judgment had been entered. Could you then  
16 come into the court and say, sorry, court, I forgot to  
17 tell you that you couldn't enter any judgment here because  
18 an unalterable time bar had passed?

19 MR. POOR: I think, so long as it's within the  
20 same proceeding, Your Honor, you could, and that's - that  
21 was the holding in the Kirsch case, which the Seventh -

22 QUESTION: How about initially on appeal?  
23 Suppose you - you suffered the adverse judgment in the  
24 bankruptcy court and then you want to raise that, after  
25 all, the complaint was untimely, on appeal for the first

1 time?

2 MR. POOR: I think that that would probably be a  
3 rare instance, but I think that in - if it is  
4 jurisdictional or unalterable, then so long as it's within  
5 the same proceeding that's just - that is part of what a  
6 jurisdictional rule is.

7 QUESTION: Do you have any authority with respect  
8 to this kind of rule, a rigid time limit, that it's okay  
9 to untimely bring that to the court's attention? I mean,  
10 all the precedent that your brief cites are cases where  
11 the party who opposes the time extension timely brings up  
12 that the complaint was untimely.

13 MR. POOR: We have cited a number of those, Your  
14 Honor, in our - both our opening brief and our reply  
15 brief, and I would invite the Court's attention to -

16 QUESTION: Where the defendant was untimely -  
17 that -

18 MR. POOR: Yes, Your Honor.

19 QUESTION: - where as here?

20 MR. POOR: Yes, and - and even more extreme, a  
21 more extreme example, if I would invite the Court's  
22 attention to the Dollar case, where after the time limit  
23 had passed, the creditor went to the debtor and says -  
24 said I want you to extend the time limit, and for whatever  
25 reason, the debtor said, okay, I'll agree to that, and

1 then they brought that to the bankruptcy court for  
2 approval and the bankruptcy court said, no, this is a  
3 jurisdictional time limit, you can't have a side deal with  
4 a creditor -

5 QUESTION: That was a case where the court made  
6 an - an initial ruling without having expended any time in  
7 adjudicating the case. Here, you present the situation  
8 where the court grants a motion for summary judgment and  
9 then the debtor says, sorry, court, you never should have  
10 adjudicated this. We didn't tell you, but now you have to  
11 erase all - everything that you did.

12 MR. POOR: Well -

13 QUESTION: I did - was not aware of such a case.

14 MR. POOR: Well, there - there are a number of  
15 them where they're not raised in the - there's a whole  
16 spectrum. They're not raised in the answer -

17 QUESTION: Raised after the case is adjudicated  
18 on the merits?

19 MR. POOR: Yes. The Kirsch case is one case  
20 where it - actually after trial, in Kirsch, the court  
21 found that since the rule - and I - it was not alterable  
22 under the plain meaning of the twin here, this 4004, 4007,  
23 that that could not be altered, even after a trial, and as  
24 I recall, the Poskanzer case is yet another one of those  
25 where -

1 QUESTION: Who made those decision where the -

2 MR. POOR: The - the Kirsch case is from the  
3 bankruptcy court in the Northern District of Illinois, and  
4 - and the Poskanzer case is from New Jersey and we cite a  
5 number of them in page 16 and in our footnote on that -

6 QUESTION: The - the law - like - like the time  
7 limit here, the law is unalterable, and if you fail to  
8 make a legal argument at the trial level, you're not  
9 normally permitted to raise that argument on appeal where  
10 you haven't raised the objection below.

11 MR. POOR: That -

12 QUESTION: The court - the court doesn't say,  
13 well, the law is unalterable so you're entitled to - to  
14 raise this point at any stage in the proceeding. That's -  
15 that's just not the way we do things, and that's why we  
16 do have this terminology jurisdictional. There is  
17 something special about that, but the mere fact that  
18 something is unalterable certainly doesn't allow you to  
19 raise it whenever you like.

20 MR. POOR: Well, Your Honor, the - to go back to  
21 the - the concept of - of waiver or - or forfeiture, if  
22 the rule is - is truly jurisdictional, using the shorthand  
23 that it cannot be altered, then -

24 QUESTION: No, no, no. That was the point of -  
25 of my question. It is not a synonym for - for the term

1 jurisdictional that it can't be altered. There are a lot  
2 of things that - that can't be altered which you're not  
3 allowed to raise late.

4 MR. POOR: But if - if the rule itself, for  
5 instance, does not allow a - a debtor and a creditor to  
6 extend this time line themselves, then it would be, I  
7 submit, anomalous to allow the debtor to do, by inaction,  
8 what the Court could never do on its own or - or permit a  
9 rule that says that -

10 QUESTION: Well, that - that's like saying you  
11 cannot let the defendant change the law by merely failing  
12 to raise a legal objection that was fully available. He's  
13 not changing the law, he's just forfeited the - that - the  
14 benefit of that provision of law.

15 MR. POOR: Well, if it can be forfeited, Your  
16 Honor, then I would submit that it can also be waived. It  
17 could be - and -

18 QUESTION: What's - what's the citation of that?  
19 I mean, you refer to Rule 6, and Rule 6 governs a whole  
20 lot of famous time limits, new trials, 60(b) motions, et  
21 cetera. So, therefore, there must be a lot of cases where  
22 the following thing happened: Somebody made a motion under  
23 Rule 59, or whatever it is, out of time, all right, a day  
24 late -

25 MR. POOR: A day -

1 QUESTION: A day late.

2 MR. POOR: Right.

3 QUESTION: And then nobody said a word about it.  
4 Then one year later, for the first time on appeal, the  
5 other side says, oh, I agree we never said a word about  
6 this before so we're raising it now for the first time,  
7 and the court said, fine, you can raise it for the first  
8 time. Now, what are the cases that hold that? I mean,  
9 I'm not saying there aren't any, I haven't faced this  
10 before, but I would have thought it comes up million - you  
11 know, quite a lot of times where people forget to - or  
12 they don't care or whatever it is, and they raise  
13 something very late. What are those cases?

