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# Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine

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# Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine

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*A federal court of appeals ordinarily has no authority to entertain an appeal that is filed out of time. On occasion, however, the untimeliness of an appeal will result not from the appellant's carelessness or lack of familiarity with governing timing prescriptions, but instead from reasonable reliance upon a district court's representation that the appeal period would be lengthier than it turned out to be. To provide the courts of appeals with an equitable basis upon which to reach the merits of such an appeal, the United States Supreme Court recognized what has come to be known as the "unique circumstances" doctrine.*

*The Supreme Court's most recent pronouncements on the unique circumstances doctrine, however, have narrowed it almost completely out of existence. Even before abolishing the doctrine for appeals from civil actions, the Court generated significant confusion by imposing conditions for the doctrine's application that were both unduly demanding and inconsistent with its original understanding. The courts of appeals have thus been deprived of discretion to reach the merits of many appeals that would have fallen within the purview of the doctrine as originally conceived.*

*This Article urges that Congress reclaim legislatively the essence of the unique circumstances doctrine that the Supreme Court implemented judicially in* Harris. *Such a measure would involve an amendment to § 2107 codifying a formulation of the doctrine that comports with its original understanding. To derive that formulation, this Article examines* Harris *and the Court's other key decisions addressing the doctrine. The formulation ultimately reached is that in determining whether an appeal is timely, a court of appeals is bound to accept as true any representation of a district court upon which a litigant reasonably relies in foregoing an opportunity to initiate an indisputably timely appeal.*



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## I. INTRODUCTION

A federal court of appeals ordinarily has no authority to entertain an appeal that is filed out of time.[1] On occasion, however, the untimeliness of an appeal will result not from the appellant's carelessness or lack of familiarity with governing timing prescriptions, but instead from reasonable reliance upon a district court's representation that the appeal period would be lengthier than it turned out to be.[2] To provide the courts of appeals with an equitable basis upon which to reach the merits of such an appeal, the United States Supreme Court recognized what has come to be known as the "unique circumstances" doctrine.[3] The courts of appeals, in turn, have

1. *See* Bowles v. Russell, 127 S. Ct. 2360, 2362 (2007).

2. *See, e.g.*, Thompson v. INS, 375 U.S. 384, 386-87 (1964) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007); Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 216-17 (1962) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

3. *Thompson*, 375 U.S. at 387; *Harris*, 371 U.S. at 217.

employed the doctrine to preserve numerous appeals that were technically untimely.[4]

The Supreme Court's latest pronouncements on the unique circumstances doctrine, however, have narrowed it almost completely out of existence. Specifically, the Court recently declared that, given the jurisdictional nature of the timing prescriptions contained in 28 U.S.C. § 2107, the doctrine can no longer be applied in the context in which it was most often implicated: an appeal as of right from a decision by a federal district court in a civil proceeding.[5] Even before that decision, the Court had significantly restricted the scope of the doctrine by suggesting that it applied only when the appellant "performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done."[6] Ironically, as a consequence of either of these rulings, the doctrine no longer encompasses the circumstances giving rise to *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, the very case in which the Court initially recognized and invoked the doctrine.[7] The courts of appeals have thus been deprived of discretion to reach the merits of many appeals that would have fallen within the purview of the doctrine as originally conceived.

This Article urges that Congress reclaim legislatively the essence of the unique circumstances doctrine that the Supreme Court had implemented judicially in *Harris*. Such a measure would involve an amendment to § 2107 codifying a formulation of the doctrine that comports with its original understanding. To derive that formulation, this Article examines *Harris* and the Court's other key decisions addressing the doctrine. The formulation ultimately reached is that in determining whether an appeal is timely, a court of appeals is bound to accept as true any representation of a district court upon which a litigant reasonably relies in foregoing an opportunity to initiate an indisputably timely appeal. This quasi-estoppel approach to the doctrine appropriately emphasizes the notion that the timeliness of an appeal should not be governed by ordinarily applicable timing prescriptions when the appellant would have complied with those prescriptions but for the district court's representation that more time to appeal would be available. Instead, the court of appeals must assume

4. *See infra* note 178 and accompanying text.
5. *See Bowles*, 127 S. Ct. at 2366.
6. Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989).
7. 371 U.S. at 217.

the truth of the district court's representation, even if legally erroneous, and assess the timeliness of the appeal accordingly.

Part II of the Article provides an overview of the timing requirements governing an appeal from a district court's decision in a civil proceeding that a court of appeals has jurisdiction to review as a matter of right. Part III then conducts a comprehensive examination of *Harris*—and the Supreme Court's other cases through which the doctrine has evolved in order to derive an appropriate formulation of the doctrine—while demonstrating the confusion and inconsistency generated in the courts of appeals by the Court's most recent formulation. Part IV discusses how the Court determined, in retrospect, that the doctrine never should have applied to appeals as of right from decisions in civil proceedings. Finally, in Part V, the Article proposes that the original understanding of the unique circumstances doctrine be codified through an amendment to § 2107 in order to restore the capacity of the courts of appeals to reach the merits of technically untimely appeals when equitable considerations would so demand.

## II. INITIATING A TIMELY APPEAL AS OF RIGHT IN CIVIL PROCEEDINGS[8]

The appropriate method of commencing a proceeding in a federal court of appeals depends upon both the nature of the decision to be appealed and the tribunal that rendered it.[9] Because the unique circumstances doctrine is most often implicated when a litigant in a civil proceeding challenges a decision of a federal district court[10] that is

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8. This Part draws from a similar discussion contained in a previous publication. *See* Philip A. Pucillo, *Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal*, 59 OKLA. L. REV. 271, 273-77 (2006).

9. *See generally* FED. R. APP. P. 4 (discussing an appeal from a judgment or order from a district court); *id.* R. 6 (discussing appeals in bankruptcy cases from a final judgment, order, or decree from either a district court or a bankruptcy appellate panel); *id.* R. 13 (discussing an appeal from a decision of the United States Tax Court); *id.* R. 15 (discussing an appeal of an order of an administrative agency, board, commission, or officer); *id.* R. 22 (discussing the procedure for applying for a writ of habeas corpus); Pucillo, *supra* note 8, at 273 (explaining that the process of taking an appeal is dependent upon "the nature of the decision to be challenged").

10. Although the courts of appeals have invoked the unique circumstances doctrine most frequently in regard to action by federal district judges and federal district clerks, they have also invoked the doctrine (or at least examined whether to do so) in regard to action by bankruptcy judges. *See* Home & Family, Inc. v. Eng. Res. Corp. (*In re* Home & Family, Inc.), 85 F.3d 478, 479-81 (10th Cir. 1996); Weston v. Mann (*In re* Weston), 18 F.3d 860, 863 (10th Cir. 1994); Anderson v. Mouradick (*In re* Mouradick), 13 F.3d 326, 329 (9th Cir. 1994); Ford v. Union Bank (*In re* San Joaquin Roast Beef), 7 F.3d 1413, 1418 (9th Cir. 1993); Allred v. Kennerley (*In re* Kennerley), 995 F.2d 145, 147-48 (9th Cir. 1993); Slimick v. Silva (*In re* Slimick), 928 F.2d 304, 309-10 (9th Cir. 1990); Headlee v. Ferrous Fin. Servs. (*In re* Estate of

appealable as a matter of right,[11] this Article focuses on that particular context.

### A. *The Timing Requirements of a Notice of Appeal in a Civil Proceeding*

Rule 3 of the Federal Rules of Appellate Procedure provides that an appeal as of right from a decision of a federal district court may be initiated "only by filing a notice of appeal with the district clerk *within the time allowed by Rule 4*."[12] Rule 4(a)(1), in turn, sets forth the timing requirements applicable to the filing of a notice of appeal in a civil proceeding.[13] Under Rule 4(a)(1)(A), a litigant ordinarily has thirty days from the district court's entry of a judgment or order[14] in

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Butler's Tire & Battery Co.), 592 F.2d 1028, 1033-34 (9th Cir. 1979). The doctrine has also been used to examine action by magistrate judges, *see* Schneider *ex rel.* Estate of Schneider v. Fried, 320 F.3d 396, 403-04 (3d Cir. 2003); Green v. Bisby, 869 F.2d 1070, 1072-73 (7th Cir. 1989); Fairley v. Jones, 824 F.2d 440, 442-43 (5th Cir. 1987); and immigration judges, *see* Hernandez-Rivera v. INS, 630 F.2d 1352, 1354-55 (9th Cir. 1980); as well as agencies such as the National Labor Relations Board, *see* Long Island Radio Co. v. NLRB, 841 F.2d 474, 478-79 (2d Cir. 1988); and the Merit Systems Protection Board, *see* Oja v. Dep't of the Army, 405 F.3d 1349, 1360-61 (Fed. Cir. 2005).

11. *See, e.g.*, 28 U.S.C. § 1291 (2000) (granting appellate jurisdiction over "appeals from all final decisions of the district courts of the United States"); *id.* § 1292(a)(1) (granting appellate jurisdiction over "appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"). When a decision may be appealed only with the permission of the court of appeals, *see, e.g.*, FED. R. CIV. P. 23(f) ("A court of appeals may *in its discretion* permit an appeal from an order of a district court granting or denying class action certification . . . ." (emphasis added)), the appellant must file with that court a petition for permission to appeal. *See id.* R. 5(a)(1) ("To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal.").

12. FED. R. APP. P. 3(a)(1) (emphasis added).

13. *Id.* R. 4(a)(1).

14. Under Rule 4(a)(7) of the Federal Rules of Appellate Procedure, a judgment or order is "entered" within the meaning of Rule 4(a):

> (i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or
>
> (ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:
>
> - the judgment or order is set forth on a separate document, or
> - 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

*Id.* R. 4(a)(7).

which to file a notice of appeal.[15] However, Rule 4(a)(1)(B) affords a litigant sixty days in which to file the notice when the United States, or an officer or agency of the United States, is a party to the underlying action.[16]

Notably, Rule 4(a)(1)'s thirty-day and sixty-day timing restrictions have statutory counterparts in the provisions of 28 U.S.C. § 2107.[17] Indeed, the thirty-day limit imposed by Rule 4(a)(1)(A) is an exact reflection of § 2107(a), which provides in relevant part that "no appeal shall bring any judgment, order or decree *in an action, suit or proceeding of a civil nature* before a court of appeals for review unless notice of appeal is filed, *within thirty days* after the entry of such judgment, order or decree."[18] Moreover, Rule 4(a)(1)(B)'s allowance for sixty days when the United States is a party to the underlying proceeding simply mirrors the same allowance contained in § 2107(b).[19]

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15. *Id.* R. 4(a)(1)(A) ("In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.").

