No. 02-819

IN THE

Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Bankruptcy Rule 4004 sets the deadline for objecting to a debtor's discharge in bankruptcy. The question presented is whether the deadline set by Rule 4004 is mandatory and jurisdictional and thus cannot be waived.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the court of appeals below is reported as *In re Kontrick*, 295 F.3d 724 (7th Cir. 2002) and is reprinted in the Appendix to the Petition for Certiorari. Pet. App. 1-23. The opinion of the district court is reported as *Ryan v. Kontrick*, 2001 U.S. Dist. LEXIS 7473 (N.D. Ill. May 30, 2001). Pet. App. 25-38. The opinions of the bankruptcy court are unreported. Pet. App. 39-75.

JURISDICTION

The court of appeals entered its judgment on July 8, 2002. Petitioner filed a petition for rehearing and for rehearing en banc on July 22, 2002 which was denied on August 27, 2002. Pet. App. 24. The petition for certiorari was filed on November 25, 2002 and granted on April 28, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

The opinion of the court below involves Federal Rule of Bankruptcy Procedure 4004 (Bankruptcy Rule). The rule states in part:

> (a) [A] complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors….
>
> (b) On motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

Bankruptcy Rule 4007(c) contains a parallel provision which states:

> A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors. . . . On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Both Rules 4004 and 4007 are included in Bankruptcy Rule 9006(b)(3) which states in part:

> The court may enlarge the time for taking action under Rules … 4004(a) [and] 4007(c) … only to the extent and under the conditions stated in those rules.

Rule 9006(b)(3) is modeled on Federal Rule of Civil Procedure 6(b) which states in part:

> [T]he court may not extend the time for taking any action under Rules 50(b), and (c)(2), 52(b), 59(b), (d) and (e) and 60(b), except to the extent and the conditions stated in them.

The complete text of Fed. R. Civ. P. 6(b), Bankruptcy Rule 9006(b) and related rules, Fed. R. Crim. P. 45(b) and Fed. R. App. P. 26(b), are reprinted in the attached appendix.

STATEMENT OF THE CASE

A. Kontrick Discloses He No Longer Has a Joint Checking Account Almost Four Years Before His Bankruptcy

Petitioner Andrew Kontrick and respondent Robert Ryan are physicians who practiced medicine

together. Pet. App. 2. Disputes arose over their medical practice which were submitted to arbitration. R. 1, no. 13, Ex. C, ¶ 9.[1] In July 1992, an arbitrator awarded Ryan $47,156 in damages, plus attorney fees and costs. *Id*. In October 1992, the parties began a second arbitration. *Id*. ¶ 11.

Kontrick and his wife owned a joint checking account. *Id*. ¶ 16. Kontrick deposited his salary to that account and the family expenses were paid from it (family account). *Id*. Sometime in late 1992 or early 1993, Kontrick removed his name from the account. *Id*. After doing so, he continued to deposit his salary to the same account and the family expenses continued to be paid from it. *Id*.

In June 1993, Ryan attempted to collect the first arbitration award by having Kontrick testify at a citation to discover assets. *Id*., no. 8, Ex. 7. During this testimony, Kontrick disclosed to Ryan's counsel that he no longer had a joint checking account with his wife and that he continued to deposit his salary to the same account from which his wife paid the family expenses. *Id*. at Tr. 14-18. Kontrick also disclosed that he had "divested" himself of certain other assets. *Id*. at 9-13, 22-25. One month later, Kontrick paid the full amount of the first arbitration award. *Id*., no. 13, ¶ 13.

The second arbitration continued for another two years. *Id*. ¶ 20. In May 1995, the arbitrator issued an award in favor of Ryan. *Id*. This award was confirmed as a judgment in state court in the amount of $614,000 in December 1996. *Id*. After attempting unsuccessfully to settle the case, Kontrick filed a

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[1] The record citations are designated "R. __" and refer to the numbered items in the record on appeal from the bankruptcy court.

petition for relief under chapter 7 of the Bankruptcy Code in April 1997. *Id*. ¶ 22.

B. Ryan Files the Family Account Claim at Issue Almost Four Months After the Rule 4004 Deadline

Rule 4004 states that an objection to a debtor's discharge of debts must be filed within 60 days of the first meeting of creditors, unless the bankruptcy court extends the time. In this case, Ryan received three extensions of the deadline set by Rule 4004. Pet. App. 3-4; R. 1, no. 1. The last one was to January 13, 1998. *Id*. On that date, Ryan filed a seven-count complaint objecting to Kontrick receiving a general discharge of his debts under section 727(a) of the Bankruptcy Code and also seeking a determination of the nondischargeability of Kontrick's debts to Ryan under section 523(a) of the Code. Pet. App. 4. In the count at issue here, Count I, Ryan identified specific transfers of property that he alleged Kontrick made within one year of bankruptcy with an actual intent to defraud as grounds to bar his discharge under section 727(a)(2)(A). Pet. App. 4, n. 1; R. 1, no. 2, ¶¶ 50-55. However, the complaint contained no allegations regarding the family account. Pet. App. 4, n.1.

Almost four months after the deadline for objecting to discharge had expired, Ryan filed an amended complaint on May 6, 1998. *Id*. at 4; R. 1, no. 4. This complaint added a new paragraph to Count I which for the first time alleged that Kontrick's removal of his name from the family account and his deposits of salary to the account were grounds to bar his discharge. Pet. App. 4; R. 1, no. 4, ¶ 56. Kontrick answered the amended complaint, but did not raise the untimeliness of this new claim. Pet. App. 4, 16.

