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COURT OF APPEALS
STATE OF NEW YORK

JONES,

Appellant,

-against-

NO. 107

CATTARAUGUS-LITTLE VALLEY CENTRAL
SCHOOL DISTRICT,

Respondent.

20 Eagle Street
Albany, New York
November 19, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar
2 is Jones v. Cattaraugus-Little Valley Central School
3 District.

4 MS. MCMICHAEL: May it please the court.
5 Virginia McMichael, for the appellant, Brittany Jones. I'd
6 like to reserve three minutes - - -

7 CHIEF JUDGE WILSON: Yes.

8 MS. MCMICHAEL: - - - for rebuttal. First of
9 all, I would like to thank the court. As a Pennsylvania
10 attorney, this is my first time here in the New York court.
11 And I appreciate your granting my application for admission
12 pro hac vice.

13 CHIEF JUDGE WILSON: Most welcome.

14 MS. MCMICHAEL: The waiting period between
15 February 14, 2019, the effective date of the CVA, and
16 August 14, 2019, when the window opened for filing revived
17 claims is neither a statute of limitations nor a condition
18 - - -

19 JUDGE RIVERA: So here - - -

20 MS. MCMICHAEL: - - - preceding.

21 JUDGE RIVERA: Let's say - - - I'd like you to
22 address this. I'm a little - - -

23 MS. MCMICHAEL: Sure.

24 JUDGE RIVERA: - - - troubled by a conclusion
25 reached by the Second Circuit panel that the revival of the

1 claim is as of the effective date of the statute rather
2 than the first day of the revival period. And I'd like you
3 to address how the statute itself supports that conclusion
4 because I cannot read it that way. I'm having great
5 difficulty.

6 MS. MCMICHAEL: Your Honor, I think the answer is
7 in the statutory language. And as the court - - -

8 JUDGE RIVERA: Okay.

9 MS. MCMICHAEL: - - - as this court is well
10 aware, that's the first place you look to - - -

11 JUDGE RIVERA: Okay.

12 MS. MCMICHAEL: - - - to interpret a statute.

13 JUDGE RIVERA: Yes.

14 MS. MCMICHAEL: The - - - the legislature in
15 Section 2014 said that prior - - - claims that had
16 previously been time-barred - - -

17 JUDGE RIVERA: Yes.

18 MS. MCMICHAEL: - - - because they were to have
19 been brought within a year and ninety days from her turning
20 eighteen - - -

21 JUDGE RIVERA: Right. Right.

22 MS. MCMICHAEL: - - - are hereby revived.

23 JUDGE RIVERA: Yes.

24 MS. MCMICHAEL: And hereby revived, it does - - -
25 as of the effective date of the statute - - -

1 JUDGE RIVERA: It doesn't say that. That is my
2 problem.

3 MS. MCMICHAEL: It doesn't, but - - - but that -
4 - -

5 JUDGE RIVERA: No, no, no, no. Let's stay with
6 the text. We're on the text. It says, hereby revived,
7 comma, an action thereon may be commenced not earlier, and
8 then it - - - it sets out the time frame. And even if this
9 was ambiguous, the legislative history is very clear that
10 there's a revival period, and that period is set out in
11 this statute. It's not the effective date of the statute.

12 MS. MCMICHAEL: Well, it - - - the claims - - -
13 so I envision it as - - - as if - - -

14 JUDGE RIVERA: Yes.

15 MS. MCMICHAEL: - - - it's a door. So the - - -

16 JUDGE RIVERA: Right.

17 MS. MCMICHAEL: - - - door was closed on pre-
18 existing - - -

19 JUDGE RIVERA: Yes.

20 MS. MCMICHAEL: - - - claims.

21 JUDGE RIVERA: Yes.

22 MS. MCMICHAEL: And that door opened on - - -

23 JUDGE RIVERA: Yes.

24 MS. MCMICHAEL: - - - February 14, 2019, when the
25 statute - - -

1 JUDGE RIVERA: And how could one walk through - -

2 -

3 MS. MCMICHAEL: So - - -

4 JUDGE RIVERA: - - - if it's a door?

5 MS. MCMICHAEL: - - - it's open - - - it's open -

6 - -

7 JUDGE RIVERA: Yes.

8 MS. MCMICHAEL: - - - until it closes at August
9 14, 2021.

10 JUDGE RIVERA: Well, if that's what they meant to
11 do, it would be in - - - well, initially, not now, right?
12 Initially, it would have been an eighteen-month statute of
13 limitations. That's not what they did. They're very
14 clear, and action there may be commenced. Hereby revived
15 is simply declaring that they are reviving. You have to go
16 through the rest of the sentence to understand what's the
17 period during which it is revived.

18 MS. MCMICHAEL: Well, but if they had intended -

19 - -

20 JUDGE RIVERA: Yeah.

21 MS. MCMICHAEL: - - - the claims to continue to
22 be time-barred - - -

23 JUDGE RIVERA: Yes.

24 MS. MCMICHAEL: - - - until the - - - until
25 August 14 - - - 15th of the same year, 2019, six months

1 later, they would have said claims will be revived as of
2 then. They said hereby revived.

3 JUDGE HALLIGAN: Then what effect do the words
4 maybe commenced not earlier than six months after have?
5 How are you giving any effect to them under your reading?

6 MS. MCMICHAEL: Well, the reading is that the
7 claims were not - - - were - - -

8 JUDGE HALLIGAN: I take it you - - -

9 MS. MCMICHAEL: - - - were revived, but it was a
10 procedural provision - - -

11 JUDGE HALLIGAN: Okay.

12 MS. MCMICHAEL: - - - for filing.

13 JUDGE HALLIGAN: So it has no consequence with
14 respect to the viability of the claim at all. So is it
15 your view that if - - - well, let me ask this. If - - -
16 and I think there are a couple cases like this, Carlino,
17 for example. So if a defendant moves to dismiss on the
18 ground that the claim was filed prior to the six months,
19 does the court have power to dismiss that?

20 MS. MCMICHAEL: Yes.

21 JUDGE HALLIGAN: Okay. And why not after?

22 MS. MCMICHAEL: Well, the distinction is - - -
23 and it happened in two cases.

24 JUDGE HALLIGAN: I know.

25 MS. MCMICHAEL: Carlino and Geiss.

1 JUDGE HALLIGAN: And Geiss, yes.

2 MS. MCMICHAEL: And the distinction - - - I think
3 the key distinction is, is it a dismissal with prejudice or
4 a dismissal without prejudice. Because as the court is
5 well aware, a statute of limitations is a final time bar.
6 And if you bring a claim that's barred by a statute of
7 limitations, the court is going to dismiss it with
8 prejudice.

9 JUDGE RIVERA: Well, let me ask you this. If
10 indeed - - - and you - - - you've adopted the Second
11 Circuit's view, it - - - hereby revived means as of the
12 effective date of the statute, not the revival period
13 that's set out two words later, right? It's the effective
14 date of the statute. Why - - - during those six months
15 before one can file pursuant to the now legislatively
16 adopted revival period, why - - - why isn't that claim
17 subject to the existing statutes of limitation?

18 MS. MCMICHAEL: Well, I think they would be
19 subject to the - - - well, that's why I think it comes into
20 the hereby revived language. Because if it were still
21 subject to being time-barred by the prior - - -

22 JUDGE RIVERA: Yes.

23 MS. MCMICHAEL: - - - statute of limitations - -
24 -

25 JUDGE RIVERA: Right.



1 MS. MCMICHAEL: - - - that would have - - - they
2 would have been time-barred up until - - - permanently
3 time-barred by the original statute, like, up until August
4 14 of 2019.

5 JUDGE GARCIA: Right.

6 MS. MCMICHAEL: In which case, those cases that
7 dealt with premature filed claims like ours would have
8 said, oh, no, that's dismissed with prejudice because the
9 claim - - - the prior statute of limitations were still in
10 effect.

11 JUDGE GARCIA: Any case that was brought after
12 the statute of limitations, that would have happened,
13 right? Let's say, before the statute was passed, I bring a
14 claim. There's no revival statute. I'm going to be
15 dismissed with prejudice if I'm outside the statute of
16 limitations. The revival window opens. I can now bring
17 that claim again even if I was dismissed before with
18 prejudice.