14 MR. POOR: Well, I - I would invite the Court's  
15 attention to the cases that we cite on pages 16 and 17,  
16 such as the - the Rinde case, debtor failed to plead -

17 QUESTION: No, I'm not talking about bankruptcy.  
18 I'm talking about Rule 6, ordinary civil cases.

19 MR. POOR: Well, I can - I can point the Court to  
20 a case that is in that 6(b) family, in the Criminal Rule  
21 45(b).

22 QUESTION: I'm talking about civil rules of  
23 procedure, ordinary civil cases. Probably there are, I  
24 would guess conservatively 100,000 cases a year that may  
25 fall into this category. In a certain percentage of

1 those, the deadlines will be missed -

2 MR. POOR: And -

3 QUESTION: - and in a certain percentage of that  
4 percentage, the other side will have said nothing -

5 MR. POOR: And -

6 QUESTION: - waking up on appeal.

7 MR. POOR: And in -

8 QUESTION: And then there must be a lot of cases,  
9 if you're right, that would say, that's okay. I'm just  
10 repeating myself because I think there are no cases and I  
11 think, to me, that shows you're wrong, but now I'm open to  
12 hearing that there are a lot or even one.

13 MR. POOR: Well, I would - I would invite the  
14 Court to the Kirsch case that we cite in our brief.

15 QUESTION: Is Kirsch a bankruptcy case? I'm not  
16 talking about a bankruptcy case.

17 QUESTION: District court - that's a district  
18 court case.

19 MR. POOR: In - in Kirsch, the court relied upon  
20 that 6(b) analysis in a case called Hulson from the  
21 Seventh Circuit, where just such a thing happened where  
22 after the - after trial the - the party did not - did not  
23 file his Rule 59 motion on time and actually the other  
24 side - they stipulated to an untimely rule - they  
25 stipulated to it, and then on appeal in that case they -



1 the Seventh Circuit said, we don't care if you stipulated  
2 to it, it's untimely and you cannot -

3 QUESTION: All right, so that would definitely  
4 support you, and what's the name of that case?

5 MR. POOR: That's Hulson, H-u-l-s-o-n.

6 QUESTION: All right.

7 MR. POOR: And that's - and that was the basis -  
8 that was the basis of this whole analysis in the Kirsch  
9 case.

10 QUESTION: Under your - your view of the law,  
11 could the respondent here, the creditor have argued that  
12 this amendment relates back to the complaint?

13 MR. POOR: Relation back has never been in our -  
14

15 QUESTION: Could he - could he have made that  
16 argument under your view of the law, post-judgment, after  
17 you - March 2000, it was decided in 1980 - 90 - 99, March  
18 2000, you object. At that point, could the creditor say,  
19 oh, well, this relates back, it's okay?

20 MR. POOR: He - he could have, Your Honor.

21 QUESTION: All right. Well, then what you're  
22 doing is you're putting this issue potentially in the  
23 appellate courts. We don't do that sort of thing. It's -  
24 it's for the trial judge to say it relates back or not.

25 MR. POOR: Well -

1           QUESTION: And that's - that's - you put all of  
2 the parties in a very difficult position by your rule.

3           QUESTION: Didn't the court of appeals said - say  
4 you didn't suggest that it related back, therefore,  
5 they're assuming it didn't?

6           MR. POOR: That's correct, that we - we - we've  
7 never argued the - there's never - the relation back issue  
8 was never before the Seventh Circuit.

9           QUESTION: I'm not saying it is before, but I'm  
10 saying under your view, under your framework, it would be  
11 very difficult to handle that at such a late point, and  
12 it's a legitimate argument that they could have made.

13          MR. POOR: If they - they raised it on appeal, as  
14 it might be a - an issue. I think it's probably more  
15 likely in the trial court, but yes, I would agree with  
16 Your Honor on that.

17          QUESTION: Mr. Poor, I'm still looking for that  
18 case that you cited, because at least the two cases that  
19 you relied on principally, Taylor and Carlisle, those were  
20 both cases where the untimeliness point was timely raised.

21          MR. POOR: That is true, Your Honor, both in  
22 Taylor and Carlisle it was raised, but I would suggest  
23 that in Taylor, if the Court did not allow a late  
24 extension based upon a bad faith claim of exemption -

25          QUESTION: Well, the rule says good faith isn't

1 an excuse, so -

2 MR. POOR: And -

3 QUESTION: But - but you are arguing that an  
4 untimely raising of the lack of timeliness is okay, and  
5 neither Carlisle nor Taylor stand for that proposition.

6 MR. POOR: Well, they do in a broader sense, Your  
7 Honors, that they do not - I would submit that they do not  
8 allow any kind of equitable -

9 QUESTION: They were both cases where the  
10 objection to the untimeliness was timely made, right?

11 MR. POOR: That's correct.

12 QUESTION: So then they could not have considered  
13 the case such as this one where the objection is untimely  
14 made?

