THE FICTION OF EQUITABLE INTERLOCUTORY JURISDICTION

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The delegation of jurisdiction from Congress to the courts finds itself plainly described in Article III of the United States Constitution. However, all too often, this delegation has been confused in several contexts. If ignored, courts will continue to exercise discretion that they do not have and delegitimize the very structure that gives them any power to begin with.

INTRODUCTION

In federal civil procedure, some rules are malleable, while others are famously unforgiving.[1] As any first-year law student could tell you, a judge may not stipulate to subject-matter jurisdiction.[2] Conversely, FRCP 5.1(c) provides that "[u]nless the court sets a later time, the attorney general may intervene within 60 days," which explicitly allows a judge to change the rules.[3] Recent debate surrounds whether 28 U.S.C. § 1292(b) is a rule with such flexibility. A primary purpose of this article is to show that it is not.[4]

Section 1292(b) is a unique statute that allows a party to appeal an interlocutory order when it "involves a controlling question of law as to

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[1] *See* Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 883 (2020) (providing, for example, that neither parties nor the judge can stipulate to subject-matter jurisdiction).

[2] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (noting that "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived").

[3] FED. R. CIV. P. 5.1(c).

[4] *See* discussion *infra* Part I.B. Section 1292(b) is: (1) jurisdictional because it is "a time prescription governing the transfer of adjudicatory authority from one Article III court to another [that] appears in a statute;" and (2) not subject to equitable tolling because "this Court has no authority to create equitable exceptions to jurisdictional requirements."

which there is substantial ground for difference of opinion."[5] As opposed to a traditional appeal, an interlocutory appeal takes place before the final order.[6] Of course, this is a shift from the default rule that only final orders are appropriate for appeal.[7] Appealing an interlocutory order can offer significant advantages to litigants and courts alike, including disposing of the litigation altogether.

For appeal, the statute requires double certification: first from the district court, then from the court of appeals.[8] This ensures that both the district and appellate courts agree that resolution of the interlocutory order is in everyone's best interest.[9] Additionally, the rule provides that the application to the court of appeals must be made within ten days after the district court's order is entered.[10] This way, the appellate court is reviewing the order in the same light that the district court did when it made its certification.[11]

Until recently, the simplicity of this procedure was lost on the circuits.[12] As expected, would-be appellants have missed the ten-day window demanded by statute.[13] Some litigants may have failed to meet the deadline in good faith, while others ignorantly forgot. Consequently, district courts would simply reenter their certification and give the party a second bite at the apple.[14] An overwhelming majority of circuits continue the loophole today.[15] While seemingly harmless, the Supreme Court has effectively prohibited this practice in comparable contexts over the past two decades.[16] Why? Because some rules are simply unmalleable from the bench.[17]

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[5] 28 U.S.C. § 1292(b).

[6] *See id.*

[7] *Compare* 28 U.S.C. § 1291 (providing that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States"), *with* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (recognizing a "small class of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final'").

[8] *See* 28 U.S.C § 1292(b).

[9] *See id.*

[10] *Id.*

[11] *See id.*

[12] *See, e.g.*, Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 246–47 (7th Cir. 1981), *overruled by* Groves v. United States, 941 F.3d 315 (7th Cir. 2019).

[13] *E.g., id.* at 245.

[14] *See id.* at 246.

[15] *See* discussion *infra* Part II.

[16] *See* Bowles v. Russell, 551 U.S. 205, 209–10 (2007); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 713 (2019).

[17] *See Bowles*, 551 U.S. at 209–10; *Lambert*, 139 S. Ct. at 715.

These unmalleable rules come in many forms, most notably of which are rules that are categorized as "jurisdictional." A filing deadline prescribed by statute is one considered to be jurisdictional, meaning that late filing of the appeal notice necessitates dismissal of the appeal.[18] In contrast, a time limit prescribed only in a court-made rule is not jurisdictional but is a mandatory claim-processing rule that may be waived or forfeited.[19] For some time, courts disagreed (sometimes with themselves) as to what makes a rule jurisdictional.[20]