C. The Bankruptcy Court Denies Discharge on the Family Account Claim Alone

In March 1999, Ryan filed a motion for summary judgment. Pet. App. 4. This motion alleged numerous grounds to deny discharge. Pet. App. 43-46. Kontrick moved to strike many of Ryan's allegations as untimely under Rule 4004, pointing out that once the deadline had passed, no new objection could be added outside the original complaint. R. 1, no. 10, pp. 1, 4-5. He also noted that the family account claim was not in the original complaint. *Id*., p. 4. The bankruptcy court struck a number of allegations as untimely and denied the motion for summary judgment on all the grounds except one—the family account claim. Pet. App. 47-50, 55. On that ground alone, the court granted summary judgment and denied Kontrick's discharge. *Id.* at 64.

Before judgment was entered, Kontrick moved to reconsider and maintained that the bankruptcy court had no jurisdiction to consider the family account claim because it had been filed after the Rule 4004 deadline. *Id*. at 71. Kontrick also argued that in opposing Ryan's many other allegations as untimely, he had also sufficiently raised the untimeliness of the family account claim. *Id*. at 72. After acknowledging case law to the contrary, the bankruptcy court held that the Rule 4004 deadline was not jurisdictional and that Kontrick had not adequately preserved an objection to the lateness of the claim. *Id*. at 71-72. The court also held that the issue could not be raised in a motion to reconsider and deemed it "waived." *Id*.

D. The District Court and Court of Appeals Hold That Rule 4004 Is Not Jurisdictional

Kontrick appealed to the district court and argued that the majority of courts have held that the deadline for objecting to discharge is jurisdictional and cannot be waived. Pet. App. 29. The district court

noted that courts were divided on the issue. *Id*. at 30-31. It then rejected the majority line of cases and held that the time limit is not jurisdictional and affirmed the bankruptcy court. *Id*. at 31-32.

On appeal to the Seventh Circuit, Kontrick again urged the court to follow the majority line holding that the Rule 4004 deadline is jurisdictional. The court began its analysis by recognizing that there was "no dispute" that Ryan's amended complaint was filed beyond the Rule 4004 deadline and "there was no court-approved extension of time permitting him to file when he did." *Id*. at 6. The court also recognized that the original complaint "did not include a factual allegation with respect to the family account." *Id*. at 4, n.1. It also noted that both the bankruptcy and district courts had "assumed that the amended complaint and the family account allegation of May 6, 1998 were untimely" and Ryan "did not contest this assumption on appeal." *Id*. at 6, n.2. As such, the court proceeded on the basis the family account claim in the amended complaint did not "relate back" to the original complaint. *Id*.[2]

The Seventh Circuit first acknowledged the division of authority as to whether the time limit was jurisdictional. *Id*. at 7-8. The court then examined the text of Rule 4004 and found it did not provide a "definitive answer" and thus was required to "look elsewhere." *Id*. at 8-9. Among other things, the court asserted that because the rule gave the bankruptcy court discretion to extend the deadline before it expired, this implied that it also had discretion to extend the deadline after it expired. *Id*. at 11, 13.

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[2] In his brief opposing the petition for certiorari, Ryan acknowledged that the family account claim was "asserted for the first time" in the amended complaint filed after the deadline. Resp. Br. at 3.

The court also attempted to distinguish *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). *Id*. at 14-16, n.4. In *Taylor*, this Court held that the deadline set by Bankruptcy Rule 4003 for objecting to a debtor's claim of exemptions was mandatory and could not be extended on equitable grounds, even for a claim not made in good faith. The court below gave two reasons to distinguish *Taylor*. First, the court found that because *Taylor* did not state that a debtor had an "unlimited time" to contest a late objection, the Rule 4003 deadline could still be extended by other equitable doctrines such as waiver. *Id.* at 15, n.4. Second, it noted that *Taylor* stressed the policy of "finality." *Id.* From this, the court reasoned that because the doctrine of waiver also promoted finality, it followed that Rule 4004 could be waived. *Id.* After finding that the deadline was not jurisdictional, the court rejected Kontrick's other arguments and affirmed the district court.

SUMMARY OF ARGUMENT

Bankruptcy Rule 4004 sets the time limit for objecting to a debtor's discharge. It is not ambiguous. It states that an objection to discharge must be filed within 60 days of the meeting of creditors, unless the court extends the time. The rule also states that any motion for such an extension must be filed before the deadline expires.

What is more, Rule 9006(b)(3) states that Rule 4004 (and a limited number of other rules) may not be extended for "excusable neglect," but only under the terms contained in the rules themselves. When these rules were adopted in 1983, the exclusion of Rule 4004 from the excusable neglect standard marked a departure from past practice and was designed to promote finality and certainty. Based on the plain meaning of the rule, a majority of courts has held that

this time limit is jurisdictional and may not be altered by equitable doctrines.

Under settled precedent from this Court, the plain meaning is "conclusive" unless it is "demonstrably at odds" with the drafters' intent. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Here, the plain meaning is fully harmonious with that intent. In fact, the rulemakers intentionally placed Rule 4004 among a pattern of similar federal rules whose jurisdictional nature is well established.