16. *Id.* R. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.").

17. Section 2107 provides in relevant part:

> (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> (b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

28 U.S.C. § 2107(a)-(c) (2000).

18. *Id.* § 2107(a) (emphasis added).

19. *Id.* § 2107(b) ("In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.").

### B. Addressing an Expired Appeal Period: Extension and Reopening

When the pertinent appeal period has expired, a federal court of appeals has no authority to afford a litigant additional time in which to file a notice of appeal.[20] The relevant provision is Rule 26(b)(1) of the Federal Rules of Appellate Procedure, which states that "the court may not extend the time to file . . . a notice of appeal (*except as authorized in Rule 4*)."[21] And under Rule 4(a), a district court alone may extend the time to file a notice of appeal, and only under limited circumstances.[22]

First, Rule 4(a)(5) authorizes a district court to grant an extension of time to file a notice of appeal.[23] The litigant seeking the extension must move "no later than 30 days after the time prescribed by . . . Rule 4(a) expires"[24] and demonstrate "excusable neglect" or "good cause" for the extension.[25] If granted, the extension may not exceed "30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later."[26]

Second, under Rule 4(a)(6),[27] a district court may reopen the time to file a notice of appeal when a litigant seeks to appeal from a

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20. *See* FED. R. APP. P. 26(b)(1); *see also* Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007) (finding that filing a timely notice of appeal is a requirement to confer jurisdiction upon a court of appeals in a civil proceeding).

21. FED. R. APP. P. 26(b)(1) (emphasis added).

22. *See id.* R. 4(a)(6); *see also Bowles*, 127 S. Ct. at 2363 (discussing Rule 4(a)'s relevant provisions, which allow a district court to reopen or extend the time to file a notice of appeal).

23. Rule 4(a)(5) provides in full:

> (A) The district court may extend the time to file a notice of appeal if:
>  (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
>  (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
>
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
>
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

FED. R. APP. P. 4(a)(5).

24. *Id.* R. 4(a)(5)(A)(i).

25. *Id.* R. 4(a)(5)(A)(ii). For an interesting discussion of the "excusable neglect" standard, see *Graphic Commc'ns Int'l Union, Local 12 N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 4-7 (1st Cir. 2001).

26. FED. R. APP. P. 4(a)(5)(C).

27. Rule 4(a)(6) provides in full:

judgment or order of which it did not receive timely notice under Federal Rule of Civil Procedure 77(d).[28] To qualify for such relief, the litigant must file the appropriate motion within 180 days after entry of the judgment or order to be appealed, or within seven days after receiving notice of the judgment or order under Rule 77(d), whichever is earlier.[29] The litigant then must demonstrate that he did not receive notice of the judgment or order under Rule 77(d) within twenty-one days of entry by the district court.[30] Finally, the district court must find that a reopening of the appeal period would not prejudice any of the parties.[31] Upon granting the motion, "[t]he district court may reopen the time to file [a notice of] appeal for a period of 14 days after the date when its order to reopen is entered."[32]

Like Rule 4(a)'s thirty-day and sixty-day requirements, the preceding standards applicable to a litigant's effort to obtain an extension or a reopening of the time to appeal have counterparts in § 2107. Specifically, § 2107(c) provides that "[t]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."[33] That same section also authorizes a district court to reopen the time to appeal for a fourteen-day period "upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier," as long as the court determines "(1) that a party entitled to notice of the entry of a judgment or order did not receive

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> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice ... of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

*Id.* R. 4(a)(6).

28. Rule 77(d) provides in pertinent part: "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the service." FED. R. CIV. P. 77(d).

29. FED. R. APP. P. 4(a)(6)(B).

30. *Id.* R. 4(a)(6)(A).

31. *Id.* R. 4(a)(6)(C).

32. *Id.* R. 4(a)(6).

33. 28 U.S.C. § 2107(c) (2000).

such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced."[34]

### C. *The Unique Circumstances Doctrine*

A third means of seeking relief from an expired appeal period, unlike extension or reopening of time to appeal, has no basis in any statute or procedural rule.[35] Rather, this avenue resulted from the Supreme Court's effort to provide the courts of appeals with an equitable basis upon which to reach the merits of an appeal that, although technically untimely, should nonetheless be treated as timely because the appellant reasonably relied upon a district court's representation that the appeal period would be lengthier than it turned out to be.[36] This approach thus requires not that the appeal period be extended or reopened, but that the timeliness of the appeal is assessed in a manner that accounts for the appellant's reasonable reliance.[37]

The Supreme Court's recognition and development of this approach, which has come to be known as the unique circumstances doctrine, is examined in Part III below.

## III. THE RECOGNITION AND DEVELOPMENT OF THE UNIQUE CIRCUMSTANCES DOCTRINE

### A. *The Recognition of the Doctrine in* Harris

The Supreme Court's initial recognition of the "unique circumstances" doctrine occurred almost forty-five years ago in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*[38] *Harris* arose from the efforts of Harris Truck Lines, Inc. (Harris) to recover unpaid freight charges from Cherry Meat Packers, Inc. (Cherry), a shipper.[39] After the district court dismissed Harris's complaint and entered judgment in favor of Cherry on its counterclaim, Harris's attorney sought to confer with the company's general counsel about whether to bring an appeal.[40] Unable to reach the general counsel, who was then vacationing abroad,

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34. *Id.* § 2107(c)(1)-(2).

35. *Cf.* MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 6.03, at 343-44 (3d ed. 1999) (describing the "unique circumstances" doctrine as "another escape hatch from a finding of untimeliness").

36. *See* Thompson v. INS, 375 U.S. 384, 386-87 (1964) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

37. *See id.*

38. 371 U.S. 215 (1962) (per curiam), *overruled* by *Bowles*, 127 S. Ct. 2360.

39. *Id.* at 215.

40. *Id.* at 216.

Harris's attorney moved in the district court for an extension of time in which to file a notice of appeal.[41] Significantly, the motion was filed *within* the initial thirty-day appeal period,[42] rather than after its expiration.[43] The district court eventually granted the motion and afforded Harris an additional two weeks of time to appeal.[44]

Although Harris filed a notice of appeal within the time as extended by the district court, the United States Court of Appeals for the Seventh Circuit dismissed the appeal for lack of jurisdiction because the appeal was filed untimely.[45] In so ruling, the court was satisfied that Harris was not entitled to an extension of time to appeal because it had failed to demonstrate the requisite "'excusable neglect based on a failure of a party to learn of the entry of the judgment.'"[46] The court reasoned that "[n]either the motion for extension nor any of the assertions made at the hearing . . . support a finding or conclusion that [Harris] was unaware of the entry of the judgment or of the order," and thus the district court had no basis upon which to grant the extension.[47] The court concluded, therefore, that Harris's notice of appeal was filed out of time.[48]

In vacating the Seventh Circuit's judgment, the Supreme Court expressed empathy for a litigant in Harris's position by noting "the

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41. *Id.*

42. Under then-Rule 73(a) of the Federal Rules of Civil Procedure, a litigant ordinarily had thirty days from the entry of a judgment or order in which to file a notice of appeal. FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969). A period of sixty days would apply instead if the United States, or an agency of the United States, were a party to the action. *Id.*

These same timing prescriptions are now contained in Rule 4(a)(1) of the Federal Rules of Appellate Procedure. *See supra* notes 15-16 and accompanying text.

43. *See Harris*, 371 U.S. at 216.

44. *Id.*

45. *Id.*

46. *Id.* at 217 (quoting FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969)). At that time, Civil Rule 73(a) authorized a district court to extend the appeal period upon a showing of "excusable neglect based on a failure of a party to learn of the entry of the judgment." FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969). Rule 4(a) of the Federal Rules of Appellate Procedure subsequently absorbed the relevant provisions of Civil Rule 73(a). *See* FED. R. APP. P. 4(a) advisory committee's note ("This subdivision is derived from FRCP 73(a) without any change of substance."). Presently, Rule 4(a) authorizes a district court to extend the appeal period upon a generalized showing of either "excusable neglect" or "good cause." *See id.* R. 4(a)(5)(A)(ii).

47. Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 303 F.2d 609, 611-12 (7th Cir. 1962), *vacated*, 371 U.S. 215 (1962) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

48. *Id.*

obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding."[49] Resolving that such a finding was entitled to "great deference" by a court of appeals, the Court held that "[w]hatever the proper result as an initial matter on the facts here, the record contains a showing of *unique circumstances* sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling."[50] Accordingly, the Court remanded the case to the Seventh Circuit for consideration of the appeal on the merits.[51]

Considering the *Harris* Court's rather cursory explanation of its determination that the Seventh Circuit improperly invalidated the extension that Harris had secured from the district court, it is difficult to pin down the exact proposition that informed the Court's decision. One plausible explanation is that the Court meant to say nothing more than that, in the narrow context of a motion to extend the time to file a notice of appeal before the relevant time period has expired, a district court's finding of excusable neglect is not reviewable by a court of appeals. After all, the mere possibility that a court of appeals would overrule an excusable neglect finding would compel a prudent litigant to file a notice of appeal *during* the appeal period rather than trust in the validity of the ensuing extension. But if a litigant is so compelled to initiate an appeal before the appeal period has expired, the exercise of seeking an extension of that period would be pointless.

However, one could also plausibly construe the *Harris* Court's discussion as endorsing a principle of estoppel that would apply well beyond the specific context of the case.[52] As noted earlier, the district court in *Harris* could not have extended Harris's time to appeal absent a determination that Harris had committed "excusable neglect based on [its] failure . . . to learn of the entry of the judgment."[53] The district court's granting of the extension thus carried with it a representation, albeit an implicit one, that Harris had made the requisite showing. Notwithstanding the apparent lack of a basis for such a

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49. *Harris*, 371 U.S. at 217.

50. *Id.* (emphasis added).

51. *Id.*

52. *See* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 6.06[6], at 6-56 (3d ed. 2007) (describing the unique circumstances doctrine as "an equitable theory similar to estoppel"); 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1168, at 572 (3d ed. 2002) ("[T]he unique circumstances concept is based on a theory very similar to estoppel.").