After decades of confusion, the late Justice Ginsburg announced a rule "both clear and easy to apply: If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional . . . otherwise, the time specification fits within the claim-processing category."[21] The Court distinguishes time prescriptions imposed by Congress through statute from court-made rules or deadlines.[22] "[P]revailing precedent makes the distinction critical," the Court warns.[23] "Failure to comply with a jurisdictional time prescription, we have maintained, deprives a court of adjudicatory authority over the case, necessitating dismissal—a 'drastic' result."[24]

Federal courts derive any and all power from Article III of the United States Constitution, which reads, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[25] In other words, Congress makes the rules.[26] That is why these jurisdictional deadlines cannot be waived or changed by courts. Courts may have the power to change some rules, like in Federal Rule of Civil Procedure 5.1(c).[27] Congress could even write in a statute that a rule is discretionary.[28] However, Congress did not do

[18] Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 16 (2017).

[19] *Id.* at 16–17.

[20] *See id.* at 17 (noting that "[t]his Court and other forums have sometimes overlooked this distinction . . . .").

[21] *Id.* at 20.

[22] *See id.* at 17.

[23] *Id.*

[24] *Id.*

[25] U.S. CONST. art. III, § 1.

[26] *See id.*; U.S. CONST. art. III, § 2.

[27] *See* FED. R. CIV. P. 5.1(c) (allowing a court to change the time period prescribed in the rule).

[28] *See* U.S. CONST. art. III, § 1.

so in § 1292(b), and pretending that it did threatens the legitimacy of this constitutional structure.[29]

Article III structure is not subject to equitable exceptions absent congressional authorization. While a majority of circuits maintain a fiction that equity creates an exception, a recent split among the circuits gives us newfound hope.[30] This article will: (1) provide a warning and guide to practitioners concerned with preserving appeal; and (2) advocate for reverence toward the constitutional structure in both trivial and extreme circumstances.

JUDGE BARRETT AND THE SEVENTH CIRCUIT ADMIT, "WE WERE WRONG" IN *GROVES*

Abandoning a Decades-Old Practice

When a district court certifies an interlocutory order for review before final judgment, parties have ten days to petition the appellate court to hear the interlocutory appeal.[31] Most jurisdictions, including the Seventh Circuit, had provided a way to circumvent that deadline.[32] District courts could reenter or recertify their orders—restarting the ten-day clock as if it never began.[33] That practice was discontinued in the Seventh Circuit when then-Judge Amy Coney Barrett authored the *Groves* opinion, citing the very Court she would soon join.[34]

The facts of *Groves* are tragically relatable and painfully damning. After receiving the district court's permission to appeal, Mr. Groves sought Seventh Circuit certification on exactly the tenth day from the district court order.[35] When sending the application, a paralegal mistyped the clerk's e-mail address, leaving the application undelivered.[36] An automated message

[29] *See* 28 U.S.C. § 1292(b) (omitting any language suggesting permitted tolling).

[30] *See* Groves v. United States, 941 F.3d 315, 322–23, 322 n.5 (7th Cir. 2019) (creating a circuit split over the issue of whether the § 1292(b) deadline may be tolled).

[31] 28 U.S.C. § 1292(b).

[32] *See, e.g.*, Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 248 (7th Cir. 1981), *overruled by* Groves v. United States, 941 F.3d 315 (7th Cir. 2019).

[33] *See id.*

[34] *Groves*, 941 F.3d at 323.

[35] *Id.* at 318.

[36] *Id.*

noting the failure was sent to the paralegal within minutes, only to find itself in a spam folder, undiscovered until two days later.[37]

Not to worry, the Seventh Circuit had historically provided an easy fix for Mr. Groves.[38] For decades, the Seventh Circuit permitted district courts to reenter or recertify their orders—restarting the clock—whenever doing so would "further the purpose of the interlocutory review statute."[39] Unfortunately for Mr. Groves, this easy fix disappeared the day his case reached the Seventh Circuit.[40] The Seventh Circuit acknowledged that recent Supreme Court precedent "call[ed] that workaround into question."[41]

The Seventh Circuit abandoned its decades-old practice due to recent developments made by the Supreme Court. Justice Barrett wrote, "[i]n light of the Court's precedent, we conclude that *we were wrong* to hold that district courts can extend the ten-day window by simply reentering or recertifying their orders."[42] Mr. Groves's appeal was dismissed for lack of jurisdiction.[43] In sum, the Seventh Circuit held that "[t]he statute does not authorize either district courts or the courts of appeals to extend § 1292(b)'s deadline for any reason."[44] While the Supreme Court has not announced the same conclusion explicitly, we can clearly trace the Seventh Circuit's reasoning to show why the Court would reach the same conclusion if the opportunity presented itself.[45]

Guidance from Our Highest Court

Over the past two decades, the Supreme Court has erected a framework that should urge the split-majority toward an updated holding.[46] Notably, this framework was necessary to clean up the mess that the Court admittedly

[37] *Id.*

[38] *See Nuclear Eng'g*, 660 F.2d at 241.