In particular, Rule 9006(b)(3), which limits Rule 4004, is patterned after Federal Rule of Civil Procedure 6(b). Other federal rules, such as Criminal Rule 45(b) and Appellate Rule 26(b) are also modeled on Rule 6(b). The rules based on Rule 6(b) have long been construed as unambiguous deadlines that may not be altered by equitable defenses. Indeed, in *United States v. Robinson*, 361 U.S. 220, 228 (1960), this Court observed that when Rule 45(b) was adopted it "must be presumed" that the drafters were aware of the established precedent construing Rule 6(b) as "mandatory and jurisdictional." The same may be said for Rules 4004 and 9006(b). When these rules were adopted, it must also be presumed that the rulemakers were aware of the longstanding construction of Rule 6(b). Thus, there is no indication that the drafters intended Rule 9006(b)(3) to be read any differently than Rule 6(b) or its counterparts.

In addition, this Court's decisions in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) and *United States v. Carlisle*, 517 U.S. 416 (1996) reenforce the conclusion that Rule 4004 is jurisdictional. In *Taylor*, this Court considered the closely analogous Rule 4003 that sets the deadline for objecting to a debtor's exemptions. Based on the plain language of Rule 4003, the Court held that a late objection could not be extended on equitable

grounds, even for an exemption claimed without good faith. In *Carlisle*, the Court found that Criminal Rules 29 and 45(b) were "plain and unambiguous" and therefore a motion for acquittal filed even one day after the deadline could not be allowed on equitable grounds. The language and structure of Rules 4004 and 9006(b)(3) mirror the rules in *Carlisle* and thus its reasoning applies with equal force here.

The court below looked beyond the text of Rule 4004 to a variety of policy reasons to find that the rule was not jurisdictional. None of these policy arguments are convincing. Yet whatever their merits, as this Court stated in *Carlisle*, the unambiguous language of the rule may not be ignored to obtain "optimum policy results." 517 U.S. at 430. In sum, the plain meaning of Rules 4004 and 9006(b)(3) fits squarely with the drafters' intent and does not allow for equitable exceptions such as waiver.

ARGUMENT

A. The Unambiguous Language of Rules 4004 and 9006(b)(3) Demonstrates That the Deadline Is Jurisdictional

1. The Deadline Was Excluded from the Excusable Neglect Standard and Kept Short to Promote a Debtor's Fresh Start

One of the fundamental purposes of bankruptcy law is to provide a debtor with a "fresh start" by discharging past debts, in exchange for distributing the debtor's current property to creditors. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). And, "[t]he discharge is the most important element of the debtor's fresh start." *In re Nowinski*, 291 B.R. 302, 305 (Bankr. S.D.N.Y. 2003) (citing H.R. Rep. 95-595 at 128 (1977) and *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). To be sure, the right to a discharge is not unlimited and the Bankruptcy

Code sets out certain grounds by which a creditor may object to a discharge. *See* 11 U.S.C. § 727(a). The Code also provides certain grounds by which a creditor can object to the "dischargeability" of a specific debt. *See* 11 U.S.C. § 523(a). At the same time, any exceptions to discharge are construed strictly against creditors and liberally in favor of debtors to further the fresh start policy. *See, e.g., In re Baylis*, 313 F.3d 9, 17 (1st Cir. 2002).

Rule 4004 governs the time for objecting to discharge under section 727(a). Similarly, Rule 4007 sets the time for objecting to the dischargeability of a particular debt under section 523(a). Both rules contain the same language that an objection "shall be filed no later than 60 days after the first date set for the meeting of creditors" and that any motion to enlarge the deadline must be "filed before the time has expired." Because the rules are virtually identical, courts have treated them as interchangeable with respect to the filing deadline. As the court below stated: "Because the rules are almost identical, it is appropriate to consider decisions by courts construing Rule 4007(c) as well as Rule 4004(a)." Pet. App. 8, n.3. *See also In re Ginn*, 179 B.R. 349, 352 (Bankr. S.D. Ga. 1995) (in holding that the deadline is jurisdictional, the court finds that Rules 4004 and 4007 are "virtually identical").

When the current Bankruptcy Rules were adopted in 1983, Rules 4004 and 4007 were listed among the rules in Rule 9006(b)(3) that could not be enlarged for excusable neglect, but only by the terms contained in the rules themselves.[3] This represented a

[3] The Bankruptcy Rules are promulgated under this Court's rulemaking authority. 28 U.S.C. § 2075. The process for establishing these rules is essentially the same as that for other federal rules. 28 U.S.C. § 2073. The current Bankruptcy

significant departure from past practice because the predecessor rule, 906(b), had in fact allowed extensions of time for objecting to discharge based on excusable neglect. *See In re Kearney*, 105 B.R. 260, 262-64 (Bankr. E.D. Pa. 1989) (discussing history of the rules). By preventing the deadline from being extended for excusable neglect, the drafters sought to promote finality and certainty: "It is clear that by prohibiting that which was formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim." *Id.* at 262 (quoting *In re Figueroa*, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983)). *See also Neeley v. Murchison*, 815 F.2d 345, 346 (5th Cir. 1987) (court notes that not allowing Rule 4007 to be extended for excusable neglect was a departure from past practice and holds that the rule could not be equitably tolled).

In addition, the time for objections—60 days from the first meeting of creditors—was also designed to promote the fresh start policy. "This fixed relatively short limitation period enables the debtor and creditors to make better-informed decisions early in the proceeding." *Neeley*, 815 F.2d at 346-47. *See also Nowinski*, 291 B.R. at 305 ("the debtor has an interest in a prompt resolution of discharge issues, and the law sets a tight time frame for discharge objections.") (citation omitted); *In re Ham*, 174 B.R. 104, 107 (Bankr. S.D. Ill. 1994) (the short time for objections is "intended to protect the debtor's fresh start"). As such, based on the policies of finality, certainty and a fresh start underlying the deadline, the law "places a heavy burden on the creditor to protect his rights." *See Neeley*, 815 F.2d at 347.