19 MS. MCMICHAEL: Correct.

20 JUDGE GARCIA: Right? So why isn't it the same
21 effect in that window period? The old statute of
22 limitations period exists, you get dismissed. If you have
23 time and the window is open, you can bring the claim in the
24 window.

25 MS. MCMICHAEL: Well - - -



1 JUDGE GARCIA: You can bring it later, like, you
2 can bring it in the eighteen months.

3 MS. MCMICHAEL: Well, you would get - - - you
4 would get dismissed, except it would be a dismissal without
5 prejudice.

6 JUDGE CANNATARO: But I think the point of Judge
7 Garcia's question, though, is that it doesn't matter if
8 it's dismissed with prejudice or without prejudice because
9 when the window opens, you can file the claim. You have a
10 statutory authorization to do that. So why don't we just
11 say the statute of limitations was on - - - you know,
12 foreclosed the case until August 14th, 2019 or August 15?

13 MS. MCMICHAEL: Well, then why would they say, is
14 hereby revived? Wouldn't they say it's revived - - -

15 JUDGE RIVERA: But again, you're taking it out of
16 context - - - hereby revived. And it doesn't say hereby
17 revived, period. It says, hereby revived, and then it sets
18 forth the period for the revival. Well, let me ask you - -
19 - let me ask you this. Maybe this is why I'm not
20 understanding fully this argument or not fully appreciating
21 the Second Circuit's conclusion on this. What do you
22 understand revival means?

23 MS. MCMICHAEL: It means that claims that were
24 previously time-barred - - -

25 JUDGE RIVERA: Okay.

1 MS. MCMICHAEL: - - - by operation of the
2 existing statute of limitations.

3 JUDGE RIVERA: But does that mean the claim was
4 extinguished?

5 MS. MCMICHAEL: It is time - - - I don't - - -
6 well, statute of limitations don't extinguish - -

7 JUDGE RIVERA: Okay.

8 MS. MCMICHAEL: - - - claims ab initio.

9 JUDGE RIVERA: Okay.

10 MS. MCMICHAEL: They - - - it's not like it
11 evaporated. It just prevents you from bringing an action
12 on that claim after the statute of limitations.

13 JUDGE SINGAS: So why can't we look at the
14 sponsor's memo, which I think is pretty clear, right? If
15 we're not - - - if we're saying we can't figure out what
16 the language means, although I'll take issue with that,
17 because, look, they have to say hereby revive because,
18 otherwise, the claim was dead, you know, the - - - right?
19 You agree - - -

20 MS. MCMICHAEL: Right.

21 JUDGE SINGAS: - - - with that? initially it was
22 dead, so it has to be revived. The sponsor's memo says,
23 such a revival can only take place within a one-year
24 window, which commences six months from the effective date
25 of the act, and any revived civil actions brought during

1 the one-year window shall not be dismissed. I mean, I
2 think it's pretty clear that they have these boundaries of
3 one year, and unfortunately, you fell out of it.

4 MS. MCMICHAEL: So essentially, what it would
5 mean is that the defendant's affirmative defense that our
6 claim was barred by the statute of limitations is saying
7 not barred by the revival statute of limitations - - -

8 JUDGE SINGAS: If you bring it within - - -

9 MS. MCMICHAEL: - - - but by the prior statute of
10 limitations - - -

11 JUDGE SINGAS: No. But if you bring it within
12 that one-year period, it can be revived. But if it's
13 outside of it, you can't.

14 MS. MCMICHAEL: Because we - - -

15 JUDGE SINGAS: And it - - - it remains a dead
16 claim because the original statute of limitations expired.

17 MS. MCMICHAEL: That's certainly an argument.
18 We're saying that's not the way - - -

19 JUDGE TROUTMAN: What to you - - -

20 MS. MCMICHAEL: - - - the Second Circuit read the
21 language then.

22 JUDGE TROUTMAN: Counsel, to you, what is the
23 six-month period?

24 MS. MCMICHAEL: The six-month period is from
25 February 15th. The - - -

1 JUDGE TROUTMAN: What is the effect of it?

2 MS. MCMICHAEL: The effect of that is that it - -
3 - the purpose of it - - - first, let's start with the
4 purpose. Why would you have that six-month window? And
5 the purpose of it was that the legislature knew there were
6 going to be a lot of claims coming in. And we've certainly
7 seen that. Every time I update, there's a new decision.
8 And that gave the court, administratively, an opportunity
9 to be prepared for the onslaught of cases. It also gave
10 plaintiffs who were dealing with claims that accrued many,
11 many years before to get their ducks in order, in order to
12 present their proof. And in other words, instead of
13 saying, oh, you got to bring your case tomorrow. You've
14 got less time. They gave them a little bit more
15 opportunity - - -

16 JUDGE RIVERA: Yes. But if that's - - -

17 MS. MCMICHAEL: - - - to do that.

18 JUDGE RIVERA: - - - what they meant to do, they
19 could have started it the date that they started it and
20 added the six months at the end.

21 MS. MCMICHAEL: At the end.

22 JUDGE RIVERA: And they didn't do that.

23 MS. MCMICHAEL: Well, they - - -

24 JUDGE RIVERA: So the six months is not about
25 plaintiffs. It is as clear as day, it's about the court

1 administration. Because it requires training. It requires
2 the chief administrator to prepare things. It is just as
3 clear as day that that was the interest.

4 MS. MCMICHAEL: Well, I think of the case law
5 that we've cited in the brief does talk about waiting
6 periods are often designed to give plaintiffs an
7 opportunity to - - -

8 JUDGE HALLIGAN: But I don't think you've pointed
9 to anything that is - - -

10 JUDGE RIVERA: Okay.

11 JUDGE HALLIGAN: - - - similar to this in that
12 there is language which revives a cause of action. And I
13 think the question is, does it revive the cause of action
14 effective the date of enactment, or does it revive it six
15 months later, right? But I don't see any other examples,
16 and correct me if I've missed them, where you have this
17 peculiar combination of language which could be read to
18 revive it on the date of passage, but you also have it
19 connected to a clause that says, wait for six months. Are
20 there other examples of this kind of structure that you can
21 point us to?

22 MS. MCMICHAEL: I'm not aware of - - - aware of
23 one.

24 JUDGE HALLIGAN: And so I couldn't find one
25 either.

1 MS. MCMICHAEL: Yeah.

2 JUDGE HALLIGAN: So if we're trying to figure out
3 how to square the straightforward, I think, anyway,
4 language here - - - hereby revived with the clause that
5 comes after, doesn't the intention to create a one-year
6 window matter? It seems pretty clear that that's what the
7 legislature was looking to do. But I think under your
8 reading, there's an eighteen-month window. Am I wrong
9 about that?

10 MS. MCMICHAEL: Well, there are several cases,
11 and they're cited in my brief, if I can find the right - -
12 - right page, where in - - - often in parentheses, quite
13 frankly, they talk about the revival window being from
14 February 15th of 2019 until August of 2020 - - -

15 JUDGE HALLIGAN: But - - -

16 MS. MCMICHAEL: - - - and then 2021.

17 JUDGE HALLIGAN: But the effect of your position,
18 I think, is that the window is extended by six months
19 longer than what the legislature appeared to have been
20 trying to do. Didn't it look like the legislature was
21 trying to do, first, a one-year period - - -

22 MS. MCMICHAEL: One year.

23 JUDGE HALLIGAN: - - - and then it added a year,
24 I believe? And you want us to extend that by six months, I
25 think?

1 MS. MCMICHAEL: Well, I guess it depends upon
2 whether you see is hereby revived to be - - - to - - -

3 JUDGE HALLIGAN: Yes.

4 MS. MCMICHAEL: - - - you know - - -

5 JUDGE HALLIGAN: But your - - - your reading - -
6 -

7 MS. MCMICHAEL: Yes.

8 JUDGE HALLIGAN: - - - your reading would mean
9 that it is extended by six months where there is not a
10 motion to dismiss. I take it your view is that if the
11 motion to dismiss had been brought within the window where
12 you could have cured that a dismissal without prejudice
13 would have been proper; is that right?