[39] *Groves*, 941 F.3d at 318.

[40] *Id.*

[41] *Id.*

[42] *Id.* (emphasis added).

[43] *Id.*

[44] *Id.* at 321.

[45] *See id.* (noting that the Seventh Circuit is only changing its mind because new Supreme Court precedent casts doubt on the outdated practice).

[46] *See* Bowles v. Russell, 551 U.S. 205, 207–08 (2007); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 713 (2019).

created itself.[47] For decades, the word "jurisdictional" was "a word of many, too many, meanings," encompassing claim-processing rules, mandatory rules, and indeed jurisdictional rules.[48] While tantalizing, a discussion of this "mess" is beyond the scope of this Article. What is relevant here is that the Court finally clarified (1) what makes a rule jurisdictional and (2) whether a jurisdictional rule may be waived or excused.[49]

In *Bowles v. Russell*, a criminal defendant failed to timely file a notice of appeal and moved to reopen the filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6) and 28 U.S.C. § 2107(c), which authorizes the district court to extend the deadline for a period of fourteen days.[50] The district court granted the motion but inexplicably provided seventeen days to file.[51] After filing his notice of appeal outside the fourteen-day statutory period—but within the seventeen-day fictional period—the Supreme Court held that the "untimely notice—even though filed in reliance upon a District Court's order—deprived the Court of Appeals of jurisdiction."[52] As mentioned, the Court in *Bowles* reached this conclusion and provided us with two crucial clarifications.

The first clarification is what characterizes a rule as "jurisdictional."[53] The Court reasoned that "[b]ecause Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period . . . that limitation is more than a simple 'claim-processing rule.'"[54] To supplement, "when an 'appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of *jurisdiction*.'"[55] Avoiding any confusion, this premise was reiterated ten years later in *Hamer*: "If a time prescription governing the

[47] *See Bowles*, 551 U.S. at 215 (Souter, J., dissenting) (noting that the justices "have tried to clean up [their] language").

[48] *Id.* The Court has even observed that rules can be mandatory and jurisdictional, mandatory but not jurisdictional, and that claim-processing rules are both separate from mandatory rules and synonymous with mandatory rules. While fascinating to explore, there is admittedly a lot to unpack here.

[49] *See id.* at 213 (majority opinion).

[50] *Id.* at 207.

[51] *Id.*

[52] *Id.* at 206–07.

[53] While somewhat vague in the *Bowles* language, the premise is solidified by the Court years later. *See Bowles*, 551 U.S. at 213; Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 20 (2017).

[54] *Bowles*, 551 U.S. at 213.

[55] *Id.* (quoting United States v. Curry, 47 U.S. 106, 113 (1848)) (emphasis added).

transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional."[56]

The second clarification is whether a jurisdictional rule may be waived or excused. After characterizing the rule as jurisdictional, the Court concluded that "because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations."[57] To emphasize, the Court responded to Bowles' "unique circumstances" excuse by plainly stating, "[b]ecause this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate."[58] In sum, a jurisdictional rule is neither waivable nor excusable, even when equity calls for such action.[59]

More recently, the Court emphasized the rigidity of filing deadlines for interlocutory appeals, even when they appear in claim-processing rules.[60] In *Lambert*, the Court concluded that the fourteen-day deadline to appeal a class-certification decision—an interlocutory order—could not be extended by a court of appeals.[61] This was so even though the relevant deadline came from Rule 23(f), a non-jurisdictional claim-processing rule, as opposed to a jurisdictional statutory deadline.[62] In other words, the Supreme Court found it beyond the power of the courts to adjust the less stringent, nonjurisdictional rule, in *some* contexts, and beyond the power of the courts to adjust the more stringent jurisdictional rules in *all* contexts.[63]

Synthesizing *Bowles*, *Lambert*, and *Hamer*, the suggestion that § 1292(b) is subject to equitable tolling loses all its flavor.[64] The Supreme Court has made a point to limit judicial overreach when it comes to statutory deadlines.[65] Applying this guidance here, § 1292(b) is: (1) jurisdictional because it is "a time prescription governing the transfer of adjudicatory

[56] 138 S. Ct. at 20.