15 MR. POOR: And that - what that gets - what that  
16 gets back to our point in our brief that in the Santos  
17 case that the Seventh Circuit relied upon most heavily  
18 here, they did what I would call a pick and choose of  
19 different type of equitable exceptions. In -

20 QUESTION: I didn't think that forfeiture was an  
21 equitable exception.

22 MR. POOR: Well, in -

23 QUESTION: There is a difference between waiver,  
24 which is a conscious act, and forfeiture, which is rule  
25 that says, if you don't raise the point, which is the

1 ordinary consequence of not raising a defense, if you  
2 don't raise it and the time to amend passes and you have a  
3 judgment on the merits, you can't go back to square one  
4 and said, oh, sorry, I should have put it in my answer,  
5 but -

6 MR. POOR: Well, our - our biggest point here,  
7 Your Honor, is that either these rules set time limits  
8 that cannot be altered by any type of equitable doctrine,  
9 be it forfeiture, waiver, or equitable estoppel, I mean,  
10 either all of those are in or -

11 QUESTION: I didn't think that forfeiture was an  
12 equitable doctrine.

13 MR. POOR: Well, I - I guess in this case we've  
14 always talked about waiver as - as what we're talking  
15 about here in terms of - it was an implied waiver in terms  
16 of - it was inaction - inaction by the debtor -

17 QUESTION: Well, you're - you're talking about  
18 the same thing as implied exceptions to the statute of  
19 limitations that, you know, the statute may have run but  
20 there are certain exceptions where the thing will still be  
21 considered.

22 MR. POOR: That's - that's correct, Your Honor.  
23 If - a tolling type, and I think that's what we're getting  
24 at here is are there tolling-type exceptions to this  
25 language and I come back - we come back to the point that

1 if this rule was designed by the rulemakers to track the  
2 language of 6(b) and not allow any type of exception,  
3 whether it's equitable tolling or - or whatever, then  
4 either - either all those exceptions come in or they - or  
5 they don't, because -

6 QUESTION: But - but you cite only - in response  
7 to Justice Breyer, you cite only one 6(b) case that you're  
8 aware of that applied the principle you're arguing for  
9 here, namely that a late-raised objection will - will be  
10 heard, right?

11 QUESTION: It isn't an exception. The point is,  
12 I think some of us have been pointing out to you, is our  
13 belief, which you could try to disabuse us of, that this  
14 has nothing to do with exceptions. We'll assume there are  
15 no exceptions no matter what, but there can be a rule of  
16 law that you win and there are no exceptions, but still,  
17 because you didn't raise the point, you lose it. That has  
18 nothing to do with exceptions. It has to do with the  
19 normal rule, in a court you have to raise a point. Now  
20 that's what I'm interested in.

21 MR. POOR: And -

22 QUESTION: And that's what I wonder - I'm asking  
23 because Rule 6, I think, would be analogous to that and so  
24 if you - there are some cases -

25 MR. POOR: And I would - the Hulson case is an

1 excellent example.

2 QUESTION: Which case? Because I'm looking for  
3 it in your brief.

4 MR. POOR: No, it's in the - the Kirsch - the  
5 Kirsch -

6 QUESTION: Cited by another case, right?

7 MR. POOR: That's correct.

8 QUESTION: It's cited in Kirsch?

9 MR. POOR: Yeah, but - and the - the other point  
10 I would make, though, is that the - the overall concept  
11 here is this case is really no different than the Carlisle  
12 case in that if the claimant Carlisle, one day late, or  
13 the - the motion one day late could not be extended  
14 because of attorney error -

15 QUESTION: But Mr. Poor, it can't be like  
16 Carlisle because the Government timely made that  
17 objection.

18 MR. POOR: But the - the question, Your Honor, is  
19 - I would come back to this: Could the Government waive  
20 the - the objection deadline in 45(b)? And I think the  
21 answer, and I think this is where this all comes together,  
22 all of this comes together in this point, is that the  
23 Government could not waive that 45(b) deadline, and that  
24 45(b) deadline is the same as 6(b) and it's the -

25 QUESTION: So you think that case stands for the

1 proposition that the Government had said nothing and the  
2 court had said, I considered this, I grant the motion to  
3 acquit, that the Government could then come in and say, oh  
4 sorry, we forgot to tell you that this was one day late  
5 and so you couldn't consider it.

6 MR. POOR: If there are - I would submit, Your  
7 Honor, that if these - if these deadlines are such that  
8 they may not be -

9 QUESTION: But the - the opinion of this Court  
10 certainly doesn't give any basis for that - for such a  
11 judgment.

12 MR. POOR: Well, it dealt with the idea it was  
13 their inherent power to do that, but if - if the Court  
14 allows a rule that says the Government can waive this or  
15 the Government can - if the Government can stipulate to  
16 it, which is, in effect, a waiver-type argument, then I  
17 think that that pretty much unravels Carlisle. If the  
18 Government is able to stipulate to a late - a late time  
19 period by either action or inaction, then I think that  
20 unravels Carlisle and all these 6(b) family of cases.

21 QUESTION: Do you wish to reserve the balance of  
22 your time, Mr. Poor?

23 MR. POOR: I do, Mr. Chief Justice.

24 QUESTION: Very well.

25 Mr. Figliulo we'll hear from

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ON BEHALF OF THE RESPONDENT

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

The best way for me to understand this case is just to walk through the case. This is a - an adversary proceeding. Rule 4004 deals with the time for filing a complaint objecting to discharge, and that specifically is provided as an adversary proceeding. Once we move into the realm or the arena of an adversary proceeding, the rules are pretty clear. If - if the complaint is late, the plaintiff runs the risk of losing his case if the defense is timely raised, but there's obligations that shift to the defendant once we're in the adversary proceeding. The defendant has to answer -

QUESTION: Mr. Figliulo, do you know of any case in which an objection could be waived and yet prior to the time of waiver, the parties could not, by stipulation, eliminate the objection?