14 MS. MCMICHAEL: Yes. Just - - -

15 JUDGE HALLIGAN: Okay.

16 MS. MCMICHAEL: - - - as in the Geiss and Carlino
17 case.

18 JUDGE HALLIGAN: Right. Okay.

19 MS. MCMICHAEL: It's a dismissal without - - -

20 JUDGE HALLIGAN: And so I think your position is
21 that if it's not brought until after that window closes,
22 that - - - that, effectively, the start date has been
23 pushed back six months so that we have a eighteen-month or
24 a thirty-month, you know, depending on whether it's one
25 year or two window. Is that right? That hard to square

1 with what it looks like the legislature was trying to do.

2 MS. MCMICHAEL: I understand the question. I
3 just think that if you look at cases that have construed
4 that, they do talk about - - -

5 JUDGE HALLIGAN: So it's a - - -

6 MS. MCMICHAEL: - - - a day beginning in
7 February. I mean, that's - - -

8 JUDGE HALLIGAN: Okay. So are we looking - - -

9 MS. MCMICHAEL: - - - so far.

10 JUDGE HALLIGAN: - - - at a circumstance where
11 the legislature meant to do one thing, but the plain words
12 suggest that it actually did something different?

13 MS. MCMICHAEL: That's certainly how the Second
14 Circuit has interpreted it. By saying that the hereby
15 revived means that it started on February 15.

16 JUDGE RIVERA: But if one looks at that and says
17 there's a - - - at a minimum, there's ambiguity. I think
18 it's clear, but I think it reads the other way, but okay.
19 But then it's, at a minimum, ambiguous. Now we're left
20 with the legislative history. Judge Singas has already
21 read it to you. It's very hard to see it your way, that
22 it's revived as of the effective date of the statute.

23 MS. MCMICHAEL: So that anything filed prior to
24 August 15th of 2019 was barred by the prior existing
25 statutes of limitations that's there.

1 JUDGE RIVERA: But even - - - but again, I think
2 you're stuck with the problem that even if one says, okay,
3 it's revived as the effective date because the statute of
4 limitations that's tied to the revival has not yet begun,
5 the clock has not started to tick for six months, you're
6 left with an existing statute of limitations, and
7 therefore, you're still barred. Unless you want to argue,
8 or think that one could argue - - - I don't know that it's
9 preserved, but you're free to argue it to us, that it's
10 revived as of the effective date of the statute, but that
11 meant the statute - - - the old statute of limitations
12 starts clicking again - - -

13 MS. MCMICHAEL: Well - - -

14 JUDGE RIVERA: - - - and is in place until the
15 new one picks up.

16 MS. MCMICHAEL: I think that the cases where they
17 dismissed it without prejudice - - -

18 JUDGE RIVERA: Yes.

19 MS. MCMICHAEL: - - - for filing prematurely - -
20 -

21 JUDGE RIVERA: Yes.

22 MS. MCMICHAEL: - - - would suggest that the
23 claims that were filed in that six-month window weren't
24 time-barred by the prior statute. I mean, I understand
25 that a lower court decision - - -

1 JUDGE RIVERA: Or subject to the prior - - - or
2 subject to the prior statute of limitation starting again
3 because it's revived and the statute of limitation is also
4 revived and starts again.

5 MS. MCMICHAEL: I'm not sure I understand the
6 question, Your Honor.

7 JUDGE RIVERA: Well, yes, if you say - - - if you
8 say it's revived the statutory - - - I'm sorry, the 214-g
9 statutory, one-year - - - then one year, now, two-year,
10 statute of limitations doesn't start clicking yet. It's
11 not in place for six months. During the six months
12 something is in place, unless you think it's in the ether
13 and nothing is in place. Then it's - - - then there are
14 statutes of limitations for these kinds of claims, right?
15 So I asked, are you, in part, perhaps arguing that, for
16 those six months, the old statute of limitations start anew
17 and apply to those claims that are filed during those six
18 months?

19 MS. MCMICHAEL: I - - - well, but - - - but
20 didn't those statutes become irrelevant as of the date of
21 revival - - -

22 CHIEF JUDGE WILSON: That's what I thought your -
23 - -

24 MS. MCMICHAEL: - - - and the new action - - -

25 CHIEF JUDGE WILSON: - - - from your papers - - -



1 MS. MCMICHAEL: - - - in February?

2 CHIEF JUDGE WILSON: From your papers, I thought

3 - - -

4 MS. MCMICHAEL: That's my - - -

5 CHIEF JUDGE WILSON: - - - your argument was - -

6 -

7 MS. MCMICHAEL: - - - position.

8 CHIEF JUDGE WILSON: - - - the new statute had
9 two features to it: a start date and a stop date. The
10 start date was not a statute of limitations. The stop date
11 was a new statute of limitations for these claims that were
12 revived as of the effective date of the statute. I thought
13 that's what your argument was.

14 MS. MCMICHAEL: Uh-huh.

15 JUDGE RIVERA: It - - - it does seem to - - -

16 CHIEF JUDGE WILSON: Did I misunderstand that?

17 MS. MCMICHAEL: They - - - they don't - - - the
18 claims don't become the - - - that door opened in February,
19 and it didn't close again until - - -

20 CHIEF JUDGE WILSON: But you couldn't walk
21 through it for some sort of claims processing reason right
22 away - - -

23 MS. MCMICHAEL: Well - - -

24 CHIEF JUDGE WILSON: - - - but that the statute
25 of limitations that apply to these revived claims was the



1 new one in the statute. I thought that's what - - -

2 MS. MCMICHAEL: Yes.

3 CHIEF JUDGE WILSON: - - - your position was.

4 MS. MCMICHAEL: Yes. That's the argument that
5 we're making. That the prior statute of limitations became
6 irrelevant - - - ineffective as of the enactment date of
7 the same year.

8 JUDGE HALLIGAN: And that's contingent, though, I
9 think, on whether hereby revived, or is it herein revived,
10 hereby revived - - -

11 MS. MCMICHAEL: Hereby revived.

12 JUDGE HALLIGAN: - - - stands alone - - -

13 MS. MCMICHAEL: Right.

14 JUDGE HALLIGAN: - - - or whether it's modified
15 by the and phrase that comes after it, right?

16 MS. MCMICHAEL: Right.

17 JUDGE GARCIA: Can I ask just one question?

18 MS. MCMICHAEL: Yes.

19 JUDGE GARCIA: If a plaintiff had brought an
20 action in 2018 before the statutes even - - - they're time-
21 barred. They get dismissed - - -

22 MS. MCMICHAEL: Correct.

23 JUDGE GARCIA: - - - with prejudice in 2018.

24 MS. MCMICHAEL: Correct.

25 JUDGE GARCIA: When this window opens in August,



1 can they bring a claim?

2 MS. MCMICHAEL: Yes.

3 JUDGE GARCIA: So what's the difference with or
4 without prejudice if you get dismissed in the six months?
5 It would have the same effect of you bringing a claim
6 before the revival period. It would have the same effect
7 as you bringing a claim in 2018 if you brought it in the
8 six months. You get dismissed with or without prejudice;
9 as long as you have time on the other end, two years or
10 whatever, you can bring the claim.

11 MS. MCMICHAEL: Well, but you run into a
12 situation like what happened here, where they delayed for
13 two years - - -

14 JUDGE GARCIA: The more likely we - - -

15 MS. MCMICHAEL: - - - so we didn't know.

16 JUDGE GARCIA: - - - ran into that, the more
17 people file in the time they told you not to file because
18 it's going to take more time for these cases to wind
19 through because they're not prepared for them yet. So
20 you're filing in the six-month period that says you can't
21 file because the courts aren't ready for it, and then
22 you're saying, oh, it's unfair because it took you too long
23 to decide this motion and now we're out of luck.

24 MS. MCMICHAEL: Well, what happened here is that
25 the school district made a strategic decision in their

1 pleadings.

2 JUDGE GARCIA: They said you're barred by the
3 statute of limitations.

4 MS. MCMICHAEL: They
5 put in the boilerplate, plaintiff's claims are
6 barred by the statute of limitations. And they took a
7 chance whether that was going to subsume within that larger
8 statement that plaintiff's claims are barred because she
9 filed too soon.

10 JUDGE GARCIA: No. They're barred by the
11 existing - - - if you - - -

12 MS. MCMICHAEL: You - - -

13 JUDGE GARCIA: - - - go with the - - -

14 MS. MCMICHAEL: Okay.

15 JUDGE GARCIA: - - - reading that Judge Rivera is
16 suggesting here, one possible reading of this, they're
17 barred by the old statute.