[57] *Bowles*, 551 U.S. at 213 (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 513–14 (2006)).

[58] *Id.* at 213–14.

[59] *See id.* at 213.

[60] *See* Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714–15 (2019).

[61] *Id.*

[62] *Id.*

[63] *See id.*

[64] *See id.*; *Bowles*, 551 U.S. at 206–07; Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 20 (2017).

[65] *See Bowles*, 551 U.S. at 210.

authority from one Article III court to another [that] appears in a statute;"[66] and (2) not subject to equitable tolling because "this Court has no authority to create equitable exceptions to jurisdictional requirements."[67] While the Supreme Court has not addressed § 1292(b) head-on, it is extremely difficult to imagine how it might maneuver around its own precedent to a different conclusion.

THE SURVIVING MAJORITY

As of the date of this Article, only the Seventh and D.C. Circuits make up the small minority of courts that prohibit equitable tolling. Although most circuits have not addressed the issue since the Supreme Court remodeled its jurisdictional jurisprudence, recent holdings suggest that the split might not be going anywhere anytime soon.[68]

Most recently, the Southern District of New York recertified an order pursuant to Second Circuit precedent that was set in 1996—predating the Supreme Court's 2007 *Bowles* decision.[69] The court cites *Groves* and even points to the *Bowles* reasoning without giving any explanation for ignoring it (other than the 1996 Second Circuit holding).[70] Only time will tell how the Second Circuit will respond, although the Supreme Court's recent framework should urge the court toward an updated holding.[71]

The syllogism provided by the Seventh Circuit seems simple enough. Courts do not have the power to create equitable exceptions to jurisdictional rules.[72] Section 1292(b) is a jurisdictional rule because it governs the transfer of adjudicatory authority from one Article III court to another and appears in a statute.[73] Thus, courts do not have the authority to create an equitable exception to § 1292(b).[74] Notwithstanding this simplicity, all but two circuit courts have failed to recognize the logic. Why could that be? The Southern

[66] *Hamer*, 138 S. Ct. at 20.

[67] *Bowles*, 551 U.S. at 214.

[68] *See* Guzman v. First Chinese Presbyterian Cmty. Affs. Home Attendant Corp., No. 20-cv-3929, 2021 WL 2188020, at *1–2 (S.D.N.Y. May 28, 2021) (citing Marisol A. v. Giuliani, 104 F.3d 524, 528 (2d Cir. 1996)).

[69] *Id.*

[70] *See id.*

[71] *See* Groves v. United States, 941 F.3d 315, 318 (7th Cir. 2019)

[72] *Id.* at 321.

[73] *See* Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 20 (2017).

[74] *See id.* at 17.

District of New York, for example, is operating under Second Circuit guidance, which predates Supreme Court guidance.[75] However, outdated precedent is not the only barrier to a toll-free 1292(b).

Advocates have advanced several arguments to protect the infinite deadline such as the clear statement rule, statutory interpretation, and perplexing Supreme Court precedent. However, the basic framework that the Supreme Court has developed squashes each argument, making it clear that the jurisdictional § 1292(b) statute is not subject to equitable tolling.[76]

The "Clear-Statement" Rule

In an effort to save the exception, Mr. Groves argued that no statutory deadline is jurisdictional unless Congress clearly says so.[77] In briefing, Groves argued that "Congress did [nothing] 'special' to suffuse the ten-day deadline to petition for permission to file an interlocutory appeal with jurisdictional significance."[78] The Seventh Circuit found this reasoning to be "mistaken."[79] Citing Supreme Court precedent, the Seventh Circuit noted that "[t]he clear-statement rule applies only when a time limit appears in a statute that does *not* govern an Article III court's adjudicatory authority."[80] Proper application of the clear-statement rule helps the court determine whether Congress has exercised its power to "attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule."[81] However, § 1292(b) does in fact govern an Article III court's adjudicatory authority, leaving the clear-statement rule misplaced in this context.[82]

In fact, when a time limit appears in a statute that does address an Article III court's adjudicatory authority, as § 1292(b) does, the default runs the other way—the limit is presumptively jurisdictional.[83] That presumption is

[75] *Guzman*, 2021 WL 2188020, at *1–2 (citing Marisol A. v. Giuliani, 104 F.3d 524, 528 (2d Cir. 1996)).