MR. FIGLIULO: There's a - a bankruptcy case that holds that, but I don't think - I don't think that's right. I think the -

QUESTION: Well -

MR. FIGLIULO: I think you can't agree -

QUESTION: - that - that holds what? You - you think - you think the parties can waive the limitation of



1 - of 4004?

2 MR. FIGLIULO: I believe they can, yes.

3 QUESTION: The parties, if they get together, can  
4 waive it?

5 MR. FIGLIULO: Yes, I - I believe they can.

6 QUESTION: All right.

7 MR. FIGLIULO: And I think - I think -

8 QUESTION: I have trouble - I have trouble with  
9 that.

10 MR. FIGLIULO: Here - here's - here's -

11 QUESTION: I can't imagine that - that you're  
12 unable to, by stipulation, agree to eliminate it, but you  
13 can - one of the parties can nonetheless waive it. That -  
14 that'd be a very unusual -

15 MR. FIGLIULO: I think the statute of limitations  
16 is a personal defense and -

17 QUESTION: It can be waived.

18 MR. FIGLIULO: - therefore, it can be waived, and  
19 there's tolling agreements that are entered into regularly  
20 -

21 QUESTION: Exactly.

22 MR. FIGLIULO: - with respect to statute of  
23 limitations -

24 QUESTION: Right.

25 MR. FIGLIULO: - and I think it could apply to

1 4004(a) as well.

2 QUESTION: So you think the what's his case is  
3 wrong - what was the name of the one that -

4 MR. FIGLIULO: I think it was Barley, In re  
5 Barley, Your Honor. I think that case said that the  
6 stipulation was not -

7 QUESTION: And was that a case in which the - in  
8 which the court expressly addressed the issue and say -  
9 and said, I'm not going to allow - I'm not going to permit  
10 the extension of time?

11 MR. FIGLIULO: I think that was.

12 QUESTION: That - that's - that's far different  
13 than just a waiver.

14 MR. FIGLIULO: I do understand.

15 QUESTION: There the judges said, you're - we're  
16 not going to allow you to delay the processes of this  
17 court, and that's quite different than parties simply  
18 doing it on their own without the judges' intervention.

19 MR. FIGLIULO: I agree, Your Honor, and the rule,  
20 like Rule 6(b) or 9000(6)(b) focuses on motions for  
21 extension and enlargement and it is strict and it does  
22 provide the guidelines for the court to follow, but I -

23 QUESTION: I - I'm not sure what you're saying  
24 now. You -

25 MR. FIGLIULO: Well -

1                   QUESTION: - you think in Barley, when the  
2 parties signed an agreement to extend the time limit, the  
3 court should have accepted?

4                   MR. FIGLIULO: I believe that, yes.

5                   QUESTION: Okay.

6                   MR. FIGLIULO: But I think the court - the reason  
7 in the court, as I understood it, was that they could not  
8 agree to do that because extensions and enlargement of  
9 time is governed by the rule and that it wasn't permitted  
10 by the rule. But in this case I think we have a classic  
11 situation where we have a limitations period that's the -  
12 it should have been raised in the answer. It was not  
13 raised in the answer. It wasn't raised until after the  
14 court granted summary judgment. That's a classic case of  
15 an implied waiver of a limitations defense and the court  
16 recognized that at the bankruptcy level, it's been  
17 recognized that way at the district court level, it's been  
18 recognized that way by the Seventh Circuit, and it's a, I  
19 think, 100 percent right.

20                   It's also directly in accord with the background  
21 principles of waiver that apply to a civil-type action.

22                   QUESTION: Would you agree - do you agree with  
23 the Government that if the statute in question, not the  
24 bankruptcy rule, but at 157(b)(2)(J), if that required  
25 timely objection as some other statutes in the bankruptcy

1 realm do, then you would lose, if the statute rather than  
2 the rule required timely objection?

3 MR. FIGLIULO: I think if the statute provided -  
4 if Section 157 provided timely, like it does for  
5 abstention, I think that would make the rules more of an  
6 exercise of the code and perhaps a stronger basis for  
7 arguing the mandatory strictness of the rules. I do not  
8 think it would make it jurisdictional.

9 QUESTION: Well, many - many statute of  
10 limitations are, of course, enacted by the legislature  
11 rather than by rule, and nonetheless you have tolling  
12 there, do you not?

13 MR. FIGLIULO: Exactly, Your Honor. In fact,  
14 traditionally, and as this Court has recognized from time  
15 to time, that statute of limitations, which are phrased in  
16 mandatory terms, are silent with respect to whether  
17 certain exceptions or defenses traditionally apply, but  
18 regularly apply those, and that would apply particularly  
19 here where the bankruptcy court is a court of equity, and  
20 waiver is one of those principles.

21 QUESTION: In the typical case there's not a  
22 whole bunch of people who are hanging on the resolution of  
23 this issue. I mean, what's involved here is, I mean, it -  
24 it says no later than 60 days after the first date set  
25 for meeting of creditors. The problem is you have a whole

1 bunch of people who don't know what their rights are going  
2 to be until this matter is settled and it - it seems to me  
3 that it's - it's quite reasonable to insist upon  
4 compliance with that time limit no matter what, because  
5 there are other people's interests involved.