18 MS. MCMICHAEL: By the old statute would be the
19 argument.

20 JUDGE GARCIA: So why isn't that - - -

21 MS. MCMICHAEL: Well - - -

22 JUDGE GARCIA: - - - an accurate defense?

23 MS. MCMICHAEL: For them? Because if the old
24 statute - - - it - - - it goes - - - it goes back to what's
25 the effect of that February date.



1 JUDGE RIVERA: Let me - - -

2 MS. MCMICHAEL: I mean, it really comes down to

3 - - -

4 JUDGE RIVERA: Let me ask you this.

5 MS. MCMICHAEL: - - - how do you construe that.

6 JUDGE RIVERA: I know the red light is on and - -

7 -

8 MS. MCMICHAEL: Yes.

9 JUDGE RIVERA: - - - and perhaps something for
10 you to address more extensively when you get back up. But
11 what is your position on the equitable estoppel - - - on
12 equitable estoppel, given what you have just said, that
13 they made some strategic - - -

14 MS. MCMICHAEL: Right.

15 JUDGE RIVERA: - - - decision that perhaps
16 ensured that you would not be able to timely file if you
17 discovered the - - - the premature filing.

18 MS. MCMICHAEL: Right. I did argue equitable
19 estoppel to the Second Circuit.

20 JUDGE RIVERA: Yes.

21 MS. MCMICHAEL: And they didn't - - -

22 JUDGE RIVERA: So they relied on a state case.
23 So you want to argue that they've misread that, that's up
24 to you. So - - - but then we can do that when you get back
25 up.

1 MS. MCMICHAEL: I thought I was done with that
2 issue, Your Honor, quite frankly. But you know - - -

3 JUDGE RIVERA: Well, what was your argument about
4 the equitable - - -

5 MS. MCMICHAEL: Well, the argument was that - - -
6 that they engaged in gamesmanship, and that they made a
7 strategic drafting decision to frame it broadly, kind of
8 kept the powder dry, not so clueless in what was going on,
9 and - - - and kept extending discovery during that next
10 year as - - - as - - - because the statute got extended
11 because of COVID, and then waited until two or three weeks
12 after the final window closed in August 14, 2021, to file a
13 motion for summary judgment, at which time we were, you
14 know, completely time-barred because the, you know, final
15 date of that statute had passed. Obviously, you know,
16 we're all wishing that trial counsel had filed it more
17 timely, but that's not what happened.

18 JUDGE GARCIA: And so I'm just not sure of this.
19 Did you - - - I read the District Court opinion, and it
20 seems the District Court opinion is much more focused on
21 equitable estoppel than, I think, injustice theory and
22 counsel error. Was the argument on this - - - this is not
23 a statute of limitations issue made to the District Court?
24 Because it doesn't seem - - -

25 MS. MCMICHAEL: No. No. It's really a- - -

1 JUDGE GARCIA: - - - to really be addressed.

2 MS. MCMICHAEL: Quite candidly, Your Honor,
3 that's an issue that the Second Circuit kind of surprised
4 us with, quite frankly. I think my opposing counsel would
5 agree. I was asked, well, is this a claim processing rule?
6 And I was, quite frankly, oh, I hadn't really thought of it
7 that way. And so you know, now that we've, you know,
8 approached it from that point of view, it's a little
9 different. What the Second Circuit wants to know from this
10 court, of course, is, is it a statute of limitations or a
11 condition precedent? Statute of limitations defense would
12 have been preserved in their affirmative defense.
13 Condition precedent would have been presumably preserved by
14 plaintiffs failed to state a claim, or is it something
15 else. And if it's something else, then they - - - then
16 it's forfeited is how they're approaching it.

17 CHIEF JUDGE WILSON: Thank you.

18 MS. MCMICHAEL: Uh-huh.

19 MR. HINES: Good afternoon. And may it please
20 the court. Patrick Hines, on behalf of respondent. This
21 case is about whether the court is going to upset
22 established notions of what statutes of limitations are in
23 order to save one claimant from run of the mill attorney
24 error. The court - - -

25 JUDGE TROUTMAN: With respect to a statute of



1 limitations, does it not focus on an end date in which a
2 case is viable?

3 MR. HINES: Not always, Your Honor. Of course,
4 statute of limitations set time periods during which
5 remedies can be sought on claims arising elsewhere in law.
6 And obviously, time periods have a start date and an end
7 date.

8 CHIEF JUDGE WILSON: Well, isn't start date
9 usually an accrual date, not a statute of limitations date
10 - - -

11 MR. HINES: Well - - -

12 CHIEF JUDGE WILSON: - - - claim accrual date?

13 MR. HINES: - - - a claim accrual date has to do
14 with when the clock for the time period starts and stops.

15 CHIEF JUDGE WILSON: Right. And haven't we
16 distinguished in some of our cases between a claim accrual
17 date, which is not a statute of limitations, and where the
18 court - - - or sorry, where the legislature has set a
19 statute of limitations. We've nevertheless said, we get to
20 decide what the claim accrual date is, often as a matter of
21 common law?

22 MR. HINES: Well, deciding the claim accrual date
23 is when the legislature has not been specific or where
24 there's injustice. I think there was an effort to have the
25 court interpret the DES cases in that way. But in the



1 Fleishman case, the court declined to do so and pointed
2 back to the legislature to say, if you want to have a
3 different accrual date, then it really needs to be for the
4 legislature to decide. And here, certainly, the
5 legislature made very clear this is the window. And when
6 you have a statute that prescribes a window of time during
7 which remedy can be sought, that is a statute of
8 limitations. That's what a - - -

9 JUDGE SINGAS: So how do you square the language
10 of hereby revived with your position?

11 MR. HINES: A couple of answers to that. One is
12 the statute points to every claim or civil action that is
13 brought is hereby revived. So it's revived when it's
14 brought, but it can only be brought during the period of
15 time where action thereon can be commenced. Secondly, it
16 doesn't really matter - - -

17 JUDGE TROUTMAN: Couldn't you, likewise, read
18 that as, it's revived, now you can go about preparing for
19 it to file it within the expiration of that six months?

20 MR. HINES: I read hereby - - -

21 JUDGE TROUTMAN: And the court being ready and
22 trained.

23 MR. HINES: Hereby revived means it's no longer
24 subject to the prior applicable statute of limitations.
25 That's what the legislature meant. They wanted to be clear

1 that other statutes of limitations aren't going to apply.
2 And in the event - - -

3 JUDGE TROUTMAN: So you can bring the claim.

4 JUDGE CANNATARO: Well, if that is what it meant,
5 then commencing before the window opens, but there's no
6 prior applicable statute of limitations, puts it in some
7 limbo world where, you know, using that hypothetical we
8 were using before that - - - where we posited that maybe it
9 was dismissed under the pre-existing statute of limitations
10 wouldn't be an issue if what you say is true?

11 MR. HINES: Respectfully, I disagree with your
12 premise. What it's saying is that the other statutes of
13 limitations are not going to apply. And in the very same
14 sentence, it provides action thereon may be commenced
15 during this specific time period. That is exactly what a
16 statute of limitations does under this court's - - -

17 JUDGE CANNATARO: So what's that period in the
18 window? What do you call that? What's the operative
19 effect of that?

20 MR. HINES: It is a period during which action
21 thereon cannot be commenced because it's outside the
22 statute of limitations.

23 JUDGE HALLIGAN: Aren't there other provisions in
24 the statute which provide for a later effective date?

25 MR. HINES: In this - - - in 214-g?

1 JUDGE HALLIGAN: I thought 214-c, for example,
2 which is training, takes effect later. I thought there
3 were a couple of provisions in the statute - - -

4 JUDGE GARCIA: I thought this one tied to age.
5 Isn't there one?

6 JUDGE CANNATARO: Something about 50 - - -

7 MR. HINES: So with respect to 208-b, which was
8 also ended at the same time - - -

9 JUDGE HALLIGAN: Well, just if I can finish my
10 question. I thought that there were a couple of other
11 parts of the statute which had an effective date that was
12 specifically set later. And if I'm right in recalling
13 that, I might not be, then if the legislature did not
14 specifically extend the effective date here, wouldn't that
15 suggest that they meant the revival to take effect on the
16 date of enactment in February?