[76] *See* Bowles v. Russell, 551 U.S. 205, 206–07 (2007); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019); *Hamer*, 138 S. Ct. at 16–17.

[77] *Groves*, 941 F.3d at 319.

[78] Supplemental Brief for Plaintiff-Appellant Philip G. Groves at 12, *Groves*, 941 F.3d 315 (No. 17-2937).

[79] *Groves*, 941 F.3d at 319.

[80] *Id.* at 319–20 (citing *Hamer*, 138 S. Ct. at 20 n.9) (emphasis in original).

[81] Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

[82] *Groves*, 941 F.3d at 319–20.

[83] *Id.* at 320 (citing *Hamer*, 138 S. Ct. at 20 n.9) (emphasis in original).

consistent with the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional"—a principle that the Supreme Court emphasized in *Bowles*.[84]

Groves then relies on a backup argument: Even if the clear-statement rule is narrower in scope, it applies here because § 1292(b) does not *really* govern the transfer of adjudicatory authority from the district court to the court of appeals because the district court retains jurisdiction over the case even if the petition is granted.[85] Once again, the Seventh Circuit finds Groves's argument to be "meritless."[86] Section 1292(b) does govern the transfer of adjudicatory authority to the courts of appeals because it empowers them "to review a district-court order, and once that order is on appeal, the district court can no longer modify it."[87]

Not even the split-majority would agree with Mr. Groves here.[88] Neither the Seventh Circuit nor any other circuit questions the jurisdictional status of the ten-day limit.[89] The Sixth Circuit stated that "[f]ailure to file an appeal within the 10–day period is a jurisdictional defect that deprives this court of the power to entertain an appeal."[90] The Fourth Circuit similarly stated "[t]he ten-day filing requirement is jurisdictional and therefore may not be waived."[91] So, why are these circuits on the other side of the split? The majority accepts the rule as jurisdictional, but for some reason maintains the fiction that, in this single circumstance, a jurisdictional rule can be tolled.[92] Contrary to this fiction, Supreme Court precedent prohibits the attachment of any exception to a jurisdictional rule.[93]

[84] *Id.*; Bowles v. Russell, 551 U.S. 205, 210 (2007).

[85] Supplemental Brief for Plaintiff-Appellant Philip G. Groves at 14, *Groves*, 941 F.3d 315 (No. 17-2937).

[86] *Groves*, 941 F.3d at 320.

[87] *Id.*

[88] *See* In re City of Memphis, 293 F.3d 345, 348 (6th Cir. 2002); Safety-Kleen, Inc. (Pinewood) v. Wyche, 274 F.3d 846, 866 (4th Cir. 2001).

[89] *Groves*, 941 F.3d at 321.

[90] *In re City of Memphis*, 293 F.3d at 348.

[91] *Wyche*, 274 F.3d at 866.

[92] *See, e.g.*, Marisol A. v. Giuliani, 104 F.3d 524, 528 (2d Cir. 1996).

[93] *See* Bowles v. Russell, 551 U.S. 205, 213 (2007).

A Possible Interpretation of Lambert.

In *Lambert*, while discussing the procedural rule, and with one sentence, the Court disrupts what we might have thought to be our framework.[94] "Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility."[95] Surely, the Court added this language to be *inclusive* of procedural rules to jurisdictional treatment, but perhaps accidentally used language that could *exclude* jurisdictional rules from jurisdictional treatment.[96] In other words, this language could leave room for the argument that a jurisdictional deadline can be tolled if the text leaves room for it.[97] While the argument can be made, it will almost certainly fail.[98]

First, it is worth reiterating the holding in *Lambert*. To begin the opinion, Justice Sotomayor writes "[t]his case poses the question whether a court of appeals may forgive on equitable tolling grounds a failure to adhere to that deadline when the opposing party objects that the appeal was untimely."[99] The next sentence reads, "[t]he applicable rules of procedure make clear that the answer is no."[100] While we get lost in the weeds of the *Lambert* opinion, it is crucial that this holding remain paramount.