6 MR. FIGLIULO: Your Honor, I don't quarrel with  
7 the fact that the time limit is important and it serves a  
8 valid purpose, but when we look at waiver - and we're not  
9 talking about exceptions to extend time here, we're  
10 looking at the defendant's obligation to - to assert a  
11 timely objection to the untimeliness of the complaint.  
12 That promotes finality because that brings the issue to a  
13 head and it - it conserves judicial resources - it does  
14 everything waivers should do.

15 QUESTION: But are you -

16 QUESTION: Except - except that it does not lead  
17 to the conclusion that they should be able voluntarily to  
18 agree to extend the time period, which - which is a  
19 position you support?

20 MR. FIGLIULO: It's a position I support but it's  
21 not critical to the -

22 QUESTION: Well -

23 MR. FIGLIULO: - position that we advocate, but I  
24 do think it's right, because I do think -

25 QUESTION: Well, would you - would you agree that

1 a district court could override that determination of the  
2 parties, say I'm not going to allow the late filing?  
3 Other - the rights of other persons are involved and the  
4 district court in the hypothetical case says, I know this  
5 is not jurisdictional but it is within my control.

6 MR. FIGLIULO: I think the - the bankruptcy court  
7 level, that probably would be within the court's  
8 discretion, but I - my view is that it's - it's like a  
9 tolling agreement and it should be permitted, because a  
10 statute of limitations or a limitations period is a  
11 personal defense. Now, if there's extraordinary  
12 circumstances where the court refuses to enforce the  
13 agreement, I can't conceive of why that would be  
14 permitted.

15 QUESTION: Isn't the difference between the  
16 statute of limitations and the case we've got here that in  
17 the statute of limitations case we make the assumption  
18 that the only two interested parties are the plaintiff and  
19 the defendant, and if they don't care, why should anybody  
20 else? In this case, however, there are other interested  
21 parties and there is a pretty well-articulated  
22 governmental interest in wrapping this up quickly. So it  
23 seems to me that in - in the bankruptcy case, the court  
24 would have every reason, if it was brought to its  
25 attention, e.g., in the form of a stipulation, to say, no,

1 I'm going to keep the ball rolling fast. Isn't that the  
2 distinction?

3 MR. FIGLIULO: Your Honor, I think that's a sound  
4 distinction. I - I happen to believe that  
5 dischargeability is a complaint for objecting to  
6 dischargeability primarily affects the objecting party and  
7 the debtor, and while there may be other rights of people  
8 implicated, it's still very personal with respect to the  
9 debtor and the creditor who's making the objection to  
10 discharge. And that would also be even more true with  
11 respect to dischargeability of particular debts as in  
12 4007.

13 So I understand the policy consideration, there  
14 is a distinction there. I - I've probably bitten off more  
15 than I should have with respect to whether that can be  
16 agreed on or not -

17 QUESTION: You don't have to maintain that.

18 (Laughter.)

19 QUESTION: Why don't you recognize that -

20 MR. FIGLIULO: But I do -

21 QUESTION: - that this is simply - the question  
22 is essentially, where does one draw the line? And one  
23 might say, even if the objection to the timeliness isn't  
24 raised in the initial answer, it could be raised in an  
25 amendment to the answer. It could even be raised in

1 opposition to the summary judgment motion. But there  
2 comes a point where it's too late to make that objection,  
3 and that's essentially the question for us: Where do you  
4 draw the line when it's too late? Now, it could be on  
5 appeal, it could be after adjudication on the merits in  
6 the trial court. So on that question of where do we draw  
7 the line about raising this objection, what is your  
8 position?

9 MR. FIGLIULO: I know that in this case, once -  
10 once the court adjudicates the merits, it is waived, it's  
11 over, it's too late. I would -

12 QUESTION: And that's all you have to maintain to  
13 prevail here?

14 MR. FIGLIULO: I do believe - I do believe that  
15 whether there's been an implied waiver or a waiver has  
16 some of a fact inquiry that's necessary. It can be as  
17 early as the failure to raise it in the answer, but I do  
18 recognize the liberal rules of amendment to answers and  
19 that may be permitted it by the court in its discretion,  
20 so it's not a bright line before judgment, it's not bright  
21 line where you draw the line, in my judgement, but in -  
22 and certainly once the court rules, it's too late.

23 QUESTION: I have one question of bankruptcy  
24 practice. You just - you can tell me how it works. Is  
25 the - is the order for the first meeting of creditors,



1 which is what triggers the - the time limit here, is -  
2 does that date often fluctuate the - the order of the  
3 first meeting of creditor and then they'll - and then  
4 they'll change it?

5 MR. FIGLIULO: No, that - it's pretty set, Your  
6 Honor. That - it can happen, but that's unusual. The  
7 date is - the set - there's notice that goes out and it's  
8 a relatively fixed point in time from which these  
9 deadlines then are calculated.

10 QUESTION: There was a timely complaint filed and  
11 it is a little odd that it was never argued that, well,  
12 this is really within the - within the frame of the  
13 original complaint, so it - it should relate back. Why  
14 didn't you argue that?

15 MR. FIGLIULO: Your Honor, that was argued before  
16 the bankruptcy court. The bankruptcy court did not  
17 discuss it at all in its opinion. It was argued before  
18 the district court. It wasn't discussed by the district  
19 court at all. My client represented himself pro se before  
20 the Seventh Circuit. It was not raised in the briefs on  
21 appeal, so with respect to whether that's an alternative  
22 grounds for affirmance, that's been waived, somewhat  
23 ironically, but I think it has been.