17 MR. HINES: Well, they didn't extend the
18 effective date of the statute in that it was effective as
19 of the date passed. But they were very clear and
20 unambiguous about when these newly revived claims could be
21 commenced.

22 JUDGE HALLIGAN: Well, this is - - - I take it
23 you mean with the phrase that starts with and, you know, et
24 cetera, following hereby revived, right?

25 MR. HINES: Yes.

1 JUDGE HALLIGAN: And I - - - and my question is:
2 if in other parts of the statute the legislature
3 specifically said, you know, this will take effect six
4 months later, in so many words, why wouldn't it have done
5 the same thing if it meant for the revival and the, I
6 think, concomitant extinction of the old statute of
7 limitations, which I think is what you're relying on? If
8 it meant that to be kicked out six months, why wouldn't it
9 have said so explicitly like it did in other parts?

10 MR. HINES: Well, it's tough to answer your
11 question, Your Honor, because I'm not particularly familiar
12 with the other provisions of the statute that you're
13 referring to. But, you know, I think the - - - the - - -
14 the canon of statutory interpretation - - -

15 JUDGE HALLIGAN: Okay. I'll just - - - I'll read
16 the provision I'm talking about to you. It says, this act
17 shall take effect - - - and this is section 12. The act
18 shall take effect immediately, except that section 9 of the
19 act shall take effect six months after this act shall
20 become a law provided, et cetera, that the training shall
21 commence - - - set forth in specific sections three months,
22 et cetera. All I'm asking is, does that indicate that the
23 legislature thought specifically about when different
24 provisions should take effect and did not embed in there
25 that this provision, the revival provision, would not take

1 effect months later?

2 MR. HINES: At best, I think that's an oversight
3 and - - - and not really careful wording by the
4 legislature. I don't - - -

5 JUDGE HALLIGAN: It could say the same thing
6 perhaps - - - I mean, which way that cuts, I don't know.
7 It could be an oversight that the legislature didn't
8 include that, but maybe we need to take that at the text at
9 face value then.

10 MR. HINES: Well, there's so much other context
11 to this statute as well. I think - - - on its face, I - -
12 - I think, if it's unambiguous in the words of the statute,
13 we have to avoid peculiar readings or strange readings to
14 find meaning that is not really there. And here, the
15 statute is so clear that action thereon may be commenced
16 not earlier than and not later than.

17 CHIEF JUDGE WILSON: And so - - -

18 MR. HINES: That's what a statute of limitations
19 does.

20 CHIEF JUDGE WILSON: - - - since we normally
21 think of when you can bring a claim as either the date the
22 claim accrues, or perhaps, in this case, the date that it's
23 revived, or something like that, why isn't it - - - and you
24 - - - I think your argument has been, we need to think of
25 the opening and closing periods as reciprocal. And because

1 the latter is a statute of limitations, the first one must
2 be a statute of limitations. That's, at least, how I
3 understood your argument. Why couldn't we more
4 appropriately think of the first period as a condition
5 precedent to bringing a suit?

6 MR. HINES: It's certainly one thing that you
7 could - - - that you could characterize it as compliance
8 that is condition precedent to suit. I think it's somewhat
9 inconsistent because if you're saying that a - - - if the
10 rule is, and I think it is based on this court's prior
11 precedent, that a statute of limitations governs the remedy
12 and not the right. So it sets a time period during which
13 remedy can be sought. That's the nature of a statute of
14 limitations.

15 CHIEF JUDGE WILSON: Well, usually - - -

16 MR. HINES: It would be - - -

17 CHIEF JUDGE WILSON: - - - usually, it terminates
18 your ability to bring a claim at a point. We don't usually
19 think - - - I mean, can you give me a case of ours where
20 we've said the commencement period is a statute of
21 limitations?

22 MR. HINES: Well, I think we can look to the DES
23 cases that - - - Hymowitz and World Trade Center, which it
24 wasn't a DES case but similar case, where you have the
25 legislature looking at the limitations period and saying,

1 well, the beginning period that we've set - - - the accrual
2 date we've set, that's unfair to claimants. So we're going
3 to adjust it. We're going to adjust the beginning period
4 to benefit claimants, which is very similar to what this
5 legislature is doing here. It's - - -

6 JUDGE HALLIGAN: But I thought those cases were
7 ones where there wasn't this gap between, you know, the
8 effective date and the date of revival. Am I misrecalling
9 that?

10 MR. HINES: I'm not aware of any other statute in
11 which they've had a statute passed on one date and then
12 opened the window within a defined period of time later. I
13 understand - - -

14 JUDGE CANNATARO: Counsel - - -

15 MR. HINES: - - - what you're asking there, but -
16 - -

17 JUDGE CANNATARO: - - - on this question of
18 policy, my understanding of the purpose of a statute of
19 limitations is to allow a potential defendant to rest and
20 repose at the end of the statute. That logic doesn't
21 really work so well if - - - you know, in terms of saying
22 that this is a statute of limitations because you certainly
23 are not resting in repose as of the effective date of this
24 statute. You're well aware that your rights may be
25 infringed by a lawsuit that's coming in six months. So it

1 - - - for me, conceptually, it's a hard fit to at least
2 call the beginning of this window a statute of limitations.

3 MR. HINES: This court has never defined a
4 statute of - - - the nature of a statute of limitations
5 solely by virtue of the policy goal achieved. If we were
6 talking about the defense of laches as an equitable
7 defense, I would agree with you that the only purpose of
8 laches is to prevent prejudice to the defendant. But this
9 court has never understood statutes of limitations, a
10 legislative act, so narrowly - - -

11 JUDGE RIVERA: Look, I'm a little confused by
12 this hole you're going down. I think it's pretty clear
13 from the legislative statements that it is a revival
14 period. That is what they call it. That is what it is.
15 You don't have to worry about the front part - - - the
16 first day as being part of statute of limitations because
17 that phraseology only applies in situations where the
18 statute of limitations doesn't have a start date, it starts
19 with the accrual. They've already accrued. These are
20 claims that exist. Nothing else needs to happen other than
21 the filing, correct?

22 MR. HINES: I think it's - - - but the point is -
23 - -

24 JUDGE RIVERA: So I don't - - - all I'm saying
25 is, I don't know why you need to push this part of your

1 argument when the legislature has given you your answer.
2 There's a window during which someone can file a claim that
3 previously could not be filed. And that's it. And it
4 doesn't include the six months.

5 MR. HINES: Absolutely. I think - - - you know,
6 our primary argument is, look at the text - - -

7 JUDGE RIVERA: So if we're going to answer the
8 Second Circuit, what is the six months?

9 MR. HINES: The six months is part of the - - - I
10 - - - I think that their question is inapt. It's phrased
11 in a - - -

12 JUDGE RIVERA: Okay.

13 MR. HINES: - - - in a way that doesn't make
14 sense because the beginning point and the end point are the
15 periods. So to try to characterize that six months as this
16 separate legal concept from a statute of limitations is
17 simply an inapt characterization of what the - - -

18 JUDGE RIVERA: Well, the six months isn't part of
19 the revival period. That is - - - it's not part of the
20 revival period. So what is the six months then?

21 MR. HINES: The six months is simply a period of
22 time preceding the revival period during which claims
23 cannot be commended.

24 JUDGE RIVERA: So you too are of the school of
25 thought, perhaps, that they are not revived during those

1 six months or - - -

2 MR. HINES: I - - -

3 JUDGE RIVERA: - - - or does it not matter for
4 purposes of your argument?

5 MR. HINES: It does not matter for purposes of
6 our argument. However, to - - - to answer the question, I
7 think that it says every claim brought is hereby revived.

8 CHIEF JUDGE WILSON: Well, they brought the
9 claim.

10 MR. HINES: Well, they - - - they brought the
11 claim. However, action thereon could not be commenced
12 except during this time period. And that is a statute of
13 limitations.

14 JUDGE RIVERA: Well, there could be some claims
15 that were not brought, right? That was the problem that
16 people might not have realized or been able to pursue these
17 claims during the short statute of limitations. So there
18 may be claims that were never brought.

19 MR. HINES: Correct. I mean, certainly, it's not
20 something where anyone was required to bring a claim. They
21 could - - - they could let their claim go away and did not
22 have to file a lawsuit. You know, there - - - those are
23 judgments that could be made by claimants. So to say,
24 hereby revived, has to be read along with, and action
25 thereon may be commenced not earlier than. That is what a

1 statute of limitations does.