Nevertheless, the argument might be made that the text of § 1292(b) affords some flexibility. Language such as "within ten days *after the entry of the order* . . ." cracks the door open just enough to let some air in.[101] If a new order is entered or an existing order is recertified, does that leave room for flexibility the way the *Lambert* dicta described? After all, it would be within ten days after the entry of "the order"—although not the original order. This is presumably the fiction that the majority currently operates under, although no opinion has ever admitted it.

Any exploration into the language of this statute, however, is ultimately moot. The rule examined in *Lambert* was Federal Rule of Civil Procedure

[94] *See* Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019).

[95] *Id.*

[96] *See id.*

[97] *See id.*

[98] No advocate has yet to make this argument; however, this section aims to preemptively examine it. *See infra* Part II.B.

[99] *Lambert*, 139 S. Ct. at 713.

[100] *Id.*

[101] 28 U.S.C. § 1292(b) (emphasis added).

23(f), a procedural rule, not a statute.[102] It can be waived or forfeited by an opposing party. The Court pointed out that "[t]he mere fact that a time limit *lacks jurisdictional force*, however, does not render it malleable in every respect."[103] This is what the Court was referring to in saying "[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility."[104] The Court is coming to rescue Rule 23(f), a nonjurisdictional rule, from being treated differently from a jurisdictional rule. The dicta could be rephrased to read: "Just because a rule is nonjurisdictional does not mean it can always be tolled." The Court uses this language to *include* Rule 23(f) in the camp of rules that are not subject to equitable tolling—a camp that jurisdictional rules are automatically included in.[105] Examination of a jurisdictional statute, such as § 1292(b), is moot because it is already in the camp of rules that are not subject to equitable tolling.

The text of a rule becomes relevant only when the rule has not been placed in the toll-free camp already.[106] If a rule is categorized as such, then "[c]ourts may not disregard a properly raised procedural rule's plain import any more than they may a statute's."[107] The Court confirms this conclusion by distinguishing procedural rules from statutes in the preceding quote. In other words, when the text of a procedural rule allows, the procedural rule can be treated as a statute.[108] When the rule is treated like a statute, it is not subject to equitable tolling. This analysis is unnecessary when examining a statute. A statute is already on the final step of that analysis. It is jurisdictional. The door that was previously "cracked open" swiftly closes shut.

The "Puzzling Case" of Baldwin.

In *Groves*, then-Judge Barrett described *Baldwin County Welcome Center v. Brown*[109] as "a puzzling case,"[110] and, upon examination, we see exactly

[102] *Lambert*, 139 S. Ct. at 714.

[103] *Id.* (emphasis added).

[104] *Id.*

[105] *Id.* at 714–15 (noting "[r]ules in this mandatory camp are not susceptible of the equitable approach that the Court of Appeals applied here").

[106] *See id.* at 714.

[107] *Id.*

[108] *See id.* (explaining that "[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility").

[109] 466 U.S. 147 (1984).

[110] Groves v. United States, 941 F.3d 315, 322 n.3 (7th Cir. 2019).

why. *Baldwin* is especially strange because the Supreme Court faced § 1292(b) head-on but did not address the tolling issue.[111] *Baldwin* was decided in 1984, predating the Supreme Court's new guidance; however, any Supreme Court encounter with § 1292(b) remains worthy of our review here. It is unclear whether the Court viewed the procedural posture differently or thought that interlocutory jurisdiction was proper.[112] While the dissent does address the issue, it does so without much clarity or authority.[113]

In *Baldwin*, the district court recertified its order nine months after § 1292(b)'s filing period had expired, thereby "permitting what would otherwise be a time-barred interlocutory appeal."[114] Yet this jurisdictional question was only addressed by Justice Stevens in his dissenting opinion, joined by Justices Brennan and Marshall. In this opinion, Justice Stevens concluded, with little explanation, "that interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will."[115]

There are two points to be made with respect to the *Baldwin* dissent. First, a dissenting Supreme Court opinion is certainly not binding precedent, and nobody seriously makes that contention.[116] But second, it can and has been argued that the majority in *Baldwin* implicitly addressed recertification by taking the appeal in the first place, consistent with Justice Stevens's dissent.[117] The *Groves* court actually makes a note of this second point. [118] "Even if the majority approved recertification sub silentio, . . . its assumption would be a 'drive-by jurisdictional ruling[]' lacking precedential effect."[119] Thus, while somewhat perplexing, *Baldwin* cannot provide the split-majority with a safe harbor.