Rules were adopted in 1983. *See In re Figueroa*, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983).

2. Based on the Plain Meaning of Rules 4004 and 9006(b)(3), the Deadline Is Jurisdictional

The text of a statute or rule is the starting point for determining its meaning. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) ("Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.") (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). If the language of the rule is unambiguous, then the "plain meaning" of the words is "conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

The language of Rules 4004 and 4007 is straightforward: a creditor must file an objection to discharge "no later than 60 days after the first date set for the meeting of creditors" and any motion to extend the time "shall be filed before the time has expired." Rule 9006(b)(3) is also unequivocal and states that Rules 4004 and 4007 may not be extended for "excusable neglect," but "only to the extent and under the conditions stated" in the rule.

Thus, the language of Rules 4004 and 4007 is neither complicated nor unclear. Time and again, courts have relied on this plain meaning to hold that the deadline may not be expanded by equitable exceptions. In *In re Alton*, 837 F.2d 457, 459 (11th Cir. 1987) (per curiam), the court held that Rule 4007 was "mandatory" and there was no equitable discretion to extend the deadline after it had expired: "The dictates of the [Bankruptcy] Code and Rules are clear. It is not

our place to change them." Similarly, in *In re Rowland*, 275 B.R. 209, 215 (Bankr. E.D. Pa. 2002), the court found that the "plain language" of Rule 4007 and its "specific exclusion" under Rule 9006(b)(3) confirmed its holding that the rule was "jurisdictional."[4] *See also In re Goodwin*, 215 B.R. 710, 714 (Bankr. W.D. Tenn. 1997) (court follows the "majority" and holds that Rule 4007 is jurisdictional based on its "plain meaning"); *In re Glover*, 212 B.R. 860, 862 (Bankr. S.D. Ohio 1997) (court agrees with the "majority" because the "language of the Code and Rules is quite clear"). Therefore, because the language of these rules is not ambiguous, they should be read to give effect to their plain meaning; namely, that a court has no authority to extend the deadlines based on equitable exceptions imported from outside the rules.

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[4] As to the use of the term "jurisdictional" in this context, the court in *In re Leet*, 274 B.R. 695, 700, n.6 (B.A.P. 6th Cir. 2002) observed:

> We do not think any real light is shed on the subject by calling the time limits established by rules "jurisdictional," and we view usage of the term as a shorthand denomination of the idea that rules exist, not just to regulate the parties, but in some cases to limit courts in the exercise of their powers and discretion. Justice Ginsburg has criticized the usage, stating, "It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'." *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J. concurring)

Petitioner uses the term "jurisdictional" here as commonly used to describe a deadline that a court has no authority to extend or alter with equitable exceptions.

B. The Plain Meaning Harmonizes With the Drafters' Intent: Rule 9006(b)(3) Was Modeled on Rule 6(b) Which has Long Been Deemed Jurisdictional

1. Rule 4004 Should Be Read Consistently With the Other Deadlines in Rule 9006(b)(3) That Do Not Permit Equitable Exceptions

Reading Rule 4004 as not allowing equitable exceptions is fully in accord with the drafters' intent. Words also derive their meaning from how they fit within a pattern or a whole—whether it be a statutory scheme or, as in this case, within a system of rules. *See FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 133 (2000) (words must be read "with a view to their place in the overall statutory scheme" and therefore a court should interpret a statute as a "symmetrical and coherent regulatory scheme and fit, if possible, all parts into a harmonious whole.") (citations omitted). There is also a presumption that if the same words are used elsewhere within a coherent plan that they have the same meaning. *See United States Nat'l. Bank v. Independent Ins. Agents, Inc.*, 508 U.S. 439, 460 (1993) ("[p]resumptively, identical words used in different parts of the same act are intended to have the same meaning.") (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

In this case, the rulemakers intentionally placed Rule 4004 among similar federal rules whose jurisdictional nature is beyond dispute. Rule 9006(b) details "enlargements of time" for three types of rules. Rule 9006(b)(1) deals with rules "in general" and allows enlargements for "cause" if the request is made *before* a time limit has expired and for "excusable neglect" *after* it has expired. Subsection (b)(2) specifies rules for which, as stated in its heading, "enlargement [is] not

permitted." Subsection (b)(3) enumerates rules—among them 4004 and 4007—for which "enlargement [is] limited" and that may be extended "only to the extent and under the conditions stated in those rules."

Among the rules listed in 9006(b)(3) are those whose jurisdictional nature is well settled. Rule 3002(c) is listed in 9006(b)(3) and states that proofs of claim for certain bankruptcy cases must be filed within 90 days of the meeting of creditors, unless otherwise extended by the rule. Courts have read the deadline set by Rule 3002(c) as unambiguous and therefore not subject to equitable exceptions. *See In re Gardenhire*, 209 F.3d 1145, 1148 (9th Cir. 2000) (based on the "plain meaning" of the Bankruptcy Code and Rules, the deadline set by Rule 3002(c) is not subject to equitable tolling—even though other deadlines in the Code may be); *Matter of Greenig*, 152 F.3d 631, 634-35 (7th Cir. 1998) (Rule 3002(c) is based on "clear and unambiguous language" and the bankruptcy court has no equitable power to extend the time fixed by the rule.)