2 JUDGE HALLIGAN: Well, but here is what I'm
3 struggling with. I think you said that you haven't
4 identified any statutes where there is something that you
5 would call a statute of limitations on the front end,
6 right? Not any other statutes where there's a gap between
7 the date on which a cause of action is revived and it can
8 be commenced, right?

9 MR. HINES: Correct.

10 JUDGE HALLIGAN: Okay. And for example, the U.S.
11 Supreme Court has looked at what they call claims
12 processing rules. I'm thinking here, specifically, about
13 Henderson v. Shinseki. And said this is something that is
14 aimed at encouraging parties to take certain procedural
15 steps at certain times, but can't extinguish their rights.
16 And so if we don't see anything else that looks like what
17 we have here, where there is a gap between the revival date
18 and what the statute says about when the action should be
19 commenced, why wouldn't we think about it in the way the
20 Supreme Court has thought about what it calls claims
21 processing rules, which is that it doesn't preclude the
22 action from proceeding?

23 MR. HINES: With respect, Your Honor, I disagree
24 with your premise on what the Supreme Court has said when
25 it's talking about claims processing rules. The Supreme

1 Court, when they're talking about claims processing rules,
2 they're talking about federal statutes that create rights
3 of action and require action within a certain amount of
4 time. Sometimes that's a statute of limitations.
5 Sometimes it's something else.

6 JUDGE HALLIGAN: I think - - -

7 MR. HINES: But - - -

8 JUDGE HALLIGAN: - - - Shinseki is a case about
9 the time to take an appeal. It's not, I think, a case
10 about when you can file a claim initially. And granted,
11 that's different than what we have here. But my point is
12 just that it's a different category of a statutory
13 provision that the court has identified that doesn't have
14 the same effect that a statute of limitations would have.

15 MR. HINES: But it's a jurisdictional question,
16 right?

17 JUDGE HALLIGAN: Well, in - - -

18 MR. HINES: Which is not relevant here.

19 JUDGE HALLIGAN: Well, I think in some cases like
20 Wilkins, which comes after Shinseki, I think you're right
21 about that. I think it says we have jurisdictional
22 provisions and nonjurisdictional statute of limitations
23 might be nonjurisdictional provision. But I actually read
24 Shinseki as different as saying there is another kind of
25 rule which is not a statute of limitations and which is not

1 jurisdictional and is a claims processing rule. I don't
2 think that that provision is a statute of limitations. So
3 I'm just asking, why could this not be, if we don't see an
4 analog for it in our statutes, something that is likewise
5 an unusual arrangement, but not a statute of limitations?

6 MR. HINES: To do that, Your Honor, would be a
7 rug pull, I think, because - - -

8 JUDGE HALLIGAN: Would be a?

9 MR. HINES: Would be a rug pull. Would be
10 unexpected by any parties who are figuring out what
11 defenses they need to plead and how they need to do so.

12 JUDGE HALLIGAN: But I think we've agreed that
13 there aren't other statutory provisions like this out
14 there. So it would be sui generis as opposed to something
15 that would be broadly disruptive, I assume.

16 MR. HINES: And I think when we're - - - when the
17 court is reading claim revival statutes, under the Regina
18 decision in 2020, the court should take a very narrow view.
19 There should be a very explicit legislative intent. And
20 one more thing - - -

21 JUDGE HALLIGAN: I appreciate - - -

22 MR. HINES: - - - that we should avoid - - -

23 JUDGE HALLIGAN: I appreciate all that. But I
24 just want to make sure I do understand. There aren't any
25 other statutory schemes like this? I haven't identified

1 any. I don't think you have, but I want to make sure,
2 where there is this gap in terms of thinking about what the
3 implications of considering it that way would be.

4 MR. HINES: The answer is no. However, I don't
5 think that makes this not a statute of limitations because
6 if the rule we're encouraging this court to adopt and
7 basically maintain from its prior precedent is that the
8 nature of a statute of limitations is that it sets a time
9 period during which the remedy can be sought. That's
10 exactly what 215 - - -

11 JUDGE TROUTMAN: What about Black's Law
12 Dictionary that says the statute of limitations is a law
13 that bars a claim after a specified period, specifically a
14 statute establishing a time limit for suing in a civil case
15 based on the date when the claim accrued, bars it after.
16 So how does the six months fit within that definition?

17 MR. HINES: I think that's an overly narrow
18 definition of what statutes of limitations do because - - -

19 JUDGE TROUTMAN: So Black's dictionary, we should
20 not consider that definition?

21 MR. HINES: I think it can be considered. But I
22 think, based on this court's prior case law, the nature of
23 statutes of limitations is defined as something that sets a
24 time period during which to bring a claim. The other thing
25 I would say is, if it's not a statute of limitations, the

1 only other reading becomes - - -

2 JUDGE TROUTMAN: When you say narrow and you
3 consider why statutes of limitations exist, there are
4 certain rights, of course, defendants have with respect to
5 cases being stale, plaintiffs sitting on their rights.
6 That doesn't necessarily occur here when you're talking
7 about that six-month period if, in fact - - - whether it's
8 a - - - we create a state processing aspect, the judges
9 have to be trained, an apparatus has to be set up to file
10 these claims. How is that contrary in saying the statute
11 of limitations, applying it like Black says, after the - -
12 - the six months is just to get ready, and you can still
13 bring the claim. Why is that wrong?

14 MR. HINES: Well, because the legislature here is
15 so clearly creating a window of time during which claims
16 can be commenced that it - - - the legislature certainly
17 didn't make reference to any - - - to a new legal concept.
18 They used language that is entirely consistent with every
19 other statute of limitations and every other claim revival
20 statute, but for when the opening of the window would be.
21 There's no clear expression of legislative intent to invoke
22 a new legal concept or invite this court to create one sui
23 generis and - - - and - thereby leave parties like the
24 district, who were trying to figure out how to plead their
25 defenses to - - -

1 CHIEF JUDGE WILSON: You started - - - you
2 started to say, if this is not a statute of limitations,
3 the only other - - -

4 JUDGE CANNATARO: Yeah.

5 CHIEF JUDGE WILSON: - - - and then we cut you
6 off.

7 JUDGE CANNATARO: What's the only other thing it
8 could be?

9 MR. HINES: Condition precedent, Your Honor. So
10 when the court has looked at statutes - - - the nature of
11 statutes of limitations and whether - - - whether there - -
12 - it could be something else, the only other something else
13 I could identify in all of my reading of this court's
14 precedent was a condition precedent to sue.

15 JUDGE GARCIA: Well, this seems, I think, to go
16 to what Judge Halligan was saying, to be very unique,
17 right? And we're trying to - - - and the question is
18 asking us to put this into a framework of a statute of
19 limitations, this particular statute. But it seems to me,
20 this is not that. There are statutes of limitations here,
21 they ran. This is a revival period. And after this
22 revival period is over, the old statute of limitations is
23 going to apply, right? This isn't a new statute of
24 limitations to me, either before its effective date or
25 after its effective date. It's a window. So if you - - -

1 it seems to me, one way to read this is, if you bring this
2 claim before that window opens, you are subject to the
3 statute of limitations. If you bring it in this period,
4 you can bring it. If you bring it after this period,
5 you're subject to the old statute of limitations. Why are
6 we trying to - - - why - - - and you, in your argument,
7 trying to fit this statute into some type of statute of
8 limitations framework?

9 MR. HINES: Well, because, Your Honor, the - - -
10 we're advancing a rule that builds on this court's existing
11 precedent about what statutes of - - -

12 JUDGE GARCIA: But we don't - - -

13 MR. HINES: - - - limitations are.

14 JUDGE GARCIA: We don't have - - - right. And
15 that's what I'm asking you. We don't have a statute like
16 this. The statute of limitations is, generally, you have X
17 amount of time from accrual, and that's what applies to
18 these claims. You have X amount of time from accrual.
19 What this statute does is not change you have X amount of
20 time from accrual. What it does is say, regardless that -
21 - - of the fact your time may have run under the statute of
22 limitations, you have a whatever time period, a window, to
23 file a claim, and it will be timely in that window. And
24 when that window shuts, it seems a fair reading, you go
25 back to the old statute of limitations. So it didn't - - -

1 it seems to me, one reading of the statute is it didn't
2 create anything in those six months. What those six months
3 are is what the six months after the window closes are.
4 The - - - that time period is governed by the old statute
5 of limitations. This is a window that gives you relief
6 from that statute of limitations. And that is whatever
7 that period that you can file in. So I don't understand
8 why we're trying to - - - and I know why we're trying to do
9 it. It's the way the question was teed up for us. But why
10 we're trying to characterize a six-month period before you
11 can file as this new statute creating some type of new
12 statute of limitations?