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[111] *See Baldwin*, 466 U.S. at.148–52.

[112] *Groves*, 941 F.3d at 322 n.3.

[113] *Id.*

[114] *Baldwin*, 466 U.S. at 162 (Stevens, J., dissenting).

[115] *Id.*

[116] *See* Strange *ex rel.* Strange v. Islamic Republic of Iran, 964 F.3d 1190, 1197 (D.C. Cir. 2020) (explaining that a dissenting Supreme Court opinion is not binding precedent because it does not articulate how a majority of the Court would decide the question).

[117] *Id.* at 1197.

[118] *Groves*, 941 F.3d at 322 n.3.

[119] *Id.*

Moreover, even if Justice Barrett and the Seventh Circuit improperly categorized *Baldwin* as a "drive-by jurisdictional ruling,"[120] "more recent Supreme Court decisions have severely undermined the proposition that a federal court can extend a fixed jurisdictional deadline, whether directly or indirectly."[121] As the Court recognized, there had not been a clear definition of what "jurisdictional" is or what that entails until Justice Ginsburg set the record straight less than five years ago.[122] In light of this updated framework, it is almost certain that a case like *Baldwin* would not even reach the Supreme Court today.

THE INEVITABLE EXODUS

As the D.C. Circuit would later illustrate, the reasoning in *Groves* leaves little room for advocacy.[123] When confronted with the issue next, it will be hard for a court to justify the maintenance of this fictional exception. While the Southern District of New York did indeed maintain the exception, the Second Circuit—like all circuits within the majority—has not addressed the issue since *Hamer*, *Lambert*, or even *Bowles*.[124] Luckily, when the opportunity presented itself in 2020, the D.C. Circuit followed the Seventh Circuit and abandoned the majority's sinking ship in *Strange ex rel. Strange v. Islamic Republic of Iran*.[125]

In *Strange*, parents of United States service members killed in Afghanistan attempted to serve process on former President of Afghanistan Hamid Karzai.[126] After exhausting several avenues, the parents requested to serve Karzai by Twitter.[127] The district court declined the parents' request.[128] However, the district court did certify the Twitter-service issue for interlocutory appeal under 28 U.S.C § 1292(b).[129] The D.C. Circuit largely copy-and-pasted the Seventh Circuit's analysis from *Groves*.[130] While

[120] *Id.*

[121] *Id.*

[122] *See* Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 17 (2017).

[123] *See* Strange *ex rel.* Strange v. Islamic Republic of Iran, 964 F.3d 1190, 1199 (D.C. Cir. 2020).

[124] *See* Marisol A. *ex rel.* Forbes v. Giuliani, 104 F.3d 524, 528 (2d Cir. 1996).

[125] 964 F.3d at 1199.

[126] *Id.* at 1193.

[127] *Id.* at 1194.

[128] *Id.* at 1195.

[129] *Id.* at 1196.

[130] *See id.* at 1199–1200.

tackling new arguments, the premise remained the same: "A litigant cannot elude the strictures of section 1292(b) and 'make an end-run around this limit' simply by obtaining recertification of an order for interlocutory appeal."[131]

The good news, as presented earlier, is that the majority has not addressed the issue since *Hamer*, *Lambert*, or even *Bowles*.[132] Courts can follow the Seventh and D.C. Circuits and abandon their outdated practice.[133] Courts can admit when they were wrong.[134] Rather than look for new ways to justify an outdated practice, courts should follow the Seventh and D.C. Circuits' example by abandoning such practices. After all, the split-minority is only following the example set by the Supreme Court.[135] In *Hamer*, Justice Ginsburg admitted that the Court itself had confused jurisdictional rules.[136] As a result, the split-minority adjusted its jurisprudence accordingly, and the split-majority should do the same.[137]