53. *Harris*, 371 U.S. at 217 (internal quotation marks omitted).

representation,[54] the Supreme Court forbade the Seventh Circuit from questioning that representation because Harris had reasonably relied upon it in deciding to initiate an appeal only after the initial thirty-day appeal period had lapsed.[55] Accordingly, the *Harris* Court's point may have been that, in determining whether an appeal is timely, a court of appeals is bound to accept as true any representation of a district court upon which an appellant reasonably relies in foregoing an opportunity to initiate an indisputably timely appeal.[56]

### *B. The Development of the Doctrine in* Thompson *and* Wolfsohn

Of the two readings of *Harris* discussed above, the Court emphatically rejected the narrow reading in a pair of cases that came before it several years later.[57]

#### 1. *Thompson v. INS*

*Thompson v. INS* involved the effort of Willard Thompson, a Canadian, to become a citizen of the United States by way of a petition for naturalization.[58] After the district court denied the petition following trial, Thompson sought to challenge that disposition by filing several motions, including a motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure.[59] Although Thompson was required to serve the motion within ten days of the entry of the judgment,[60] he did not do so until twelve days thereafter.[61]

Two subsequent events of significance led Thompson to conclude that the motions at issue were timely despite having been served beyond ten days of the entry of the judgment. First, in opposing the motions, the government presented no timeliness objection to them.[62]

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54. *See supra* text accompanying note 47.

55. *Harris*, 371 U.S. at 217.

56. *See* 4B WRIGHT & MILLER, *supra* note 52, § 1168, at 572-73 ("The Supreme Court seems to have concluded that a party ought not be denied an opportunity to secure appellate review because of her failure to file a timely appeal when that failure resulted from reliance on action taken by the district court that generated a reasonable belief that the appellate process could be initiated at a later date.").

57. *See* Thompson v. INS, 375 U.S. 384 (1964) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007); Wolfsohn v. Hankin, 376 U.S. 203 (1964) (per curiam).

58. 375 U.S. at 384.

59. *Id.* at 385.

60. *See* FED. R. CIV. P. 59(b), *reprinted in* 28 U.S.C. app. (1994) ("A motion for a new trial shall be served not later than 10 days after the entry of the judgment.").

61. *Thompson*, 375 U.S. at 385.

62. *Id.*

Second, and more significantly, the district court specifically declared that Thompson brought his motion for a new trial "in ample time."[63]

Thompson's belief as to the timeliness of the motions had significant ramifications for the case. In particular, a timely Rule 59 motion would have delayed the running of the sixty-day appeal period applicable to the underlying denial of his petition[64] until the district court disposed of that motion.[65] Indeed, a notice of appeal filed while such a motion was pending would have amounted to a nullity.[66] Presumably familiar with these timing regulations, Thompson waited until the district court disposed of his motions, and only then filed, within sixty days, a notice of appeal from the underlying denial of his petition.[67]

Nevertheless, the Seventh Circuit dismissed Thompson's appeal as untimely.[68] In so ruling, the court was satisfied that Thompson had not filed his postjudgment motions in a timely fashion.[69] Consequently, the initial sixty-day appeal period continued to run despite the filing of his motions, and elapsed long before he had filed a notice of appeal from the underlying denial of his petition.[70]

In vacating the Seventh Circuit's judgment, the Supreme Court invoked the unique circumstances doctrine that it had recognized two years earlier in *Harris*.[71] The Court was receptive to Thompson's explanation that had the timeliness of his postjudgment motions been questioned at the time that he had submitted them, he "could have, and

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63. *Id.* (internal quotation marks omitted).

64. The appeal period was sixty days because an agency of the United States was a party to the action. *See* FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969).

65. *See id.* ("The running of the time for appeal is terminated by a *timely* motion [for a new trial under Rule 59] . . . and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any [order] . . . denying [that] motion." (emphasis added)).

66. *See* Foman v. Davis, 371 U.S. 178, 180-81 (1962). Under the current framework, a notice of appeal filed prior to the disposition of a timely Rule 59 motion is simply held in abeyance until the disposition of that motion (and any related postjudgment motions). FED. R. APP. P. 4(a)(4)(B)(i).

67. *See Thompson*, 375 U.S. at 385 (noting that the district court denied Thompson's motions on October 16 and showing that he then filed a notice of appeal from the underlying denial of his petition on December 6).

68. *Id.*

69. *See* Thompson v. INS, 318 F.2d 681, 683 (7th Cir. 1963), *vacated*, 375 U.S. 384 (1964), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

70. *See id.* at 682 (noting that the district court entered its denial of Thompson's petition on April 18 and, accordingly, his notice of appeal from this judgment should have been filed by June 16, but was not filed until December 6).

71. *Thompson*, 375 U.S. at 387.

presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motions."[72] The Court then drew the following comparison of the circumstances of Thompson's case to those in *Harris*:

> Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the appeal.[73]

Satisfied that Thompson's case fit "squarely within the letter and spirit of *Harris*," the Court remanded the case to the Seventh Circuit for consideration of the merits of Thompson's appeal.[74]

The *Thompson* Court's analysis confirmed that the scope of the unique circumstances doctrine extended well beyond the narrow context of a litigant who relies upon a district court's mistaken (albeit implicit) finding of excusable neglect and, as a result, files his appeal outside the required thirty-day time period.[75] At the same time, however, the Court's comparison of the case to *Harris*, specifically its observation that Harris and Thompson each "did an act which, if *properly* done, postponed the deadline for the filing of his appeal," suffers from two serious flaws.[76] First, the comparison suggests that the unique circumstances doctrine applies only to an appellant who did something *improper* in the district court. However, while Thompson's act of bringing a Rule 59 motion beyond the applicable ten-day limit would qualify as improper, Harris did nothing of the sort.[77] Indeed, Harris's only act of significance was to seek an extension of time to appeal at a point when he could have filed a timely notice of appeal.[78] Second, the *Thompson* Court's comparison of the cases suggests that the unique circumstances doctrine applies only to an appellant whose improper act in the district court, if properly done, would have

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72. *Id.* at 386.
73. *Id.* at 387.
74. *Id.*
75. *See* 4B WRIGHT & MILLER, *supra* note 52, § 1168, at 572 (observing that "[t]he Harris Truck Lines principle was extended" in *Thompson*).
76. *Thompson*, 375 U.S. at 387 (emphasis added).
77. *See supra* text accompanying note 60.
78. *See supra* text accompanying notes 41-43.

"postponed the deadline for the filing of [an] appeal."[79] But while Thompson's act of bringing a timely Rule 59 motion certainly would have postponed the time in which he had to appeal from the underlying denial of his petition, the same cannot be said regarding Harris's act of bringing a motion to extend the time to appeal.[80] At best, Harris's motion would have resulted in an *order* granting the sought extension, in which case the district court's act of issuing the order, not Harris's act of filing the motion, would have effected the postponement of the appeal deadline.[81]

Notwithstanding its flawed comparison, the *Thompson* Court was correct in concluding that the case before it fit "squarely within the letter and spirit of *Harris*."[82] Indeed, the Court's disposition in both cases comports with the principle that a court of appeals is bound to accept as true a representation of the district court upon which a litigant reasonably relies in foregoing an opportunity to initiate the filing of a timely notice of appeal.[83] In the same manner that Harris had reasonably relied upon the district court's implicit representation that it had made the excusable neglect showing necessary to obtain an extension of the time to appeal,[84] Thompson had reasonably relied upon the district court's explicit representation that he had filed his motion for a new trial in time.[85] It was, therefore, incumbent upon the Seventh Circuit to view Thompson's motion as having been timely filed, and thus having the effect of delaying the running of the sixty-day appeal period until the disposition of that motion.[86] Had the Seventh Circuit done so, it would have determined that the notice of appeal filed by Thompson, which he filed within sixty days of the denial of his motion, was timely.[87] The court could then have proceeded to the merits of Thompson's appeal from the underlying denial of his petition.

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79. *Thompson*, 375 U.S. at 387.

80. *See* FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969).

81. *See* 28 U.S.C. § 2107(c) (2000); FED. R. APP. P. 4(a)(5).

82. *Thompson*, 375 U.S. at 387.

83. *See* discussion *supra* Part III.A.

84. *See* Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

85. *See Thompson*, 375 U.S. at 387.

86. *See supra* notes 64-65 and accompanying text.

87. *See supra* note 67 and accompanying text.

2. *Wolfsohn v. Hankin*

The Supreme Court affirmed its approach in *Thompson* just one month later through a summary disposition in *Wolfsohn v. Hankin*.[88] In *Wolfsohn*, Rebecca Wolfsohn, like Thompson, sought to challenge an adverse judgment by way of a motion for a new trial under Federal Rule of Civil Procedure 59.[89] Before filing that motion, however, she secured from the district court an extension of time in which to do so.[90] Although Wolfsohn filed her Rule 59 motion within the time as extended by the district court,[91] it turned out that the district court had no authority to grant the extension in the first place in light of Rule 6(b).[92]

The regrettable effect of the invalidity of the district court's extension was that Wolfsohn's Rule 59 motion was untimely.[93] Consequently, the initial thirty-day appeal period continued to run while her motion was pending before the district court.[94] Presumably believing that her motion was timely as a result of the extension, Wolfsohn waited until the district court denied the motion and only then filed, within thirty days, a notice of appeal from the underlying judgment.[95] Because the time to appeal from the underlying judgment had elapsed by that point, the United States Court of Appeals for the District of Columbia dismissed Wolfsohn's appeal as untimely.[96]

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88. 376 U.S. 203 (1964) (per curiam).

89. Wolfsohn v. Hankin, 321 F.2d 393, 394 (D.C. Cir. 1963) (per curiam), *rev'd*, 376 U.S. 203 (1964) (per curiam). Although Wolfsohn styled her motion as one for "rehearing," the court of appeals construed it as a motion for a new trial under Federal Rule of Civil Procedure 59. *Id.*

90. *Id.*

91. *Id.*

92. *See id.*; FED. R. CIV. P. 6(b), *reprinted in* 28 U.S.C. app. (1964) (providing that a district court may not enlarge the time to file a Rule 59 motion). The current version of Rule 6(b) contains this same restriction. *See* FED. R. CIV. P. 6(b).