Rule 9006(b)(3) also includes Rule 4003 (the subject of the *Taylor* case) which sets the time for objecting to a debtor's exemptions. Based on the text of Rules 4003(b) and 9006(b)(3), courts readily conclude that this deadline is jurisdictional. As stated in *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997):

> Rule 4003(b) unambiguously requires that an extension of time be granted within the prescribed thirty-day period. … Moreover, Fed. R. Bankr. P. 9006(b)(3) provides that the court may enlarge the time for taking action under Rule 4003(b) "only to the extent and under the conditions stated in those rules." Thus, Rule 4003(b) should be viewed as jurisdictional.

See also In re Stoulig, 45 F.3d 957 (5th Cir. 1995) (per curiam), *affirming Stoulig v. Traina*, 169 B.R. 597 (E.D. La. 1994) (court affirms district court's holding that it "was without jurisdiction" to grant an extension after the Rule 4003 deadline expired).

The time to appeal a bankruptcy court decision under Rule 8002 is also part of Rule 9006(b)(3). Once again, the language of these rules leaves little doubt that this time limit is jurisdictional. *Matter of Bond*, 254 F.3d 669, 673 (7th Cir. 2001) ("Rule 8002(a) describes conditions precedent that are mandatory and jurisdictional."); *In re Bushnell*, 273 B.R. 359, 366-68 (Bankr. D. Vt. 2001) (based on the text of Rules 8002 and 9006(b)(3), the time to appeal was jurisdictional and the court had no equitable power to authorize an extension).

2. Rule 9006(b)(3) Is Patterned After Rule 6(b) Which Has Been Read as Mandatory and Jurisdictional

Rule 9006(b) is itself modeled on Fed. R. Civ. P. 6(b). In *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380 (1993), this Court examined the meaning of "excusable neglect" in Rule 9006(b)(1) and recognized:

> Our view that the phrase "excusable neglect" found in Bankruptcy Rule 9006(b)(1) is not as limited as petitioner would have it is also strongly supported by the Federal Rules of Civil Procedure, which use that phrase in several places. Indeed, *Rule 9006(b) was patterned after Rule 6 (b) of those Rules.*

Id. at 391. (emphasis added).[5] In fact, the language and structure of Rule 9006(b) come directly from Rule 6(b). Both rules describe enlargements for "cause" before a deadline expires and for "excusable neglect" afterwards. And both list a narrow class of rules that are excepted from the excusable neglect standard and whose time periods may be enlarged only by the terms of the rules themselves. The rules excepted by Rule 6(b) have long been deemed to be jurisdictional. *See, e.g., Albright v. Virtue*, 273 F.3d 564, 571 (3d Cir. 2001) ("Rule 6(b) provides that the time limit of Rule 59(e) may not be judicially extended . . . . The ten-day period is jurisdictional and cannot be extended in the discretion of the district court.") (citation omitted).

Rule 6(b) also serves as the model for two other federal rules: Fed. R. Crim. P. 45(b) and Fed. R. App. P. 26(b). Rule 45(b) follows Rule 6(b) and describes extensions for cause and excusable neglect and then states that "the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in those rules." Here again, the rules listed in Rule 45(b) have been read as not allowing equitable exceptions.

Such a reading of Rule 45(b) was firmly established in *United States v. Robinson*, 361 U.S. 220 (1960). In *Robinson*, the defendants were convicted of manslaughter and filed their notice of appeal late because of a "misunderstanding" with their counsel. *Id.* at 221. The lower courts allowed the late notice of appeal based on excusable neglect. *Id.* at 222. This Court reversed. First, it found that the language of

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[5] It is worthy of note that even though *Pioneer* was a 5-4 decision, all nine justices agreed that Rule 9006(b) should be interpreted to be consistent with Rule 6(b). 507 U.S. at 400-01 (*Souter, J.* dissenting).

Rule 45(b) was "quite plain and clear," since "[i]t specifically says that the Court may not enlarge the period for taking an appeal." *Id.* at 224. However, not only did the Court find that Rule 45(b) was clear, it also stressed that it had to be read in light of the existing "judicial construction" of Rule 6(b):

> But there is more. The prototype for Rule 45(b) was Rule 6 of the Federal Rules of Civil Procedure. … It had consistently been held that Civil Rule 6(b) was mandatory and jurisdictional and could not be extended regardless of excuse. It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure.

Id. at 228-29. As a result, the Court held that the district court had no discretion to extend the deadline. *Id.* at 229. Other rules excepted in Rule 45(b) are also deemed jurisdictional. *See United States v. Hall*, 324 F.3d 720, 721 (D.C. Cir. 2003) (seven-day limit in Rule 33(b)(3) is "jurisdictional").

Appellate Rule 26(b) is also derived from Rule 6(b). *See* Advisory Committee Notes (1967 Adoption). The rule states that while a court may extend a deadline for cause generally, it may not do so for a notice of appeal (Fed. R. App. P. 4) or petition to appeal (Fed. R. App. P. 5). The rules excepted in Rule 26(b) are consistently treated as jurisdictional. *See Carr Park, Inc. v. Tesfaye*, 229 F.3d 1192, 1194 (D.C. Cir. 2000) ("plain language" of Rule 26(b) expressly does not allow court to extend time for filing petition to appeal).