MORE THAN JUST A FILING DEADLINE

So—who cares? After all, missing a ten-day deadline is not the end of the road for litigants. The practical effect of the procedure here can be somewhat trivial. A litigant who loses the opportunity to appeal a final judgment forever loses the ability to appeal.[138] In contrast, a litigant who loses the opportunity to file an interlocutory appeal has another chance later.[139] It is for these reasons that the limitations on interlocutory appeals are purposefully unforgiving.[140]

Of course, there are economic and strategic burdens placed on litigants when they lose the ability to appeal an interlocutory order. Parties and courts

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[131] *Id.* at 1203 (citation omitted) (quoting Groves v. United States, 941 F.3d 315, 324 (7th Cir. 2019)).

[132] *See, e.g.*, Marisol A. *ex rel.* Forbes v. Giuliani, 104 F.3d 524, 528 (2d Cir. 1996).

[133] *Groves*, 941 F.3d at 318.

[134] *See* Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 17 (2017); *see also* Bowles v. Russell, 551 U.S. 205, 215–16 (2007) (Souter, J., dissenting) (noting that the justices "have tried to clean up [their] language").

[135] *See Hamer*, 138 S. Ct. at 17; *see also Bowles*, 551 U.S. at 215–16 (Souter, J., dissenting).

[136] *See* 138 S. Ct. at 17.

[137] *See, e.g.*, Groves v. United States, 941 F.3d 315, 318 (7th Cir. 2019).

[138] *Id.* at 324.

[139] *Id.* (reminding us that litigants do not lose the issue after final judgment if they bypass interlocutory review when it would have otherwise been available).

[140] Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 716 (2019).

alike must now endure the lengthy trial as they await a final, appealable order. But ultimately, this is not the end of the world. If these incidental burdens were all that was at stake, equity would surely outweigh the premise of this article—but there is a much bigger picture.[141]

What makes this issue more significant is the underlying principle that is established in the Constitution. More specifically, that the Article III structure is not to be tampered with, even in the name of equity.[142] Judicial discretion is often flexed in the name of equity when circumstances suggest "it is just fairer this way." But this muscle cannot be flexed when it does not exist. As discussed in *Bowles*, there is significance in the distinction between requirements that are and are not jurisdictional.[143] If a requirement is jurisdictional, it is not—and never has been—the courts' muscle to flex, even in the name of equity.[144]

The facts of *Groves* present a perfect trivial example.[145] The paralegal simply mistyped the e-mail address.[146] Upon notice, the application surely would have been immediately sent to the proper address. There was no harm or ill intentions.[147] Nevertheless, the Seventh Circuit showed great restraint in ignoring the temptation. The Seventh Circuit recognized that it "had 'no authority to create equitable exceptions to jurisdictional requirements.'"[148] Why? Because Congress never gave the Seventh Circuit that authority.

CONCLUSION

The structure plainly established in Article III is not subject to an equitable exception created by judicial discretion.[149] As the D.C. Circuit so prudently did, courts should follow the Seventh Circuit in abandoning judicial overreach and showing reverence to constitutional structure—even when the matter appears trivial.[150]

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[141] *See* Bowles v. Russell, 551 U.S. 205, 210 (2007).

[142] *See Groves*, 941 F.3d at 323.

[143] *See* 551 U.S. at 210.

[144] *See id.* at 213.

[145] *See* 941 F.3d at 318–19.

[146] *Id.* at 318.

[147] *See id.*

[148] *Id.* at 323 (quoting *Bowles*, 551 U.S. at 214).

[149] *See id.*

[150] *See id.* at 324–25.

In *Bowles*, the Supreme Court noted that a few months prior, the Clerk of Court refused to accept a petition for certiorari because it was filed one day late.[151] As a result, the petitioner was tragically executed without any Member of the Court having seen his petition.[152] Undeniably, this anecdote arouses our sympathy, and the outcome is upsetting. However, if the Supreme Court decided that a jurisdictional boundary would not yield under the weight of a life-or-death decision, "no result justifies [courts] intervening where [they] have not been granted the power to do so."[153]

[151] *Bowles*, 551 U.S. at 212 n.4.

[152] *Id.*

[153] *Groves*, 941 F.3d at 323.