93. Wolfsohn was required to have served the motion within ten days after the district court entered its judgment. *See Wolfsohn*, 321 F.2d at 394 (quoting FED. R. CIV. P. 59(b), *reprinted in* 28 U.S.C. app. (1994) (amended 1995)). In light of the extension, however, she did not do so until thirty-five days thereafter. *Id.*

94. *See id.* As observed earlier, only a *timely* Rule 59 motion would delay the running of the period in which to appeal from the underlying judgment until after disposition of that motion. *See* FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969).

95. *See Wolfsohn*, 321 F.2d at 394 (noting that the district court denied the motion on October 12, and Wolfsohn filed her notice of appeal, based on these duties within thirty days, on November 3).

96. *Id.* The district court entered judgment on May 7, which meant that any notice of appeal from that decision was required to be filed within thirty days, by June 5. Wolfsohn, however, did not file her notice of appeal until November 3. *Id.*

On Wolfsohn's petition for a writ of certiorari, the Supreme Court summarily reversed the D.C. Circuit's judgment, offering no rationale other than citations to *Harris* and *Thompson*.[97] In so doing, the Court insinuated that the D.C. Circuit should have reached the merits of Wolfsohn's appeal by invoking the unique circumstances doctrine as developed in those cases. Such an approach would undoubtedly have been consistent with a formulation of the doctrine derived from the *Thompson* Court's comparison of *Thompson* and *Harris*.[98] Specifically, Wolfsohn's filing of an untimely motion for a new trial under Rule 59 was an act that, "if properly done," would have postponed the deadline for the filing of her appeal.[99] Moreover, having extended the time in which Wolfsohn could bring her motion,[100] the district court essentially expressed its conclusion that the eventual filing of that motion "had been properly done."[101] And, of course, Wolfsohn's reliance upon the district court's conclusion was reflected in her decision to delay the initiation of her appeal from the underlying judgment until after the district court disposed of her motion.[102] Applying the *Thompson* Court's formulation, therefore, the D.C. Circuit was obligated to entertain Wolfsohn's appeal on the merits.

As explained above, however, the preceding approach to the unique circumstances doctrine simply cannot be reconciled with *Harris*.[103] But the Court's disposition in *Wolfsohn* can nonetheless be reconciled with *Harris* and *Thompson*. Indeed, like its dispositions in *Harris* and *Thompson*, the Court's disposition in *Wolfsohn* comports with the principle that a court of appeals, in determining the timeliness of an appeal, must accept as true a representation of the district court upon which a litigant reasonably relies in foregoing the opportunity to file a timely notice of appeal.[104]

The application of this principle to *Wolfsohn* bears a remarkable similarity to its application in *Thompson*.[105] Even though the district court in *Wolfsohn* lacked the authority to extend the time in which

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97. Wolfsohn v. Hankin, 376 U.S. 203, 203 (1964) (per curiam).

98. *See* Thompson v. INS, 375 U.S. 384, 387 (1964) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

99. *See id.*

100. Wolfsohn v. Hankin, 321 F.2d 393, 394 (D.C. Cir. 1964) (per curiam), *rev'd*, 376 U.S. 203 (1964) (per curiam).

101. *Thompson*, 375 U.S. at 387.

102. *See Wolfsohn*, 321 F.2d at 394.

103. *See supra* text accompanying notes 76-81.

104. *See* discussion *supra* Part II.C.

105. *See supra* text accompanying notes 82-87.

Wolfsohn could bring a Rule 59 motion,[106] the district court's act of granting that extension carried with it the implicit representation that any motion filed within the extension would be timely.[107] Because Wolfsohn reasonably relied upon that representation in delaying the initiation of her appeal from the underlying judgment until after the district court disposed of her motion, the D.C. Circuit was required to view that motion as having been timely filed and thus having the effect of delaying the running of the thirty-day appeal period until the district court disposed of that motion.[108] Had the D.C. Circuit followed that approach, it would have found that Wolfsohn's notice of appeal, which she filed within thirty days of the denial of the motion, was timely.[109] The court could then have proceeded to the merits of Wolfsohn's appeal from the underlying judgment.

### *C. A Narrowing of the Doctrine in* Osterneck

The trilogy of *Harris*, *Thompson*, and *Wolfsohn* was noteworthy, not only for its recognition and development of the unique circumstances doctrine, but also because the Supreme Court invoked the doctrine to preserve the appeal at issue in each case.[110] But the streak came to an end approximately twenty-five years later in *Osterneck v. Ernst & Whinney*.[111]

*Osterneck* arose from a merger involving Cavalier Bag Company, Inc. (Cavalier) and E.T. Barwick Industries, Inc. (Barwick).[112] Following consummation of the merger, several members of the Osterneck family (the Osternecks), who were the owners of Cavalier

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106. *See Wolfsohn*, 321 F.2d at 394. Similarly, the district court in *Harris* had no authority to extend the time to file a notice of appeal absent a showing of "excusable neglect based on a failure of a party to learn of the entry of judgment" under then-Civil Rule 73(a). FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969).

107. *See Wolfsohn*, 321 F.2d at 394; *see also* Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 216-17 (1962) (per curiam) (implying that because notice of appeal was filed within the extension period granted by the district court, the court of appeals should hear the merits of the appeal), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

108. *See* FED. R. CIV. P. 73(a), *reprinted in* 28 U.S.C. app. (1964), *abrogated by* FED. R. APP. P. 4(a), *reprinted in* 28 U.S.C. app. (Supp. V 1969).

109. *See Wolfsohn*, 321 F.2d at 394 (noting that the district court denied the motion on October 12, and she filed her notice of appeal within thirty days, on November 3).

110. *See* Wolfsohn v. Hankin, 376 U.S. 203, 203 (1964) (per curiam); Thompson v. INS, 375 U.S. 384, 387 (1964) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007); *Harris*, 371 U.S. at 217.

111. 489 U.S. 169 (1989).

112. Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1523 (11th Cir. 1987), *aff'd sub nom.* Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989).

before it was merged into Barwick, suspected that Barwick had fraudulently misrepresented its financial condition for the two years preceding the merger in order to secure the Osternecks' approval.[113] The Osternecks eventually brought suit against Barwick and several other defendants.[114]

In January 1985, the district court entered a judgment in the Osternecks' favor with respect to several, but not all, of the defendants.[115] The Osternecks subsequently brought a timely motion for discretionary prejudgment interest, which the district court granted in July 1985.[116] During the six-month interim between the filing of the motion and its disposition, several of the parties (including the Osternecks) filed notices of appeal and/or cross-appeal with regard to the January 1985 judgment.[117] As it turned out, however, the United States Court of Appeals for the Eleventh Circuit concluded that the Osternecks' motion for discretionary prejudgment interest constituted a motion to alter or amend the judgment for purposes of Rule 59,[118] and accordingly dismissed each of the appeals and cross-appeals initiated by the parties prior to the district court's disposition of that motion.[119]

In an effort to convince the Eleventh Circuit that their premature appeal from the January 1985 judgment should not be dismissed, the Osternecks urged that the court invoke the unique circumstances doctrine.[120] They reasoned that certain rulings and actions of both the district court and the Eleventh Circuit had led them to believe that the January 1985 judgment was indeed appealable upon its entry.[121] In

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113. *Id.*

114. *Id.* at 1523-24.

115. *Id.* at 1524.

116. *Id.*

117. *Id.*

118. *Id.* at 1525. The Supreme Court affirmed this conclusion on direct appeal from the Eleventh Circuit's judgment. Osterneck v. Ernst & Whinney, 489 U.S. 169, 175 (1989).

119. *See Osterneck*, 825 F.2d at 1525. At that time, Rule 4(a)(4) of the Federal Rules of Appellate Procedure provided that a notice of appeal had no effect if filed while a Rule 59 motion was pending. *See* FED. R. APP. P. 4(a)(4), *reprinted in* 28 U.S.C. app. (1988) (amended 1993) ("If a timely motion . . . is filed in the district court by any party . . . under Rule 59 . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying . . . such motion. A notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion . . . .").

Under the present framework, a notice of appeal filed before the disposition of a timely Rule 59 motion is simply held in abeyance until that motion (and any related postjudgment motions) are decided. *Id.* R. 4(a)(4)(A)(iv).

120. *Osterneck*, 825 F.2d at 1527.

121. *See id.*

particular, the Osternecks cited the district court's rulings granting one defendant's bill of costs, denying Barwick's motion for an extension of time to file its bill of costs, and denying another defendant's motion to stay execution of the judgment.[122] They also made reference to the district clerk's requirement that they pay an additional filing fee in connection with the cross-appeal that they brought only after the district court entered an amended judgment in July 1985.[123] Finally, they contended that they reasonably relied upon the Eleventh Circuit's failure to advise them that its jurisdiction over their appeal was in question.[124]

The Eleventh Circuit's determination that the situation fell beyond the purview of the unique circumstances doctrine[125] was ultimately affirmed by the Supreme Court on direct appeal.[126] Yet, the Court could have reached that same determination and maintained consistency with the trilogy of *Harris*, *Thompson*, and *Wolfsohn* by applying the formulation of the doctrine offered above, specifically, that a court of appeals, in determining the timeliness of an appeal, must accept as true a representation of the district court upon which a litigant reasonably relies in delaying the filing of a notice of appeal.[127] Indeed, none of the referenced actions of the district court or the Eleventh Circuit even arguably constituted representations that would have caused the Osternecks to *delay* the filing of a notice of appeal until the pertinent appeal period had lapsed.[128] If anything, the Osternecks suffered the adverse consequences of filing a notice of appeal *before* the appropriate time to do so.

Rather than employ the preceding approach to the unique circumstances doctrine, the Supreme Court resorted to the *Thompson* formulation, and substantially narrowed it in the process.[129] In particular, the Court stated that the doctrine "applies only where a

122. *Id.*

123. *Id.* The Osternecks argued that this requirement suggested that the district clerk did not treat their motion for discretionary prejudgment interest as a Rule 59 motion. *Id.* Specifically, they argued that, under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, no additional filing fee would have been required for a second notice of appeal filed after the disposition of a Rule 59 motion. *Id.*

124. *Id.*

125. *Id.* at 1528.

126. Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989).

127. *See supra* notes 103-104 and accompanying text.

128. The Eleventh Circuit made a similar observation in emphasizing that "[a]t no time has the district court or this court ever affirmatively *represented* to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such an assurance from either court." *Osterneck*, 825 F.2d at 1528 (emphasis added).