In short, the rulemaking process has long used Rule 6(b) as a model when selecting a limited number

of rules that may be enlarged only under their own terms and not for excusable neglect. When the rulemakers adopted Rules 4004 and 9006(b)(3), there was already an established line of authority holding that Rule 6(b) and its counterparts set deadlines that were mandatory and jurisdictional. It must be presumed that the rulemakers were aware of that longstanding judicial construction. *See Robinson*, 361 U.S. at 228-29. As a result, there is no reason to believe that the rulemakers intended these Bankruptcy Rules to be read any differently from those based on Rule 6(b).

3. This Court's Opinions in *Taylor* and *Carlisle* Reenforce the Jurisdictional Nature of Rule 4004

This Court's decisions in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) and *Carlisle v. United States*, 517 U.S. 416 (1996) reenforce the conclusion that the plain meaning of Rule 4004 does not allow for equitable exceptions.

a.) *Taylor*: There Is No Equitable Exception to the Rule 4003 Deadline

In *Taylor*, the Court considered the closely analogous Rule 4003. This rule requires that objections to a debtor's claim of exempt property be filed within 30 days of the meeting of creditors. In *Taylor*, the Court held that even though the debtor may have had no reasonable basis to claim an exemption, an objection made after the deadline could not be considered under any "good faith" exception. *Id.* 643-44. The Court stated, "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Id.* at 644.

Courts have relied on *Taylor* repeatedly to find that the deadline for objecting to discharge is jurisdictional. Recently, in *In re Leet*, 274 B.R. 695

(B.A.P. 6th Cir. 2002), the bankruptcy appellate panel held that the bankruptcy court had no equitable power to extend the deadline in Rule 4007 and stated, "Rule 4003(b), the focus of attention in *Taylor*, is similar to the rule at issue in this case, 4007(c), in that both rules provide a time limit within which papers must be filed." 274 B.R. at 697. *See also Glover*, 212 B.R. at 863 ("[*Taylor*] has made it clear that the deadlines set by [Rule 4007] are jurisdictional in nature."); *In re Thomas*, 203 B.R. 64, 68 (Bankr. E. D. Tex. 1996) (the court emphasizes the similarities between Rules 4003 and 4007 and relies on the "plain meaning" construction in *Taylor* to find that Rule 4007 is jurisdictional).

The court below offered two reasons to distinguish *Taylor*. Pet. App. 15, n.4. Neither is persuasive. First, the court observed that *Taylor* did not state that a debtor had an "unlimited time" to challenge a late objection or that "Rule 4003(b) was not subject to the usual equitable doctrines that apply to other deadlines and statutes of limitations." *Id.* However, merely because the Court did not address other equitable exceptions in *Taylor*—which were not at issue—can hardly justify adding such exceptions to Rule 4003. The *Taylor* decision rested on the plain language of Rule 4003 and did not allow equitable tolling, even in the face of an exemption claimed without good faith. Therefore, if Rule 4003 was clear enough for the Court to reject an equitable exception for bad faith, the door was not left open for other equitable defenses such as waiver. To do so would effectively nullify the result in *Taylor*.

The court's second reason to distinguish *Taylor* also falls short of the mark. The court stated that while *Taylor* did "stress the importance of deadlines, we believe this emphasis supports our conclusion, rather than undermines it." *Id.* at 15 (citation omitted). Based on this, the court reasoned that because the doctrine of

waiver also promotes "finality," it follows that Rule 4004 may be waived. *Id.* Yet by this reasoning, every jurisdictional rule would be waivable, which is simply not so. Hence, though waiver may promote finality, that general proposition does nothing to answer the question of whether Rule 4004 is jurisdictional in the first place. Thus, the court below offered no convincing reason to distinguish *Taylor*.

b.) *Carlisle*: There Is No Authority to Allow a Late Motion Under the Parallel Rules 29 and 45(b)

The *Taylor* decision reenforces that Rule 4004 may not be altered by equitable doctrines. The Court's opinion in *Carlisle* "hammer[s] the point home." *Leet*, 274 B.R. at 697. In *Carlisle*, a criminal defendant filed his motion for acquittal one day after the deadline set by Fed. R. Crim. P. 29(c). *Id.* at 418. The Court began its analysis by noting that Rule 45(b) excepts Rule 29 from the excusable neglect standard and then found that "[t]hese Rules are plain and unambiguous." *Id.* at 421. As a result, "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely post-verdict motion for judgment of acquittal…." *Id.*

In response to an argument that the district court had "inherent power" to permit a late motion, the Court stated, "Federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Id.* at 426 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988)). The Court also rejected the argument that not allowing a late motion would lead to "needless" appeals and habeas corpus proceedings: "Assuming, arguendo, that these contentions are accurate, we cannot permit them to alter our analysis, for we are not at liberty to ignore the mandate of Rule 29 in order to obtain 'optimal' policy results." *Id.* at 430

(citing *Robinson* 361 U.S. at 229-30). Therefore, the Court held that the district court could not use equitable doctrines to allow the late-filed motion. *Id.* at 433.

Rules 4004 and 9006(b)(3) should be read in the same way that the Court read the parallel Rules 29 and 45(b) in *Carlisle.* As the court stated in *Leet*, when it relied on *Carlisle* to hold that Rule 4007 was not subject to equitable exceptions:

> In *Carlisle* the Court emphasized that "plain and unambiguous" rules leave "no room" for granting extensions, even where papers are filed late due to attorney error. There is "no room" because rules are drafted and assembled into systems so as to provide precise solutions to recurrent problems in the law, such as the problem of how to proceed in bankruptcy court or the district court or the appellate courts. The drafter's goal is, above all, a coherent plan of procedure with the details carefully worked out to assure clarity and eliminate internal conflicts, thereby to arrive at a finished body of work capable of an easy and confident application.