24 QUESTION: If you're through I'd like to ask you  
25 an irrelevant question. I don't want to take your time.

1 I noticed Judge Schwartz ordered a special hearing on  
2 sanctions at the end of the proceeding. What happened at  
3 that hearing?

4 MR. FIGLIULO: Your Honor, I wasn't involved at  
5 that time. My - my understanding is that there was a lot  
6 of stuff going back and forth and there was a sanction of  
7 attorneys' fees of \$1,000 or \$1,500 assessed. That's -  
8 that's what my recollection is.

9 QUESTION: I gather it was a pretty acrimonious  
10 proceeding in the district court.

11 MR. FIGLIULO: It - it was, Your Honor. It's  
12 former partners and we know that -

13 QUESTION: Is your view on this as a bankruptcy  
14 attorney thinking, I mean, I don't see that it affects  
15 your client one way or the other, but, I mean, obviously  
16 the Solicitor General in this case has suggested an  
17 affirmance on the very narrow ground that maybe they're  
18 quite right about what the rule should be interpreted, but  
19 still they lost the chance to raise the rule because they  
20 didn't raise it. All right, that's a very narrow ground.  
21 On the other hand, the split in the circuits is more on  
22 the broader question of how absolute are these rules in -  
23 how absolute are the deadlines in this particular rule,  
24 and that's a broader question, which is also a possible  
25 ground for affirmance, so either way your client would

1 win. But, as a bankruptcy lawyer, what's your opinion?

2 MR. FIGLIULO: My - and I approach this with  
3 little trepidation, but I believe equitable exceptions,  
4 the traditional equitable exceptions of tolling and  
5 equitable estoppel, continue to apply and should apply to  
6 Rule 4004(a) and 4007. I don't think they've been  
7 expressly abrogated. I think they're such a powerful part  
8 -

9 QUESTION: A problem then about the other part  
10 that says you can't extend the deadlines in this main part  
11 except for the reasons that are there given, which is good  
12 cause, et cetera, what do we do about that?

13 MR. FIGLIULO: I - I think the - the - Rule  
14 9006(b) or 6(b), it eliminates excusable neglect as a  
15 grounds for extending time for a late-filed motion, but I  
16 don't think it eliminates equitable tolling. I think it's  
17 different. I think tolling and excusable neglect overlap  
18 some cases, and to the extent it's excusable neglect, it's  
19 not grounds for extension, but a - a true tolling -

20 QUESTION: What would be a cause for tolling if  
21 excusable neglect is out of it? It seems to me that this  
22 rule is saying there are no exceptions, period, and to say  
23 that even if you can show good cause you don't get it  
24 extended, but there's some other equitable.

25 MR. FIGLIULO: I - it's a relatively - I think

1 equitable tolling, in the context of this rule, is  
2 relatively narrow exception, it's not - it's little  
3 broader than the unique circumstances that relate to if a  
4 party's misled by a rule of court. But I do think that it  
5 can - there can be circumstances, for example, if a  
6 client's lawyer dies right before the deadline is -  
7 passes, and there's -

8 QUESTION: Why isn't that excusable neglect?

9 MR. FIGLIULO: I don't think it's neglect. I - I  
10 think there's equitable tolling and - and that - that's  
11 why I do think it survives in some way, but I - it's not  
12 critical to our position. Our position is waiver. I  
13 think we're classically correct. It's approached under  
14 the adversary proceeding rules, which engage all the rules  
15 of civil procedure, which we all know about, it's a  
16 familiar arena, and it should apply as - as it has been  
17 applied by the lower courts, and I ask that this Court  
18 affirm it. Thank you very much.

19 QUESTION: Thank you, Mr. Figliulo.

20 Mr. Jones, we'll hear from you.

21 ORAL ARGUMENT OF KENT L. JONES

22 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

23 SUPPORTING THE RESPONDENT

24 MR. JONES: Mr. Chief Justice, and may it please  
25 the Court:

1           I have very little to add to what's already been  
2 said because basically what's been said by respondent is  
3 our view as well, which is that this is a question of  
4 waiver, not a question of enlargement or extension of the  
5 time to file a timely complaint, and the one thing I do  
6 want to add, though, is that the court of appeals, it  
7 seems to us, correctly pointed out that there is a rules-  
8 based answer to the waiver question as well as the general  
9 principles that we have articulated.

10           The rules-based answer is alluded to by  
11 respondent, which is the Rule 4004(d) expressly  
12 incorporates through Part 7 of the bankruptcy code the  
13 pleading requirements of 8(c) of the Federal Rules of  
14 Civil Procedure. Now, that means that the - the debtor  
15 has an obligation to plead his affirmative defenses at the  
16 answer or they would be treated as waived. This was an  
17 affirmative defense, and so just by applying the rules it  
18 was subject to waiver when it was not raised in the  
19 answer. We think the court was right in exercising its  
20 discretion to determine that when it's not raised until  
21 after the trial, or in this case after summary judgment  
22 was entered, it's plainly too late, and it was waived.

23           QUESTION: Mr. Jones, when - at what point in  
24 that spectrum would it have been tiled permissible to  
25 allow it?