129. *See Osterneck*, 489 U.S. at 178-79.

party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done."[130] Having confined the scope of the doctrine in this manner, the Court summarily disposed of the Osternecks' assertion that the doctrine should be applied to preserve their appeal from the January 1985 judgment because the Osternecks received no specific assurance by a judicial officer.[131]

### *D. A Confused Application of the Doctrine After* Osterneck

The formulation of the unique circumstances doctrine put forth by the *Osterneck* Court was faulty in at least three respects. First, it retained the troubling aspects of the *Thompson* Court's formulation by suggesting that the doctrine applies solely to those appellants who commit an *improper* act that, if done *properly*, would have postponed the appeal deadline.[132] As observed above, these limitations upon the doctrine are unacceptable to the extent that they cannot be reconciled with *Harris*.[133] What is more, these limitations resulted in the incongruity that the equitable relief afforded by the doctrine was reserved for an appellant who commits an improper act (as opposed to an appellant who commits *no* improper act), thus ensuring that a court of appeals would be precluded from applying the doctrine in favor of those appellants who deserve it most.

Second, the *Osterneck* formulation was flawed because it limited the application of the unique circumstances doctrine to an appellant who received a specific assurance that the improper act had been properly done.[134] By requiring a *specific* assurance,[135] the formulation appears to have envisioned a statement akin to the district court's declaration in *Thompson* that Thompson's motion for a new trial was timely.[136] No such specificity, however, was involved in either *Harris* or *Wolfsohn*. Indeed, the source of reasonable reliance for the appellants in those cases was a ruling of the district court extending the

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130. *Id.* at 179.

131. *See id.*

132. *See id.* at 178-79 (citing Thompson v. INS, 375 U.S. 384, 387 (1964) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007)).

133. *See supra* notes 76-80 and accompanying text.

134. *Osterneck*, 489 U.S. at 179.

135. *Id.*

136. *See Thompson*, 375 U.S. at 385 (noting that the trial court stated that Thompson's motion was made "'in ample time'").

time to file a notice of appeal,[137] and a ruling of the district court extending the time to file a motion for a new trial,[138] respectively. At the very least, it is questionable whether a district court's mere act of entering either type of decision would rise to the level of a *specific* assurance of anything, let alone that some act of the appellant had been properly done.

The third flaw in the *Osterneck* Court's formulation was that, in order for the unique circumstances doctrine to apply, the requisite specific assurance had to be rendered by a "judicial officer."[139] The problem with the formulation's use of the phrase "judicial officer" is that it strongly suggests that only a *judge* possesses the authority to render an assurance upon which a litigant may reasonably rely.[140] The obvious implication is that a litigant who relies upon a representation provided by the clerk of the district court (or a member of the clerk's staff) will not receive the benefit of the doctrine. Such a limitation is troubling to the extent that district clerks routinely issue official communications to litigants on behalf of the court. Accordingly, a litigant who relies upon such a communication in foregoing an opportunity to file a timely notice of appeal will be acting no less reasonably than a litigant who relies upon an explicit statement from a district judge.

Not surprisingly, these defects in the *Osterneck* formulation produced a haphazard application of the unique circumstances doctrine in the courts of appeals. In particular, those courts were left to choose between applying the *Osterneck* formulation and applying the more generous conception of reasonable reliance upon which the Supreme Court originally based the unique circumstances doctrine. The confusion that ensued with regard to three recurring situations implicating the doctrine is discussed below.

### 1. An Appellant's Reliance upon an Unauthorized Extension or Reopening of Time To File a Notice of Appeal

One recurring situation implicating the unique circumstances doctrine involves an appellant who, in reliance upon a district court's

137. *See* Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 216 (1962) (per curiam), *overruled by* Bowles v. Russell, 127 S. Ct. 2360 (2007).

138. *See* Wolfsohn v. Hankin, 321 F.2d 393, 394 (D.C. Cir. 1946) (per curiam), *rev'd*, 376 U.S. 203, 203 (1964) (per curiam).

139. *See Osterneck*, 489 U.S. at 179.

140. As noted earlier, various courts of appeals have determined that the "judge" in question need not be a district judge, but may also be a magistrate judge, a bankruptcy judge, or an immigration judge. *See supra* note 10 and accompanying text.

unauthorized extension or reopening of the time to file an appeal from a judgment or order, passes over an opportunity to file what would have been an indisputably timely appeal from that judgment or order.[141] As observed earlier, a district court may extend the appeal period if the party seeking the extension demonstrates "good cause" or "excusable neglect."[142] In addition, when a party does not receive notice of a judgment or order under Federal Rule of Civil Procedure 77(d), the district court may reopen the time to appeal from that judgment or order upon satisfaction of certain conditions.[143]

Prior to *Osterneck*, if a district court exceeded its authority in extending or reopening an appeal period, the courts of appeals would ordinarily reach the merits of an ensuing appeal under the unique circumstances doctrine.[144] Such action was justified on the basis that the appellant reasonably relied upon the district court's action in foregoing the opportunity to initiate a timely appeal when the opportunity presented itself. Indeed, this approach is perfectly consistent with *Harris*, which involved nothing more than an appellant's reliance upon a district court's extension of time to appeal that by all appearances was not authorized by the standard of "excusable neglect" in effect at the time.[145]

After *Osterneck*, however, the courts of appeals were less inclined to invoke the unique circumstances doctrine in order to preserve such an appeal,[146] as illustrated by the disposition of the United States Court of Appeals for the Sixth Circuit in *Bowles v. Russell*.[147] In *Bowles*, Keith Bowles moved for a reopening of the appeal period after he failed to receive Rule 77(d) notice of the district court's denial of his petition for a writ of habeas corpus.[148] The district court granted the motion but erroneously reopened the appeal period for several days in excess of the fourteen-day limitation set forth in Rule 4(a)(6) of the

141. *See, e.g.*, *Harris*, 371 U.S. at 216.

142. FED. R. APP. P. 4(a)(5)(A)(ii).

143. *See id.* R. 4(a)(6).

144. *See, e.g.*, United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1267-70 (9th Cir. 1985), *abrogated by* Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992); Bernstein v. Lind-Waldock & Co., 738 F.2d 179, 182-83 (7th Cir. 1984); Nat'l Indus., Inc. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1264 (9th Cir. 1982).

145. *See supra* Part III.A.

146. *See, e.g.*, Bowles v. Russell, 432 F.3d 668, 673-76 (6th Cir. 2005), *aff'd*, 127 S. Ct. 2360 (2007); United States v. Dumont, 936 F.2d 292, 295 (7th Cir. 1991); Certain Underwriters at Lloyds of London v. Evans, 896 F.2d 1255, 1257-58 (10th Cir. 1990).

147. 432 F.3d at 673-77.

148. *Id.* at 670.

Federal Rules of Appellate Procedure.[149] Bowles then filed his notice of appeal from the judgment within the time as extended by the district court but outside of the fourteen days allowed under the rule.[150]

The Sixth Circuit ultimately dismissed Bowles' appeal for lack of jurisdiction because of his untimely notice of appeal.[151] In so doing, the court refused to invoke the unique circumstances doctrine, citing four separate reasons why the situation fell outside of the *Osterneck* formulation.[152] First, the court determined that Bowles' act of moving to reopen the appeal period "did not attempt to postpone [the] deadline for filing his appeal."[153] Second, the court observed that, although the district court committed an improper act by reopening the appeal period for a lengthier period of time than the rules allowed, Bowles committed no improper act of his own.[154] Third, operating under the premise that the *Osterneck* formulation required "that judicial assurances follow the actions of the party," the court noted that the assurance in the matter at hand preceded Bowles' act of moving for a reopening of the appeal period.[155] And fourth, the court was satisfied that Bowles "received no assurances from the district court that his notice of appeal was timely."[156]

Even assuming that the *Bowles* court's application of the *Osterneck* formulation was correct, its refusal to preserve the appeal at issue cannot be reconciled with the unique circumstances doctrine as originally understood. Indeed, fidelity to the original conception would require that the *Osterneck* formulation be disregarded altogether in determining whether to invoke the doctrine in the face of an appeal initiated pursuant to an unauthorized extension or reopening of an appeal period, as the United States Court of Appeals for the Eighth Circuit did in the post-*Osterneck* matter of *Estle v. Country Mutual Insurance Co.*[157]

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149. *Id.*; *see* 28 U.S.C. § 2107(c) (2000); FED. R. APP. P. 4(a)(6).

150. *Bowles*, 432 F.3d at 670-71.

151. *Id.* at 675-77.

152. *Id.* at 675-76. The *Osterneck* formulation confines the unique circumstances doctrine to situations "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989).

153. *Bowles*, 432 F.3d at 675.

154. *Id.* ("[I]t was, in fact, the district court here that performed the improper act and purported to extend the filing date beyond what was permitted by the Rule.").

155. *Id.*

156. *Id.*

157. 970 F.2d 476 (8th Cir. 1992).

*Estle* arose from Sondra Estle's effort to recover insurance benefits from Country Mutual Insurance Co. (Country).[158] After the district court entered judgment in favor of Country, Estle brought a motion for reconsideration.[159] On the following day, Estle moved to have the time to appeal from the judgment extended for thirty days following the disposition of the motion for reconsideration.[160] Notwithstanding that Rule 4(a)(5) of the Federal Rules of Appellate Procedure authorized the district court to extend the appeal period for no longer than thirty days after the prescribed time,[161] the court mistakenly extended the appeal period as Estle had requested.[162]

As it turned out, Estle filed her notice of appeal within thirty days of the denial of her motion for reconsideration, but beyond the thirty days of the prescribed time.[163] Thus Country challenged the appeal on timeliness grounds.[164] While acknowledging that Estle's appeal was initiated beyond the time allowed by the rules, the Eighth Circuit invoked the unique circumstances doctrine in order to preserve the appeal.[165] Relying upon *Harris*, and omitting any mention of *Osterneck*, the court stated that "[u]nder these unique circumstances, we conclude that the notice of appeal was timely."[166]

The Eighth Circuit's disposition in *Estle*, unlike the Sixth Circuit's disposition in *Bowles*, fits perfectly within the original conception of the unique circumstances doctrine. Consistent with *Harris* and the other cases in which the Supreme Court developed the doctrine, a circuit court's assessment of the timeliness of an appeal must consider whether the appellant reasonably relied upon a representation of the district court in foregoing an opportunity to file an indisputably timely appeal.[167] Accordingly, even though a district court lacks the authority to extend or reopen the time to appeal beyond that allowed by the pertinent timing prescriptions, the district court's act of granting an extension or reopening for a particular period of time carries with it the implicit representation that an appeal initiated within that period would

158. *Id.* at 477.
159. *Id.*
160. *Id.* at 477-78.
161. *Id.* at 478; *see* FED. R. APP. P. 4(a)(5). In light of a restyling, this restriction is presently set forth in subsection (C) of Rule 4(a)(5).
162. *See Estle*, 970 F.2d at 478.
163. *See id.*
164. *Id.* at 477.
165. *Id.* at 478.
166. *Id.*
167. *See supra* Part III.A.

be timely.[168] If an appellant relies upon that representation in delaying the filing of a notice of appeal until after the permissible time, the court of appeals is then bound to accept the district court's representation as true, which would compel the conclusion that the notice was filed in a timely fashion.[169] The court could then proceed to the merits of the appeal from the decision at hand.