274 B.R. at 698 (citation omitted).

In sum, the plain meaning of Rule 4004 should be "conclusive" unless it is "demonstrably at odds" with the drafters' intent. *Ron Pair*, 489 U.S. at 242. Here, there is not the slightest hint that the unambiguous mandate of the rule is at odds with the intent of the rulemakers. In fact, when the rulemakers drafted Rule 4004, they intentionally departed from past practice by excluding it from the excusable standard and placed it among a category of rules which were known to be jurisdictional by established precedent. Thus, the plain

meaning of Rule 4004 harmonizes with the rulemakers' intent. This fact, together with the Court's reasoning in *Taylor* and *Carlisle*, all converge at a single point: the deadline in Rule 4004 is jurisdictional and cannot be waived.

C. The Policy Arguments Advanced By the Court Below Cannot Override the Plain Meaning of Rule 4004

The court below did not find that Rule 4004 was ambiguous. However, it stated that its text did not "yield a definitive answer" and therefore it was required to "look elsewhere." Pet. App. 8-9. In looking beyond the text, the court advanced several policy arguments. None of them can withstand close scrutiny.

The court first analyzed a decision that many courts have followed, *In re Kirsch*, 65 B.R. 297 (Bankr. N.D. Ill. 1986).[6] Pet. App. 9-11. In *Kirsch*, the court held that because the rules listed in Rule 6(b) are jurisdictional and because Rule 9006(b)(3) is patterned after 6(b), Rule 4007 is also jurisdictional. *Id.* at 301-02. The court below found *Kirsch* to be "thoughtful," but still rejected it. Pet. App. 9-10. To reach this conclusion, the court needed to read the language of Rule 9006(b)(3) as more elastic than the virtually identical language of Rule 6(b). The reason the court gave to do so was that Rule 6(b) dealt with postjudgment deadlines and Rule 9006(b)(3) dealt with prejudgment deadlines. *Id.* at 10. From this, the court concluded that "substantial prejudice" might result if there was an

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[6] The following is a sample of the courts that have relied on *Kirsch* for the jurisdictional view: *In re Poskanzer*, 146 B.R. 125, 131-32 (D. N.J. 1992); *Rowland*, 275 B.R. at 215-16; *Glover*, 212 B.R. at 861; *In re Barley*, 130 B.R. 66, 69 (Bankr. N.D. Ind. 1991); *In re Booth*, 103 B.R. 800, 801-02 (Bankr. S.D. Miss. 1989).

"indefinite time" to file post-trial motions, while late objections to discharge could be raised in an answer. *Id.* 10-11. This is another version of the court's reasoning that because waiver promotes finality, Rule 4004 is waivable. Again, it does not follow that simply because waiver promotes finality in a general sense that a deadline—whether it occurs before or after judgment—is waivable.

Moreover, there is no support for what is implicit in the court's reasoning—that the policy of finality and certainty underlying Rule 9006(b)(3) is of lesser importance than that underlying Rule 6(b). Indeed, it makes little sense to suppose that the rulemakers drafted Rules 4004 and 9006(b)(3) based on the almost identical language of Rule 6(b) only to have those rules read in a way that is fundamentally different from the established meaning given to Rule 6(b). To do so would unravel the very policies of finality and certainty underlying Rules 4004 and 9006(b)(3). Further, the courts in the majority have consistently held that a debtor may neither expressly stipulate to a late objection nor implicitly waive it. *See Poskanzer*, 146 B.R. at 131-32 (even if late complaint is not raised in an answer, the Rule 4007 bar date is jurisdictional and cannot be waived); *In re Dollar*, 257 B.R. 364, 365 (Bankr. S.D. Ga. 2001) (agreed extension of time after the deadline expired was beyond court's jurisdiction to approve); *Barley*, 130 B.R. at 69 (parties may not "belatedly stipulate to waive or extend" the Rule 4007 deadline).

The court also contended that if the rule were jurisdictional, then judgments could be subject to "collateral attack after the bankruptcy court has completed its work." Pet. App. 11. The court did not explain what it meant by "collateral attack." If, however, it used the term as commonly understood—as "an attack on a judgment entered in a different

proceeding" (*Black's Law Dictionary*, 7th ed. 1999)—the reference is a "straw man." There is no collateral attack here, since petitioner raised the late objection in the same proceeding.[7] On the other hand, if the court is referring to the ability to challenge a late filing any time in the same proceeding, that would be true for any of the jurisdictional rules discussed above.

Next, the court reasoned that because Rules 4004 and 4007 allowed for discretion to enlarge the deadlines before they expired, this supported extending the deadlines after they expired. Pet. App. 11. The court stated that the ability to enlarge the time period showed that the goals of the Bankruptcy Code were "best fostered not by a rigid rule" that could be "inequitable at times and frustrate the goals of the Code." *Id.* at 12. This assertion contradicts the express language of the rule that a motion to extend "shall be filed before the time has expired." This argument also cannot be squared with the reasoning in *Taylor* or *Carlisle*. In *Taylor*, the Court recognized that under Rule 4003 the objecting party "could have asked the Bankruptcy Court for an extension of time to object" before the deadline expired. 503 U.S. at 644. Similarly, the rule at issue in *Carlisle* also allows for extensions before the deadline. *See* Rule 29(c). However, that did not make the rule any more susceptible to equitable exceptions once the deadline passed.