13 MR. HINES: Well, I - - - we don't argue that the
14 six-month period created a new statute of limitations. We
15 - - - we're arguing that revival provisions are essentially
16 a species of statute of limitations. This revival
17 provision provides a start date and an end date. And
18 outside of that provision, you don't have an ability to
19 seek a remedy. Given the text - - -

20 JUDGE CANNATARO: But that's fine as far as it
21 goes. But as we've said repeatedly, we don't have a
22 situation where there's this six-month interim period. And
23 it makes it very difficult with - - - at the risk of just
24 repeating what Judge Garcia just said, it makes it very
25 difficult to fit this in the framework of what we think of

1 as a statute of limitations. So let me just ask, what
2 would be so wrong with just saying this is sui generis?
3 This is a window. It's a - - - it's a revival window. It
4 starts on this date, the date that the legislature said,
5 August 15th, 2019, and it ends one year later, or maybe two
6 years later, depending on whether there's a pandemic or
7 not.

8 MR. HINES: Because the principle this court has
9 announced in interpreting revival provisions is - - - in
10 its - - - interpreting any statute - - -

11 JUDGE RIVERA: So your answer to that was
12 supposed to be, yes, I agree.

13 JUDGE HALLIGAN: Yes.

14 MR. HINES: I - - - I - - -

15 JUDGE RIVERA: He started that date on the date
16 you want it started?

17 MR. HINES: Yes. Yes. Exactly.

18 JUDGE RIVERA: There you go. It's a win.

19 MR. HINES: I may have misunderstood your
20 question, Your Honor. I apologize.

21 JUDGE RIVERA: There you go.

22 JUDGE HALLIGAN: Counsel, I know your light is
23 on, but can I ask, why not - - - why not bring this earlier
24 before the window had expired?

25 MR. HINES: That's a question of federal

1 procedure, Your Honor. And the district looked at the
2 federal procedural law governing the specificity with which
3 defenses must be pleaded. And we pleaded this is barred by
4 the statute of limitations, which is all that's required.
5 It then put the ball in plaintiff's court to make a motion
6 to strike that defense and serve an interrogatory asking
7 what that's all about. And this is just plain run of the
8 mill attorney error preceding that.

9 JUDGE RIVERA: But let me ask you this: your - -
10 - I thought, this is part of my problem with your argument,
11 that you're arguing that the revival period is the statute
12 of limitations. So how were they to know, when you had
13 just a boilerplate sentence, that you were referring to the
14 old statutes of limitations as opposed to the revival
15 period?

16 MR. HINES: We - - -

17 JUDGE RIVERA: Or am I misunderstanding you?

18 MR. HINES: We were referring to the concept that
19 a statute of limitations sets the time period during which
20 you are allowed to seek a remedy. And they did not file
21 during that time period; thus, it was barred by the statute
22 of limitations.

23 JUDGE RIVERA: Yes. But arguably, there's more
24 than one, given that you keep referring to the revival
25 period of the statute of limitations.

1 MR. HINES: Well, we're referring to the period -
2 - -

3 JUDGE RIVERA: Did you - - -

4 MR. HINES: - - - the statute itself has one.

5 JUDGE RIVERA: Did you, in any way, state that in
6 your assertion of its time-barred, you were referring to
7 the prior - - - right? The, otherwise, usual statute of
8 limitations that apply to these kinds of claims, as opposed
9 to the revival period that's set out in 214-g?

10 MR. HINES: We did not say revival period. We
11 said this is barred by the statute of limitations. I think
12 whether or not that adequately - - -

13 CHIEF JUDGE WILSON: But when you move into the
14 District Court on statute of limitations grounds, how did
15 you articulate what statute was - - - of limitations was
16 violated?

17 MR. HINES: It was - - - well, we articulated
18 that 214-g is the statute of - - - is the applicable
19 statute of limitations provision that we're moving under,
20 and simply saying you did not comply with that statute, and
21 therefore, the claim is barred. The - - - I think the
22 question of federal procedural law about whether we had to
23 be more specific in our statute of limitations pleading is
24 not before this court and is really for the federal courts
25 to determine.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. HINES: Thank you.

3 MS. MCMICHAEL: Very, very briefly, Your Honors.

4 I think it's noteworthy that the school district counsel
5 has not pointed to any authority that this kind of a six-
6 month waiting period is a statute of limitations. And
7 statute of limitations, as Black's Law Dictionary defined
8 it - - -

9 JUDGE RIVERA: But that's not - - - that's not
10 fatal.

11 MS. MCMICHAEL: - - - said that - - -

12 JUDGE RIVERA: - - - in many ways, is not fatal
13 to their argument because it can be, as the legislature
14 referred to it, a window. It's the revival period as
15 opposed to - - - to be distinguished from the usual statute
16 of limitations that would apply to these kinds of claims.

17 MS. MCMICHAEL: I think I understand what you're
18 - - -

19 JUDGE RIVERA: Right? I mean the matter, if it
20 is or isn't a statute of limitations, that's not what
21 matters.

22 MS. MCMICHAEL: Well, I - - - I - - -

23 JUDGE RIVERA: What matters is what happens in
24 these six months when someone files before the window.

25 MS. MCMICHAEL: I think the reason - - - what

1 it's called is important because it goes to whether they
2 preserve that affirmative defense or forfeited it. And
3 that's obviously a question for the Second Circuit, not for
4 this court. But that's why they want to know, well, what
5 do we call this six-month period? Is it a statute of
6 limitations? Well, it doesn't look like a statute - - -
7 that portion - - - that six-month portion - - -

8 JUDGE RIVERA: Yes. But even if you - - -

9 MS. MCMICHAEL: - - - doesn't look like a
10 statute.

11 JUDGE RIVERA: - - - take their argument - - -
12 right? The bald statement of it, it's barred by the
13 statute limitations, excuse me. And one doesn't know if
14 they mean the one that applied pre-revival statutes or - -
15 - or this thing that's called a window that they refer to
16 as a statute - - -

17 MS. MCMICHAEL: Right.

18 JUDGE RIVERA: - - - of limitations. The point
19 is what happens in these six months.

20 MS. MCMICHAEL: But - - -

21 JUDGE RIVERA: Right?

22 MS. MCMICHAEL: - - - but that comes down to - -
23 -

24 JUDGE RIVERA: And if that's about a premature
25 filing, that is certainly not what they've said. That's

1 not - - - right? That was not what they were describing it
2 as.

3 MS. MCMICHAEL: Well, I think that they - - -

4 JUDGE RIVERA: And they were on notice that they
5 could because you had Geiss and you already had Carlino
6 that described it that way.

7 MS. MCMICHAEL: Well, they - - - I think that
8 it's been referred to as a premature filing in this case,
9 that they filed it before that window.

10 JUDGE RIVERA: Yes. But the - - - what I
11 understood they were arguing was it's outside the statute
12 of limitations. That's why it's - - -

13 MS. MCMICHAEL: Because they're taking - - -

14 JUDGE RIVERA: - - - time-barred.

15 MS. MCMICHAEL: - - - taking a very broad
16 construction of what a statute of limitations is.

17 JUDGE RIVERA: Yeah. But then one would say - -
18 - one would have to say, the six months is part of the
19 revival period, and the language is very clear that it is
20 not.