2. An Appellant's Reliance upon an Unauthorized Extension of Time To File a Rule 59 (or Related) Motion

A second recurring situation implicating the unique circumstances doctrine is exemplified by the situation that gave rise to the Supreme Court's decision in *Wolfsohn*.[170] That is, an appellant relies upon a district court's extension of time to file a postjudgment motion under Rule 59, or a related postjudgment motion that, if timely filed, would delay the running of time to appeal from the underlying judgment,[171] in deciding to delay initiating an appeal from the underlying judgment.[172] Because such an extension is unauthorized in light of Federal Rule of Civil Procedure 6(b),[173] however, the appellant will end up filing that motion outside of the applicable ten-day restriction.[174] The time to file a notice of appeal from the underlying judgment will thus continue to run while the motion is pending before the district court.[175] In the meantime, the appellant will wait for that disposition prior to filing a notice of appeal, operating under the belief

168. *See supra* text accompanying notes 53-55.

169. *See supra* text accompanying notes 54-56.

170. *See supra* Part III.B.2.

171. Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure delineates the six categories of motions that have this effect:

(i) for judgment under Rule 50(b);
(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
(iv) to alter or amend the judgment under Rule 59;
(v) for a new trial under Rule 59; or
(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

FED. R. APP. P. (4)(a)(4)(A).

172. *See supra* text accompanying note 95.

173. FED. R. CIV. P. 6(b). As it did when *Wolfsohn* was decided, Civil Rule 6(b) presently prohibits a district court from extending the time to file a motion for a new trial under Rule 59, among other motions. *Id.*

174. *See supra* notes 90-93 and accompanying text.

175. *See supra* note 94 and accompanying text.

that the time to appeal from the underlying judgment will commence only after the district court disposes of the motion.[176] But by the time that the district court disposes of the motion, the time to appeal from the underlying judgment will have elapsed, and thus the ensuing notice of appeal from that judgment will be untimely.[177]

Consistent with the Supreme Court's disposition in *Wolfsohn*, the usual pre-*Osterneck* approach employed by the courts of appeals when confronted with this scenario was to preserve the appeal at issue by invoking the unique circumstances doctrine.[178] Armed with the *Osterneck* Court's narrow formulation of the doctrine, however, most

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176. *See supra* note 95 and accompanying text.

177. *See supra* note 96 and accompanying text.

178. *See, e.g.*, Fairley v. Jones, 824 F.2d 440, 442-43 (5th Cir. 1987); Butler v. Coral Volkswagen, Inc., 804 F.2d 612, 615-18 (11th Cir. 1986) (per curiam); Inglese v. Warden, U.S. Penitentiary, 687 F.2d 362, 362-63 (11th Cir. 1982) (per curiam); Stauber v. Kieser, 810 F.2d 1, 1-2 (10th Cir. 1982) (per curiam), *overruled by* Weitz v. Lovelace Health Sys., Inc., 214 F.3d 1175 (10th Cir. 2000); Fairway Ctr. Corp. v. U.I.P. Corp., 491 F.2d 1092, 1093-94 (8th Cir. 1974) (per curiam).

Interestingly, several courts of appeals have gone so far as to invoke the unique circumstances doctrine to preserve an appeal from an underlying judgment even when the district court had not granted an extension of time to file the postjudgment motion at issue, holding that the district court's mere act of considering the motion and ultimately adjudicating it on the merits was sufficient to induce reasonable reliance on the part of the appellant. *See, e.g.*, St. Marys Hosp. Med. Ctr. v. Heckler, 753 F.2d 1362, 1365-66 (7th Cir. 1985); Webb v. Dep't of Health & Human Servs., 696 F.2d 101, 105-06 (D.C. Cir. 1982); Vine v. Beneficial Fin. Co., 374 F.2d 627, 631-32 (2d Cir. 1967); Pierre v. Jordan, 333 F.2d 951, 955 (9th Cir. 1964). But more recent decisions have by and large rejected this approach. *See, e.g.*, Hall v. CIA, 437 F.3d 94, 98-99 (D.C. Cir. 2006); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1462-63 (9th Cir. 1992); Smith v. Evans, 853 F.2d 155, 159-61 (3d Cir. 1988); Ctr. for Nuclear Responsibility, Inc. v. NRC, 781 F.2d 935, 941-43 (D.C. Cir. 1986); Marane, Inc. v. McDonald's Corp., 755 F.2d 106, 111 n.2 (7th Cir. 1985); Gribble v. Harris, 625 F.2d 1173, 1174-75 (5th Cir. 1980) (per curiam); Flint v. Howard, 464 F.2d 1084, 1086-87 (1st Cir. 1972) (per curiam).

In cases involving a district court's actual extension of time to file a postjudgment motion, the courts of appeals have often refused to invoke the unique circumstances doctrine to preserve an appeal initiated after disposition of the motion because the appellant had no claim of reasonable reliance upon the extension under the specific circumstances of the case. For example, an appellant cannot claim reliance upon an unauthorized extension of time to file a motion if, at the time of the extension, the time in which to file a notice of appeal from the underlying judgment had already elapsed. *See, e.g.*, Talano v. Nw. Med. Faculty Found., Inc., 273 F.3d 757, 761 (7th Cir. 2001); Feinstein v. Moses, 951 F.2d 16, 20 (1st Cir. 1991); Fiester v. Turner, 783 F.2d 1474, 1476 (9th Cir. 1986).

A different scenario arose when a district court, rather than simply granting an extension to file a postjudgment motion, granted permission to file that motion out of time. *See, e.g.*, Panhorst v. United States, 241 F.3d 367, 371-73 (4th Cir. 2001); Arnold v. Wood, 238 F.3d 992, 997 (8th Cir. 2001). The United States Courts of Appeals for the Fourth and Eighth Circuits have held that, because only a *timely* motion could postpone the time to appeal from the underlying judgment, *see* FED. R. APP. P. 4(a)(4)(A), the appellant could not reasonably rely upon the extension because it was understood that the motion was untimely. *See Panhorst*, 241 F.3d at 371-73; *Arnold*, 238 F.3d at 997.

courts of appeals refused to invoke the doctrine to preserve an appeal initiated under the same circumstances.[179]

This latter approach was exemplified by the disposition of the Sixth Circuit in *Rhoden v. Campbell*.[180] In that matter, Lawtis Rhoden responded to an adverse judgment by seeking a fifteen-day extension in which to file a motion under Federal Rule of Civil Procedure 59(e).[181] Notwithstanding its lack of authority to extend the time to file such a motion,[182] the district court granted the extension.[183] Rhoden then filed his motion within the time as extended by the district court, but beyond the ten-day limit imposed by Rule 59.[184] Presumably believing that the time to appeal from the underlying judgment was not running as a consequence of his motion,[185] Rhoden waited until the district court denied the motion, and only then filed, within thirty days, a notice of appeal from the underlying judgment.[186] By then, however, the time to file a notice of appeal from the underlying judgment had expired.[187]

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179. *See, e.g.*, Allender v. Raytheon Aircraft Co., 439 F.3d 1236, 1241 (10th Cir. 2006); United States *ex rel.* McAllan v. City of New York, 248 F.3d 48, 53-54 (2d Cir. 2001) (per curiam); Weitz v. Lovelace Health Sys., Inc., 214 F.3d 1175, 1179-81 (10th Cir. 2000); Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397, 402-04 (2d Cir. 2000); Rhoden v. Campbell, 153 F.3d 773, 774 (6th Cir. 1998); Endicott Johnson Corp. v. Liberty Mut. Ins. Co., 116 F.3d 53, 57-58 (2d Cir. 1997); Pinion v. Dow Chem., U.S.A., 928 F.2d 1522, 1526-35 (11th Cir. 1991); Hable v. Pairolero, 915 F.2d 394, 394-95 (8th Cir. 1990); Varhol v. Nat'l R.R. Passenger Corp., 909 F.2d 1557, 1561-64 (7th Cir. 1990) (per curiam). *But see, e.g.*, Charles v. Barnhart, 375 F.3d 777, 781-82 (8th Cir. 2004); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 585-86 (9th Cir. 1993); United Steelworkers v. Phelps Dodge Corp., 896 F.2d 403, 406 n.2 (9th Cir. 1990).

The Seventh Circuit has emphasized that an extension of time to file a postjudgment motion cannot constitute a "specific assurance" if granted in the form of a minute order. *See, e.g.*, Hope v. United States, 43 F.3d 1140, 1143-44 (7th Cir. 1994); Green v. Bisby, 869 F.2d 1070, 1072 (7th Cir. 1989), *cited in Feinstein*, 951 F.2d at 21.

180. 153 F.3d 773 (6th Cir. 1998).

181. *See id.* at 773.

182. *See id.*; *see also* FED. R. CIV. P. 6(b) (explaining that a district court does not have the authority to extend the time to file a Rule 59(e) motion to alter or amend a judgment).

183. *Rhoden*, 153 F.3d at 773.

184. *See id.* (noting that the district court entered its judgment on October 9, but Rhoden did not file his Rule 59(e) motion until October 31, which was, however, within the fifteen-day extension granted by the district court in response to Rhoden's October 17 motion).

185. *Id.* at 774 (observing that Rhoden "apparently believed that the Fed.R.Civ.P. 59(e) motion tolled the appeal period").

186. *Id.* at 773-74 (noting that the district court denied the motion on December 1, and Rhoden filed his notice of appeal on December 31, which was beyond the thirty-day limit prescribed by Federal Rule of Appellate Procedure 4(a)(5)).

187. *See id.* (showing that the district court entered its judgment on October 6, but Rhoden did not file his notice of appeal until December 31).