Finally, after eschewing the language of the rules, the court surveyed the text of the statute dealing

[7] It is settled that if a jurisdictional issue has been litigated to judgment, then it becomes *res judicata* and is not subject to collateral attack in another proceeding. *See Ins. Corp. of Ireland v. Compaigne des Bauxites de Guinee*, 456 U.S. 694, 702, n.9 (1982). Yet that rule does not apply here (or to any of the decisions in the majority) when the late objection was raised in the same proceeding.

with bankruptcy court jurisdiction (11 U.S.C. § 157) for additional inferences. *Id.* at 12. The court attached significance to the fact that the word "timely" does not appear in the subsection listing an objection to discharge as part of the "core" jurisdiction of the bankruptcy court. *See* § 157(b)(2)(J). The court then noted that the word "timely" does appear in two other subsections—one dealing with motions to determine core jurisdiction, § 157(b)(3), and another dealing with objections in a non-core proceeding, § 157(c). *Id.* at 12-13.

Yet this attempt to divine the rulemakers' intent from where the word "timely" appears in another statute is without support from any source—either legislative history or otherwise. Further, there is little reason to attach significance to where the word "timely" appears in section 157. That section on its face does not attempt to address when an objection to discharge must be filed—that function has been specifically assigned to the rules. Therefore, to ignore the mandatory language of the rules in favor of seeking inferences from where the word "timely" appears in another statute contradicts established principles of construction.[8]

Moreover, not only are these policy reasons unconvincing, they cannot be reconciled with the express language of Rules 4004 and 9006(b)(3). Policy

[8] When the drafters actually used the word "timely" in the Advisory Committee Notes to Rule 4007, the court found this was of "marginal value." Pet. App. 13. The notes state in part: "The bankruptcy court has exclusive jurisdiction to determine dischargeability of these debts. If a complaint is not *timely* filed, the debt is discharged." (emphasis added). Contrary to the court below, this reference has been found to support the jurisdictional view. *See In re Rinde*, 276 B.R. 330, 333 (Bankr. D. R.I. 2002) (citing the same Advisory Committee Notes to find that Rule 4007 is jurisdictional).

arguments may always be raised against jurisdictional deadlines. However, as the Court emphasized in *Robinson*, such arguments do not allow unambiguous rules to be rewritten:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

361 U.S. at 229. Again in *Carlisle*, the Court stated that it was not free to ignore the mandate of the rule "in order to obtain 'optimal' policy results." 517 U.S. at 430 (citing *Robinson*). So too, in this case, the policy arguments raised by the court below cannot override the explicit mandate of the rules and the obvious intent of the rulemakers.

D. This Case Presents No "Unique Circumstances" Exception

The jurisdictional nature of rules based on Rule 6(b) and its counterparts are not, as Justice Ginsburg noted in her concurring opinion in *Carlisle*, "utterly exceptionless":

> This Court has recognized one *sharply honed exception* to rules of the 29(c)/45(b) genre. That exception covers cases in which the trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information.

517 U.S. at 1471 (Ginsburg, J. concurring) (emphasis added). This exception is referred to as the "unique circumstances" doctrine. *See Thompson v. INS*, 375 U.S.

384, 387 (1964); *see also Schneider v. Fried*, 320 F.3d 396, 403 (3d Cir. 2003) (court applies unique circumstances doctrine to allow appeal after court erroneously gave party time beyond that allowed by Rule 59).

The unique circumstances doctrine (also referred to as "extraordinary circumstances") has been used to extend the time for objecting to discharge, but only as a result of an error by the court. *See, e.g., In re Moss*, 289 F.3d 540, 542 (8th Cir. 2002) (untimely complaint allowed "due to the court's own error"); *In re Isaacman*, 26 F.3d 629, 632-33 (6th Cir. 1994) (a late objection permitted, if the court erroneously sets the wrong deadline); *In re Themy*, 6 F.3d 688, 690 (10th Cir. 1993) (out-of-time filing allowed when "creditor relies upon a bankruptcy court notice setting an incorrect deadline."). However, this narrow exception does not implicitly open up jurisdictional rules to equitable defenses such as waiver. *Leet*, 274 B.R. at 699 (the decision in *Isaacman* applying the doctrine has been "read narrowly" and applies only when the "court itself made an error"); *Rowland*, 275 B.R. at 214, n.2 (cases such as *Themy* applying unique circumstances doctrine do not mean that "waiver, estoppel and equitable tolling apply to Rule 4007(c)"); *In re Lufkin*, 256 B.R. 876, 880-81 (Bankr. E.D. Tenn. 2000) ("no court error occurred in the present case" and therefore *Isaacman* did not apply).

This case presents no unique circumstances. The bankruptcy court did not provide any incorrect or misleading information about the time for objecting to discharge. In fact, Ryan obtained three extensions of the deadline. The amended complaint that alleged the family account claim for the first time was filed almost four months after the last deadline expired. As such, there are no unique circumstances here.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

Fed. R. Civ. P. 6(b)

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), *except to the extent and under the conditions stated in them.*

(emphasis added).

Fed. R. Bankr. P. 9006(b)

Enlargement

(1) In general. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(2) Enlargement not permitted. The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.

(3) Enlargement limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, *only to the extent and under the conditions stated in those rules*.

(emphasis added).

Fed. R. Crim. P. 45(b)

Extending Time.

(1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exceptions. The court may not extend the time to take any action under Rules 29, 33, 34, and 35, *except as stated in those rules.*

(emphasis added).

Fed. R. App. P. 26(b)

Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. *But the court may not extend the time to file:*

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(emphasis added).