21 MS. MCMICHAEL: Well, that's where I disagree
22 because I do think that it is part of after it was revived.
23 I would very briefly like to - - - like to address the
24 condition precedent issue that was raised here. And - - -
25 and the case authority that's cited in our brief does say

1 that when a statute does not create a new cause of action,
2 it is not a condition precedent. This revival statute
3 didn't create new substantive underlying causes of action.
4 It just dealt with the time frame of it. So I think it's
5 inappropriate - - -

6 CHIEF JUDGE WILSON: Wait, so your view is the
7 legislature could not have created a condition precedent?

8 MS. MCMICHAEL: They - - - they - - -

9 CHIEF JUDGE WILSON: It's powerless to have done
10 that?

11 MS. MCMICHAEL: Oh, they could have, but it - - -

12 CHIEF JUDGE WILSON: Oh.

13 MS. MCMICHAEL: - - - would have to be - - - it
14 would have to be clear. And when you're - - - it's not
15 clear here. I don't think that - - -

16 CHIEF JUDGE WILSON: So if they had said, here's
17 a condition precedent to suit, you must?

18 MS. MCMICHAEL: Well, for example, it's - - -
19 it's not at all uncommon, particularly in the federal
20 system where there are administrative claims, oh, you have
21 to give - - - that, you know, under the Administrative
22 Procedures Act, for example, you have to give notice before
23 you can bring an action against an agency of the United
24 States government.

25 JUDGE RIVERA: Or - - -

1 MS. MCMICHAEL: So those - - -

2 JUDGE RIVERA: Or - - -

3 MS. MCMICHAEL: - - - those are - - -

4 JUDGE RIVERA: Or in line with the case law and
5 the jurisprudence, they could have simply said, we are
6 creating a new claim. This is a new cause of action. This
7 is the period for this cause of action. They could have
8 done that. It would have been very straightforward.

9 MS. MCMICHAEL: Right. And nowhere does it say,
10 this is a new cause of action. It refers to reviving - - -

11 JUDGE RIVERA: Right.

12 MS. MCMICHAEL: - - - otherwise, you know,
13 substantive cause - - - the time frame for filing otherwise
14 substantive causes of action. So I don't think that it
15 falls within the condition precedent rubric, basically.
16 And those two questions of whether it's a statute of
17 limitations or conditions precedent is what the Second
18 Circuit wants to know because it goes to the issue of
19 whether, as a matter of federal pleading, they forfeited
20 it.

21 JUDGE RIVERA: But the question is, actually, is
22 the statute of limitations is a condition preceding, or is
23 it an affirmative defense?

24 MS. MCMICHAEL: Something else.

25 JUDGE RIVERA: So we actually have to get to that

1 - - - well, no, they didn't say something else. They said
2 affirmative defense, but - - -

3 MS. MCMICHAEL: Well, or - - - it said, or some
4 other affirmative defense.

5 JUDGE RIVERA: Or some - - - yes. But they've
6 got it in that affirmative defense box.

7 MS. MCMICHAEL: Right. But if they had - - -

8 JUDGE RIVERA: And is that your position, it is
9 an affirmative - - - I don't know what the it is because
10 the front end of that question is the six months, so the
11 six months is not an affirmative defense. Challenging the
12 filing during the six months might be an affirmative
13 defense, I know.

14 MS. MCMICHAEL: Well, I think if they had wanted
15 to be absolutely certain - - -

16 JUDGE RIVERA: Yes.

17 MS. MCMICHAEL: - - - that they locked down an
18 affirmative - - -

19 JUDGE RIVERA: Yes.

20 MS. MCMICHAEL: - - - defense when they were
21 writing their answer, and they weren't concerned about
22 tipping us off that it was filed too soon, they would have
23 said - - - have said something in the effect of,
24 plaintiff's claim is barred - - -

25 JUDGE RIVERA: No. No. But I mean, in response

1 - - - I understand your point there. Thank you.

2 MS. MCMICHAEL: - - - because it was filed too
3 soon.

4 JUDGE RIVERA: I mean, in response to the Second
5 Circuit's question, you say it's not a statute of
6 limitation. Am I correct? The six months.

7 MS. MCMICHAEL: Correct. It is a waiting period.

8 JUDGE RIVERA: It's - - - okay. So then is that
9 waiting period in - - - something that they can invoke an
10 affirmative defense against?

11 MS. MCMICHAEL: Sure. But they didn't.

12 JUDGE RIVERA: What would be the affirmative
13 defense?

14 MS. MCMICHAEL: The affirmative defense would be
15 that - - - that plaintiff failed to state a claim - - -

16 JUDGE RIVERA: Okay.

17 MS. MCMICHAEL: - - - cognizable under the
18 revival statute - - -

19 JUDGE RIVERA: Okay.

20 MS. MCMICHAEL: - - - because they filed it
21 prematurely. And that the - - - and that part of your
22 essential claim was that you file it during this window. I
23 mean, that's a lot of words.

24 JUDGE RIVERA: I know.

25 MS. MCMICHAEL: But the essence of it would have



1 been - - - and that would have put us on notice, obviously
2 - - - trial counsel on notice that - - -

3 JUDGE RIVERA: Okay.

4 MS. MCMICHAEL: - - - whoops, I filed too soon.

5 JUDGE RIVERA: Sure.

6 MS. MCMICHAEL: And they didn't - - - they didn't
7 want to tip them off. So they made a strategic decision to
8 keep it general - - - to just put in that boilerplate
9 statute of limitations affirmative defense that it could be
10 used - - -

11 JUDGE HALLIGAN: Doesn't that happen in
12 litigation all the time?

13 MS. MCMICHAEL: Sure. But they have to live with
14 the consequences of making those kinds of strategic
15 decisions.

16 JUDGE HALLIGAN: Or they would anticipate that
17 counsel on the other side would try to figure out what it
18 means?

19 MS. MCMICHAEL: Correct. But they also - - -
20 presumably, you know, under Carlino and Geiss, if the court
21 had been confronted with a motion to dismiss because it was
22 premature, likely would have dismissed it without
23 prejudice, and - - - and we would have filed it within - -
24 - within the statutory limit.

25 JUDGE RIVERA: But wasn't counsel on notice given

1 Carlino and Geiss had been decided? I mean, it's decided
2 before the window closes, those two cases. Or am I
3 incorrect about when those cases were decided? I thought
4 that - - -

5 MS. MCMICHAEL: I have - - - I have - - -

6 JUDGE RIVERA: - - - was the whole point.

7 MS. MCMICHAEL: I have the dates here proffered -
8 - -

9 JUDGE RIVERA: They said it's dismissed without
10 prejudice. Go file it within your window.

11 MS. MCMICHAEL: Yeah.

12 JUDGE RIVERA: Right? So counsel, right, could
13 have been aware of those cases and said, uh-huh, maybe I've
14 got a problem.

15 MS. MCMICHAEL: Well, I mean, the statute kind of
16 - - - should have clued him in as to when he filed. He was
17 looking at the wrong provision in the statute. And if you
18 - - - if you read the briefs that trial counsel - - -

19 JUDGE RIVERA: Well, that explains - - -

20 MS. MCMICHAEL: - - - filed there are other
21 reasons - - -

22 JUDGE RIVERA: Yeah. But that explains - - -

23 MS. MCMICHAEL: - - - personal reasons why he did
24 that.

25 JUDGE RIVERA: Yes. That explains the mistake.

1 MS. MCMICHAEL: Right.

2 JUDGE RIVERA: Right? Or the error - - -
3 whatever, of - - - of when they filed - - - the filing
4 before the window opens. It doesn't explain what I thought
5 you were focused on, which is, once the school district
6 asserts that it's time-barred, counsel not being on - - -
7 put on notice, that their real argument is that it's
8 premature as opposed to it's barred, as in, its barred
9 because it's exceeded the time frame available. I thought
10 that's what you were talking about.

11 MS. MCMICHAEL: Well, I think, by the time they
12 filed for summary judgment, there was no way to fix the
13 problem because it was - - - - by then, it was time barred
14 by the end date of the statute of limitations.

15 JUDGE RIVERA: No. I'm talking about the answer
16 about - - - that says it's time barred. But that's - - - I
17 thought you were arguing, that's what didn't put them on
18 notice in time. Did I misunderstand you?

19 MS. MCMICHAEL: Well, if - - - if they had, and -
20 - - and the answer had been more specific, we would have -
21 - -

22 JUDGE RIVERA: Yes.

23 MS. MCMICHAEL: - - - been alerted to the fact
24 that there was a problem. I guess that's what I'm trying
25 to say.

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CHIEF JUDGE WILSON: Thank you, Counsel.

MS. MCMICHAEL: Uh-huh.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Jones v. Cattaraugus-Little Valley Central School District, No. 107 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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