The Sixth Circuit ultimately found that Rhoden's appeal was untimely and dismissed the appeal for lack of jurisdiction.[188] In so ruling, the court refused to preserve the appeal under the unique circumstances doctrine,[189] even though the situation at hand was virtually indistinguishable from that in *Wolfsohn*.[190] Indeed, rather than making any reference at all to *Wolfsohn*, the court focused entirely upon the formulation of the doctrine articulated in *Osterneck*.[191] The court then summarily concluded that the granting of Rhoden's request for an additional fifteen days in which to file his Rule 59(e) motion did not constitute a "*specific assurance* by the district court judge that the motion was timely filed or that it tolled the appeal period."[192]

This is not to say, however, that every court of appeals rejected the view that a district court's unauthorized extension of time to file a Rule 59 motion (or a motion with similar effect) amounted to a specific assurance within the meaning of *Osterneck*.[193] In the more recent case of *Charles v. Barnhart*, the Eighth Circuit was confronted with an untimely appeal that plaintiff Sandra Charles initiated only after the district court dismissed her Rule 59(e) motion as untimely.[194] Prior to that disposition, however, the district court had granted Charles's request for an extension of time to file the motion, which presumably led Charles to believe that her motion was timely and thus delayed the time to appeal from the underlying decision.[195]

The Eighth Circuit ultimately reached the merits of Charles's appeal by invoking the unique circumstances doctrine.[196] Like the Sixth Circuit in *Rhoden*, the Eighth Circuit made no reference to *Wolfsohn*.[197] Instead, the court relied upon the *Osterneck* Court's formulation in stating that the doctrine applies "when the district court *specifically assures* a party that its motion is timely, and the party

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188. *Id.* at 774.

189. *Id.*

190. *Compare id.* at 773 (explaining that the appellant requested an extension of time in which to file a Rule 59(e) motion, which was subsequently granted by the district court), *with* Wolfsohn v. Hankin, 321 F.2d 393, 394 (D.C. Cir. 1963) (per curiam) (noting that in response to the appellant's motion, the district court granted an extension of time in which to file a Rule 59(b) motion), *rev'd*, 376 U.S. 203 (1964) (per curiam).

191. *Rhoden*, 153 F.3d at 774 (citing Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989)).

192. *Id.* (emphasis added).

193. *See, e.g.*, Charles. v. Barnhart, 375 F.3d 777, 781-82 (8th Cir. 2004).

194. *Id.* at 781.

195. *See id.*

196. *Id.* at 781-82.

197. *See id.*

relies upon that assurance in failing to file a timely notice of appeal."[198] Given the district court's act of extending the time in which Charles could file a Rule 59(e) motion, the Eighth Circuit was satisfied that "Charles's untimely appeal falls within the narrow parameters of" the doctrine.[199]

The failure of both the *Rhoden* court and the *Charles* court to even mention *Wolfsohn*, let alone consider it as controlling precedent, demonstrates the extent to which the *Osterneck* formulation had displaced the original understanding of the unique circumstances doctrine in the courts of appeals. Indeed, the determination of whether the doctrine applied in both cases turned upon whether the district court's decision to extend the time to file a Rule 59 motion amounted to a specific assurance within the meaning of *Osterneck*.[200] Considering that the courts of appeals were caught up in the misguided search for an assurance that is "specific," it is not surprising that they reached conflicting conclusions in the context of a district court's unauthorized extension of a Rule 59 motion.

The courts of appeals would have achieved clarity and consistency in addressing this scenario by returning to the broader conception of reasonable reliance that served as the basis for the unique circumstances doctrine in general, and for the Supreme Court's disposition in *Wolfsohn* in particular.[201] Even though a district court lacks the authority to extend the time to file a Rule 59 motion (or a related motion),[202] its act of granting an extension carries with it the implicit representation that a motion would be timely if filed within the extended time. Should the appellant rely upon that representation in delaying the filing of an appeal from the underlying judgment until after the district court decides the motion, the court of appeals must then view that motion as timely, and thus as having the effect of delaying the running of the appeal period until the district court decides the motion. The appellant's notice of appeal, if filed within the appeal period counting from the disposition of the motion, would thus be determined to be timely. The court of appeals could then proceed to decide the merits of the appeal from the underlying judgment.

198. *Id.* at 782 (emphasis added) (internal quotation marks omitted) (citing Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989); Thompson v. INS, 375 U.S. 384, 386-87 (1964) (per curiam)).

199. *Id.*

200. *See id.* at 781-82; Rhoden v. Campbell, 153 F.3d 773, 774 (6th Cir. 1998).

201. *See supra* Part III.B.2.

202. *See* FED. R. CIV. P. 6(b).

3. An Appellant's Reliance upon a Representation from a District Clerk

A third recurring situation implicating the unique circumstances doctrine concerns an appellant's reliance upon a representation of the clerk of the district court (or a member of the clerk's staff) in foregoing the filing of a notice of appeal during the prescribed time.[203] Not every court of appeals, however, has considered such reliance to be reasonable. Indeed, several courts of appeals have construed a "judicial officer," as it appeared in the *Osterneck* formulation, as meaning a judge and only a judge.[204]

The Sixth Circuit employed this approach in dismissing the appeal at issue in *Lawrence v. International Brotherhood of Teamsters*.[205] In that case, Carl Lawrence sought to appeal from an adverse judgment by way of a notice of appeal filed two days in excess of the thirty-day appeal period.[206] Despite the untimeliness of the appeal, Lawrence urged that the court preserve it under the unique circumstances doctrine because personnel in the district clerk's office had confirmed that the appeal would be timely if filed on April 13, 2001, the date on which it was indeed filed.[207]

The Sixth Circuit rejected Lawrence's contention, holding that the phrase "judicial officer" within the meaning of the *Osterneck* formulation was limited to a judge.[208] The court reasoned that such a limitation "makes sense because 'a formal order or ruling (1) generates the highest level of justifiable reliance, and (2) raises virtually no possibility of evidentiary problems for appellate courts faced with applying the exception.'"[209] Notably, however, the court could have promoted these same important policy concerns simply by confining "judicial officer" to court personnel who render official communications to litigants, thereby excluding members of the clerk's staff whose contact with litigants is merely informal.[210]

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203. *See, e.g.*, Lawrence v. Int'l Bhd. of Teamsters, 320 F.3d 590, 593-94 (6th Cir. 2003).

204. *See, e.g., id.*; United States v. Heller, 957 F.2d 26, 29 (1st Cir. 1992) (per curiam). The Seventh Circuit had so limited the unique circumstances doctrine even before *Osterneck*. *See* Sonicraft, Inc. v. NLRB, 814 F.2d 385, 387 (7th Cir. 1987).

205. 320 F.3d at 593-94.

206. *See id.* at 592.

207. *See id.*

208. *Id.* at 593-94.

209. *Id.* at 594 (quoting Moore v. S.C. Labor Bd., 100 F.3d 162, 164 (D.C. Cir. 1996) (per curiam)).

210. *See Moore*, 100 F.3d at 164 ("This case does not qualify for application of the unique circumstances doctrine because although the statements made by the clerk's office

The most troubling aspect of the Sixth Circuit's approach in *Lawrence* was that it excluded from the scope of the unique circumstances doctrine a variety of situations in which an appellant's reliance would be reasonable even though a judge was not responsible for the erroneous representation in question. The Eleventh Circuit was presented with such a situation in *Hollins v. Department of Corrections*, which arose from a petition for federal habeas corpus relief that Wilbert Hollins filed in the United States District Court for the Southern District of Florida.[211] That court, as do many federal courts, offered litigants remote access to docket information through the Public Access to Court Electronic Records (PACER) system.[212] Using PACER, Hollins's counsel regularly monitored the docket for any activity regarding Hollins' petition.[213] Despite his monitoring, however, Hollins' counsel never learned that the district court had actually denied the petition in July 1997 because the electronic docket available to PACER users failed to reflect the disposition.[214] Moreover, neither Hollins nor his counsel received a mailed copy of the order.[215] It was not until October 1998, more than fourteen months later, that Hollins' counsel finally learned of the district court's decision during a conversation with a member of the court's staff.[216] By then, the time in which Hollins was required to file a notice of appeal from the decision had expired.[217]

Although Hollins' notice of appeal was filed well out of time, the Eleventh Circuit determined that "Hollins' officially invited reliance on the PACER system's version of the docket" constituted the type of situation that falls within the unique circumstances doctrine.[218] In so ruling, the court found that the failure of personnel in the district clerk's office to enter the denial of Hollins' petition on the electronic

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staff may constitute specific assurances, they cannot fairly be characterized as *official* judicial action." (emphasis added)). To support the classification of communications with or from clerk staff as informal or unofficial in character, see *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 152 (2d Cir. 1999) ("With regard to the oral communication with the clerk's office, such statements by a member of the clerk's office staff are not official judicial assurances that qualify as unique circumstances.").

211. 191 F.3d 1324, 1326 (11th Cir. 1999).
212. *Id.*
213. *Id.*
214. *Id.*
215. *See id.*
216. *Id.*
217. *Id.*
218. *Id.* at 1325-26.

docket available to PACER users constituted a specific assurance by a judicial officer within the meaning of *Osterneck*.[219]

The court further determined that it was reasonable for Hollins' counsel to rely upon the entries in the electronic docket available to PACER users, considering that the district court had invited such reliance by stating on its internet home page that PACER provided access to "*official* electronic case information and court dockets."[220] The court was satisfied that the district clerk's failure to enter the denial of Hollins' petition on the electronic docket, combined with the district court's officially invited reliance on the PACER system, "led Hollins' counsel reasonably to believe the district court had not yet issued a final order in the case."[221] The case thus presented unique circumstances requiring an exercise of the court's equitable power to proceed to the merits of Hollins' untimely appeal.[222]

Of course, the preceding disposition could not have occurred if Hollins had initiated his appeal in the Sixth Circuit. In light of that court's established take on the phrase "judicial officer" as used in *Osterneck*, it would have dismissed the appeal forthwith solely on the basis that the reliance-inducing mistake at issue was committed not by a judge, but by personnel in the district clerk's office.[223] Accordingly, regardless of how reasonable it was for Hollins' counsel to rely upon the failure of the PACER system to reflect the denial of his client's petition, the situation would have fallen outside the scope of the unique circumstances doctrine.