1                   MR. JONES: The broad answer to that question -  
2 well, the first answer is, that's not been raised.  
3 They've - they've suggested it can't be waived, not that  
4 the court abused its discretion. The answer to your  
5 question, though, is that it's - if it would not be too  
6 late to amend the answer, then it's not forfeited or  
7 waived.

8                   QUESTION: Well, when is it too late to amend the  
9 answer?

10                  MR. JONES: That's - there's a - a whole body of  
11 precedent about that, and as respondent correctly says,  
12 it's clearly too late once the judgment has been  
13 determined. If -

14                  QUESTION: Now wait, do you mean judgment is - is  
15 determined, or judgment is entered?

16                  MR. JONES: In this case judgment was announced  
17 after the trial. I - let me back up. I think that it's -  
18 the court retains discretion to allow an amendment up to  
19 the pre-trial stage. Up to the pre-trial answer, the  
20 court sometimes allows complaints to be amended in its  
21 discretion, and -

22                  QUESTION: Well, quite frequently, does it not,  
23 at pre-trial?

24                  MR. JONES: Not infrequently, but it's also the  
25 case that sometimes amendments are denied at that point

1 because of the particularity, facts of the case. But my  
2 point is simply, at this stage of the case it's clearly  
3 have been waived and - and -

4 QUESTION: Well, now, at this stage of the case,  
5 judgment had not yet been entered, but the motion for  
6 summary judgment had been granted. You - are you saying  
7 it can never be done at that stage?

8 MR. JONES: It would be - I - I think that it -  
9 it might be not an abusive direction - there's a lot of  
10 notes there. A court might be able to exercise discretion  
11 if it thought in the circumstances it was appropriate, but  
12 it is a matter committed to the discretion of the trial  
13 court, and certainly at that stage it was well within its  
14 discretion, and again, that issue hasn't been presented or  
15 raised. What was raised is the idea you can't waive it,  
16 and the reason that it was raised in that fashion is they  
17 said it's jurisdictional. But it's - but they've  
18 conceded, both in their reply brief and in - and in court  
19 today, that it doesn't affect the subject matter  
20 jurisdiction of the court. And the cases are clear that -  
21

22 QUESTION: How do you - how do you reconcile your  
23 view about the court having such broad discretion with -  
24 with the wording of 4004(b), which says that on motion,  
25 the court may for cause extend the time, but the motion

1 shall be filed before the time has expired? And what  
2 you're saying is, well, it really doesn't matter, the  
3 court has discretion to go ahead even though the motion  
4 wasn't filed before the time has expired.

5 MR. JONES: I'm sorry, Justice Scalia. The  
6 question that I was answering was whether the court had  
7 discretion to accept the late-raised objection to the late  
8 complaint.

9 QUESTION: I'm sorry.

10 MR. JONES: And that's a different - and I do  
11 think the court has that discretion. Whether it had -  
12 would have had discretion to allow a late complaint at  
13 that - at some later point really isn't before the Court,  
14 because they haven't claimed that there is any equitable  
15 grounds for enlarging or extending the deadline, so that  
16 question isn't presented.

17 QUESTION: I don't - you're distinguishing  
18 between granting - I'm sorry - granting -

19 MR. JONES: The -

20 QUESTION: - granting a late-raised objection and  
21 granting a late-filed complaint?

22 MR. JONES: Correct.

23 QUESTION: Okay.

24 MR. JONES: Under ordinary principles of 8(c) and  
25 the Rules of Federal Procedure which are applicable here.



1 My point is that a court could allow the late-raised  
2 defense that it - that the complaint was untimely, up to  
3 some point it would have discretion to do that, but it  
4 exercised its discretion not to allow that late-raised  
5 objection, late-raised defense in this case.

6 QUESTION: Well, the rule on amendment, which the  
7 pleading rules, the Federal rules would apply, says that  
8 it should be - if after you miss the time limit in which  
9 you are allowed to amend as a matter of right, then you  
10 may amend - and with the court's permission, and leave  
11 shall be freely given when justice so requires.

12 MR. JONES: That's the discretionary standard and  
13 I don't - I will be frank, I do not know if there's a case  
14 that says that discretion stops at this point. That's not  
15 before the Court. It would just be odd for the Court to  
16 exercise such discretion after it had already determined  
17 that the judgment should be awarded to one of the parties.  
18 That's all I was trying to say.

19 QUESTION: At the outset you said there's a text-  
20 based or a rule-based -

21 MR. JONES: Rule-based.

22 QUESTION: And that's 4000(e)?

23 MR. JONES: 4004(b).

24 QUESTION: 4004(e)?

25 MR. JONES: B.

1 QUESTION: Where is - where is that?

2 MR. JONES: It's at -

3 QUESTION: Was that in - did you make that  
4 argument in your brief?

5 MR. JONES: We did not make that argument. The  
6 respondent made the argument and the court of appeals made  
7 the point. That provision is quoted in footnote 3 of  
8 respondent's brief. It's a very short provision. It just  
9 says that the - the procedures of Part 7 will have  
10 governed, and then Rule 7008 says that incorporates Rule  
11 8(c) of the Federal Rules of Civil Procedure.

12 Now, we have not addressed the question of  
13 whether equitable exceptions would be available under this  
14 rule, but we do think that the Court's decision in the  
15 Santos case provides a sensible explanation of how to  
16 address that question. In Santos, the Court made the  
17 point that the rules appear to say you cannot extend by  
18 excusable neglect, but that doesn't preclude equitable  
19 estoppel, because estoppel is based on the misconduct of  
20 the debtor, excusable neglect is the neglect of the  
21 creditor. So not allowing an extension for neglect  
22 doesn't preclude allowing an extension for estoppel.