This unfortunate disparity in approaches occurred because the *Osterneck* formulation's requirement of a judicial officer distracted the courts of appeals from the appropriate inquiry: whether the representation upon which the appellant relied was rendered by court personnel in the form of an official communication.[224] Indeed, a litigant's reliance upon such a communication in foregoing an opportunity to initiate a timely appeal would be just as reasonable as reliance upon a ruling of a district judge extending the time to file a notice of appeal,[225] an explicit statement of a district judge that a

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219. *Id.* at 1328 (quoting Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989)).

220. *Id.* (internal quotations marks omitted).

221. *Id.*

222. *Id.*

223. *See* Lawrence v. Int'l Bhd. of Teamsters, 320 F.3d 590, 593-94 (6th Cir. 2003); Rhoden v. Campbell, 153 F.3d 773, 774 (6th Cir. 1998).

224. *See supra* text accompanying note 210.

225. *See* discussion *supra* Part III.A.

motion for a new trial had been timely filed,[226] or a ruling of a district judge extending the time to file a motion for a new trial.[227] Accordingly, a court of appeals, in the manner of the Eleventh Circuit in *Hollins*, would be acting consistently with the original understanding of the unique circumstances doctrine by using its equitable power to preserve an appeal.

## IV. THE DEMISE OF THE UNIQUE CIRCUMSTANCES DOCTRINE IN CIVIL PROCEEDINGS

As discussed in the preceding Part, the *Osterneck* formulation caused a great deal of confusion and inconsistency in the courts of appeals by significantly narrowing the scope of the unique circumstances doctrine.[228] But the damage that *Osterneck* wrought upon the doctrine has been overshadowed by the Supreme Court's recent holding that the doctrine never should have been invoked to preserve an appeal as of right in a civil proceeding in the first place.[229]

The first serious articulation of this view in a decision of the Supreme Court appeared in a separate opinion authored by Justice Scalia in *Houston v. Lack*.[230] Although the Court's disposition in *Houston* did not implicate the unique circumstances doctrine,[231] Justice Scalia, writing for himself and three other Justices, took the opportunity to challenge the underpinnings of the doctrine.[232] The thrust of Justice Scalia's position was that the doctrine could not be reconciled with a jurisdictional conception of the requirements for the filing of a timely notice of appeal, which the Court had affirmed subsequent to the trilogy of *Harris*, *Thompson*, and *Wolfsohn*.[233] Persuaded by Justice Scalia's analysis, many courts of appeals subsequently expressed skepticism concerning the viability of the

226. *See* discussion *supra* Part III.B.1.

227. *See* discussion *supra* Part III.B.2.

228. *See* discussion *supra* Part III.D.

229. *See* Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007).

230. 487 U.S. 266, 277-84 (1988) (Scalia, J., dissenting).

231. The Court held that the appeal at issue was timely because the appellant, a prison inmate, filed his notice of appeal with prison authorities within the applicable thirty-day period under Rule 4(a)(1) of the Federal Rules of Appellate Procedure. *Id.* at 269-70 (majority opinion). Accordingly, the Court had no need to consider whether to invoke the unique circumstances doctrine in order to preserve the appeal. *Id.* at 276 n.4.

232. *Id.* at 282 (Scalia, J., dissenting).

233. *See id.* (citing Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 61 (1982) (per curiam); Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 264 (1978)).

doctrine.[234] Indeed, one prominent treatise described the doctrine as being "at best, on life support."[235]

The Court ultimately confirmed the merit of Justice Scalia's view in the recent case of *Bowles v. Russell*.[236] As previously discussed, *Bowles* involved an appellant who successfully moved to reopen the time to appeal.[237] The district court, however, reopened the appeal period for seventeen days,[238] even though Appellate Rule 4(a)(6), and its statutory counterpart in 28 U.S.C. § 2107(c), allow for a reopening of no more than fourteen days. Bowles then filed his notice of appeal within the time afforded by the district court, but beyond the permitted fourteen-day period.[239] The Sixth Circuit subsequently dismissed the appeal for lack of jurisdiction based on Bowles' untimely filing of his notice of appeal.[240]

In affirming the Sixth Circuit's judgment, the Supreme Court emphasized its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional."[241] The Court observed that the timing restrictions relating to the reopening of an appeal, like the initial thirty-day period for the filing of a notice of appeal in a civil proceeding, are set forth in 28 U.S.C. § 2107.[242] Because Congress has specifically limited the amount of time in which a district court is authorized to reopen the appeal period, a litigant's failure to file a notice of appeal within that time deprives the court of appeals of jurisdiction over the ensuing appeal.[243]

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234. *See, e.g.*, United States v. Marquez, 291 F.3d 23, 28 (D.C. Cir. 2002); Panhorst v. United States, 241 F.3d 367, 371-72 (4th Cir. 2001); Arnold v. Wood, 238 F.3d 992, 996-97 (8th Cir. 2001); Anderson v. Mouradick (*In re* Mouradick), 13 F.3d 326, 329 n.5 (9th Cir. 1994); United States v. Heller, 957 F.2d 26, 28-29 (1st Cir. 1992) (per curiam); Pinion v. Dow Chem., U.S.A., 928 F.2d 1522, 1529 (11th Cir. 1991); Varhol v. Nat'l R.R. Passenger Corp., 909 F.2d 1557, 1561-62 (7th Cir. 1990) (per curiam); Kraus v. Consol. Rail Corp., 899 F.2d 1360, 1362-64 (3d Cir. 1990).

235. 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 37 (3d ed. 1999 & Supp. 2007).

236. 127 S. Ct. 2360 (2007). For critical assessments of the Supreme Court's rationale in *Bowles*, see Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. 64 (2007); Scott Dodson, *Jurisdictionality and* Bowles v. Powell, 102 NW. U. L. REV. 42 (2007); E. King Poor, *The Jurisdictional Time Limit for an Appeal: The Worst Kind of Deadline—Except for All Others*, 102 NW. U. L. REV. 151 (2008).

237. *Id.* at 2362.

238. *Id.*

239. *Id.* at 2362.

240. *Id.* at 2363.

241. *Id.* at 2364.

242. *Id.* at 2366.

243. *See id.*

Having confirmed that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," the Court proceeded to declare that the application of the unique circumstances doctrine in such a case is illegitimate.[244] In doing so, the Court highlighted that federal courts have no authority "to create equitable exceptions to jurisdictional requirements."[245] The Court thus expressly overruled *Harris* and *Thompson* "to the extent they purport to authorize an exception to a jurisdictional rule."[246]

## V. RECLAIMING THE UNIQUE CIRCUMSTANCES DOCTRINE THROUGH CONGRESSIONAL ACTION

The Supreme Court's abandonment of the unique circumstances doctrine in civil proceedings presents a splendid opportunity for Congress to reclaim the essence of the doctrine in legislative form. Of course, given the defects in the *Osterneck* formulation, a codification of the doctrine should capture the original understanding of the doctrine as developed in *Harris*, *Thompson*, and *Wolfsohn*. These cases appropriately affirm the notion that normally applicable timing restrictions should not control when the appellant would have complied with those restrictions but for a district court's erroneous representation that additional time to appeal would be available.[247] Such a situation requires that the court of appeals assume the truth of the representation, and determine the timeliness of the appeal accordingly.

Thus, § 2107 should be amended, with a corresponding amendment to Appellate Rule 4(a), to provide that a court of appeals, in determining whether an appeal is timely, must accept as true any representation of a district court upon which a litigant reasonably relies in foregoing an opportunity to initiate an indisputably timely appeal. For purposes of this amendment, the representations worthy of a reasonable reliance should include not just those of a judge, but those of a district clerk (or representative thereof) when rendering official written communications to litigants. This latter qualification, which would rule out oral or otherwise informal discussions between a

244. *Id.*

245. *See id.*

246. *Id.* Presumably, the unique circumstances doctrine may still be invoked with respect to an appeal initiated by a defendant in a criminal case, given that the timing requirements in question are not jurisdictional in nature. *See* Eberhart v. United States, 546 U.S. 12, 13, 19 (2005) (per curiam).

247. *See* discussion *supra* Part III.A-B.

litigant and personnel in the district clerk's office, would effectively eliminate the legitimate concern of evidentiary problems while ensuring that a litigant is not penalized for trusting the accuracy of an official court communication that happened to contain a clerical error or oversight.[248]

It must be emphasized that the proposed amendment to § 2107 would constitute one more step in Congress's effort to provide equity-rooted avenues of relief to appellants whose time to pursue an appeal as of right in a civil proceeding has expired. As discussed earlier, the statute already authorizes a district court to extend an expired appeal period for an appellant who can demonstrate good cause or excusable neglect, or to reopen an expired appeal period for an appellant who did not receive notice of the relevant judgment or order.[249] It follows that the statute would also afford relief to appellants who reasonably rely upon representations of the district court in foregoing an opportunity to file a timely notice of appeal.

## VI. CONCLUSION

The Supreme Court recognized the unique circumstances doctrine in order to equip the courts of appeals with an equitable basis upon which to reach the merits of an appeal that would have been filed in a timely fashion were it not for the appellant's reasonable reliance upon a district court's representation that the appeal period would be lengthier than it turned out to be. In such a case, the doctrine would permit a court of appeals to apply a quasi-estoppel approach by assuming the truth of the district court's representation, even if legally incorrect, and assess the timeliness of the appeal accordingly.

Unfortunately, however, the Supreme Court's latest pronouncements on the unique circumstances doctrine have ensured that many litigants will undeservedly lose the opportunity to have their appeals adjudicated on the merits. Even before determining in *Bowles* that the doctrine, in retrospect, cannot be applied to save any appeals as of right in a civil proceeding, the Court in *Osterneck* generated confusion and inconsistency by forcing the courts of appeals to confine their analysis to improper acts of appellants and specific assurances of judicial officers. As it turns out, under either *Bowles* or *Osterneck*, the doctrine could not be applied to preserve an appeal initiated under the

248. *See* discussion *supra* Part III.D.3.
249. *See* 28 U.S.C. § 2107(c) (2000).

circumstances giving rise to *Harris*, in which the Court initially recognized and invoked the doctrine.

It is now the responsibility of Congress to reclaim the unique circumstances doctrine through an amendment to § 2107 that captures the original understanding of the doctrine as developed in *Harris*, *Thompson*, and *Wolfsohn*. Such a provision would constitute an appropriate addition to a statute that contains existing avenues of relief from the ordinarily governing timing restrictions for the filing of a notice of appeal in civil cases.