23 QUESTION: So you think this is a totally  
24 different issue and it's a much broader issue and more  
25 important -

1 MR. JONES: This is a much - this is -

2 QUESTION: And you think, in other words, if they  
3 had come in and said, hey, we - I've been taking all the  
4 money out of wife's account, putting - put it in - you  
5 know, I put it all in her name, ha ha ha, and I had hired  
6 people to prevent the creditor from ever finding out, that  
7 then the correct defense there would be equitable  
8 estoppel, which is an enlargement of the time period?

9 MR. JONES: If the - if I understood your  
10 hypothetical, if the basis of the estoppel was that -

11 QUESTION: I'm - I'm assuming they acted very  
12 inequitably.

13 MR. JONES: - that we were unable to find - they  
14 hid from us what they were doing -

15 QUESTION: Yes, yes.

16 MR. JONES: - yes, I think that would apply. But  
17 I should also point out that in that specific factual  
18 scenario, 727(d) of the bankruptcy code would allow the  
19 discharge to be reopened in -

20 QUESTION: You see, that - that's the argument  
21 the other way. The argument the other way is you don't  
22 really need to import these defenses into the rule itself  
23 because there are other ways in the bankruptcy law that an  
24 unfair kind of conduct that can be dealt with.

25 MR. JONES: If, to the extent that there are

1 other ways to deal with it, then equity doesn't need to  
2 step in if there's an adequate legal remedy. But if -  
3 when there's not an adequate answer in the code to this -  
4 to whatever facts come up about the estoppel situation,  
5 we would think that the rules don't preclude the court -

6 QUESTION: Mr. Kent, as I remember the - this  
7 case itself, the debtor was never secretive about what he  
8 had done. He told the creditors, he told everybody, yeah,  
9 I took my name off the account -

10 MR. JONES: Yes.

11 QUESTION: - but I continued to deposit my salary  
12 in it, I continued to pay the family expenses from it. It  
13 wasn't concealed.

14 MR. JONES: It's a hypothetical -

15 QUESTION: It's a hypothetical case. I'm trying  
16 to get to the issue the - that's bothering me. Can you  
17 just give me one word about whether my belief about the  
18 Rule 6 - it refers to a new trial motion in a civil case,  
19 motion to amend the opinion, JNOV, all those time limits  
20 it says are absolute. Now, I take it it's never been held  
21 or isn't at least normally held that a lawyer can sit  
22 there, notice that the time limits weren't complied with,  
23 wait to see if he wins, and then if he loses, bring it up  
24 for the first time on appeal. Am I right about that?  
25 Because they're saying, no, I'm not right about it.

1           MR. JONES: Well, I - I think you're right about  
2 that that you can waive an argument of any - based on  
3 those rules in - in the trial court, but let me -

4           QUESTION: Is it - do you know of any case, Mr.  
5 Kent, because those are all motions that are brought after  
6 the trial, after the adjudication, and I can't imagine a  
7 scenario where a lawyer who won would then - and the other  
8 party moves for a new trial - would then say nothing.

9           MR. JONES: I'm not familiar with a case of that  
10 type, but there - I can imagine that there's a case out  
11 there that says something along the following, that this  
12 Court's jurisdiction, by statute, is based on the  
13 requirement, for example, that there be a notice of appeal  
14 filed within 30 days.

15           QUESTION: Thank you, Mr. Jones.

16           Mr. Poor, you have 2 minutes remaining.

17 REBUTTAL ARGUMENT OF E. KING POOR

18 ON BEHALF OF THE PETITIONER

19           MR. POOR: I'd like to return to the - the  
20 fundamental point is when these were adopted, 9006(b) was  
21 patterned after 6(b), and that identical language, as this  
22 Court instructed in the Robinson case, should be read to  
23 be mandatory and jurisdictional, that is, not waiveable.  
24 And if we look at a case like Santos, there's nothing in  
25 the language that allows Santos to pick and choose between

1 - between saying equitable estoppel would - would not  
2 apply but waiver would apply. The only possible way you  
3 can get there in Santos is not through the text, not  
4 through the language, which Robinson has told us is  
5 mandatory and jurisdictional. The only way you can get  
6 there is through the - a policy argument that says, we  
7 think it's a good idea not to have equitable estoppel, but  
8 on the other hand, yeah, for policy reasons, we - we  
9 should allow waiver to apply.

10           And if you allow waiver, whether it is waiver in  
11 the implied sense of inaction or waiver in the express  
12 sense of allowing a stipulation, in that case, you will  
13 have really taken what is in the text and these are no  
14 longer jurisdictional rules without exception. Rather,  
15 they have become rules that the parties themselves may  
16 change, and this deadline has never been like a statute of  
17 limitations. It has always been different. It allows the  
18 parties to, before there's any - before there's any  
19 adjudication, any deadline, to take discovery and move the  
20 deadline along. That's not like a typical statute of  
21 limitation, and the reason for that is the text. The text  
22 says it may only be extended to the extent and under the  
23 conditions stated, the exact language that was at issue in  
24 Carlisle and in Robinson, and we would submit that you  
25 have to read the same language in the same way, whether

1 it's 9006(b), 6(b), Criminal Rule 45(b), they all are  
2 based on the same language.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Poor.  
4 The case is submitted.

5 (Whereupon, at 11:01 a.m., the case in the  
6 above-entitled matter was submitted.)

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