No. 23-797

In the Supreme Court of the United States

Marco Gonzalez,

Petitioner,

v.

Salem Shahin, MD; Carol Gilmore, MD; Richard Martin, MD; Paul Andelin, MD; Jeffrey Adams, PA-C; Mercy Medical Center; McKenzie County Healthcare Systems, Inc.,

Respondents.

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

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QUESTIONS PRESENTED

Federal Rule of Appellate Procedure 4(a)(4)(A) dictates that a post-judgment motion filed "within the time allowed by" the Federal Rules of Civil Procedure tolls the 30-day period in which to file a notice of appeal from the underlying judgment. Fed. R. App. P. 4(a)(4)(A). The Civil Rules provide that a Rule 59(b) motion for a new trial must be filed within 28 days, and that time may not be extended by court order. Fed. R. Civ. P. 59(b), 6(b)(2). The commentary to Appellate Rule 4 further provides that "[a] motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), restarts the appeal time," even if "a court order that sets a due date that is later than permitted by the Civil Rules" or another party "consent[s] or fail[s] to object to the motion's lateness. Fed. R. App. P. 4 advisory committee's note, 2016.

The Petition presents two questions:

1. Whether a circuit court lacks jurisdiction to review a judgment where the petitioner failed to toll the time to appeal by not timely filing his post-judgment motion for new trial, and the respondent properly raised a timeliness objection before the appellate court?
2. Do a district court's brief comments on one piece of evidence at trial constitute reversible error where no demonstrable prejudice resulted from the comment and the jury was properly instructed as to its role as sole fact-finder?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Marco Gonzalez, appellant below and plaintiff in the district court.

Respondents are Dr. Salem Shahin, Dr. Carol Gilmore, Dr. Richard Martin, Dr. Paul Andelin, Jeffrey Adams, PA-C, Mercy Medical Center, and McKenzie County Healthcare Systems, Inc. These parties were appellees below and defendants in the district court.

Respondent McKenzie County Healthcare Systems, Inc., states it is a North Dakota non-profit corporation that has no parent corporations and that no publicly held company owns 10% or more of the party's stock. Respondent Mercy Medical Center, states CommonSpirit Health, a Colorado nonprofit corporation, is the sole corporate member of Mercy Medical Center, a North Dakota nonprofit corporation, and as such exercises control over Mercy Medical Center as specified in its bylaws. These Corporate Disclosure Statements are intended to comply with Supreme Court Rule 29.6.

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INTRODUCTION

This case presents a straightforward application of Federal Rule of Appellate Procedure 4 and 28 U.S.C. § 2107(a)'s 30-day period for filing a notice of appeal. Under those authorities, a notice of appeal must ordinarily be filed within 30 days of the judgment. That time period is "mandatory and jurisdictional"; it cannot be waived, forfeited, or excused by "unique circumstances." *Bowles* v. *Russell*, 551 U.S. 205, 209, 214 (2007) (quotation marks omitted). But Appellate Rule 4(a)(4)(A), provides for tolling where a party files a *timely* post-judgment motion. The rule expressly states, however, that a post-judgment motion is only timely if it is filed within the time allowed by the Federal Rules of Civil Procedure, which expressly prohibit a district court from extending the time in which to file certain post-judgment motions. Fed. R. App. P. 4(a)(4)(A); Fed. R. Civ. P. 6(b)(2).

Applying these rules, the Eighth Circuit correctly held that it had jurisdiction to review Petitioner's appeal from the denial of his post-judgment motion for a new trial, but lacked jurisdiction to review Petitioner's appeal of the underlying judgment. There is no dispute that Petitioner's post-trial motion was not filed within the time allowed by the Civil Rules. Consistent with this Court's precedent and the plain text of Appellate Rule 4, Petitioner's post-trial motion did not toll the 30-day deadline, and Petitioner's notice of appeal—filed 175 days after the underlying judgment was entered—was untimely.

Petitioner now seeks this Court's review, claiming a split exists among the circuits over whether an opposing party's failure to object to an post-judgment motion as untimely renders that otherwise untimely post-judgment motion timely for tolling purposes

under Appellate Rule 4. But no division exists among the circuit courts, particularly following the 2016 amendments to Rule 4 and the Federal Advisory Committee's comments, which specifically address and resolve this issue. Notwithstanding Petitioner's suggestion, the circuit courts that have had occasion to address this issue since that amendment—including the Eighth Circuit in this case—have unanimously held that an untimely post-judgment motion does not toll the time to file a notice of appeal under Appellate Rule 4. Indeed, the only circuit court cases Petitioner cites to the contrary pre-date the 2016 amendment, including the very case the Advisory Committee expressly addressed in the 2016 amendment as incorrectly applying the rule. As a result, any putative split on this issue is anachronistic, non-existent, and does not warrant this Court's intervention.

Petitioner's second question presented is equally without merit. Petitioner challenges the District Court's instructions to the jury as erroneous and prejudicial. This fact-bound question does not present a circuit split and Petitioner cannot meet the high bar required to demonstrate error and prejudice. Moreover, Petitioner's suggestion that a jury instruction applying long-standing North Dakota substantive law implicates a question of national significance merely because it involves a prescription drug label is wrong.

Even if the Eighth Circuit had jurisdiction to review the underlying judgment, it would have had no effect on the outcome in this case, including the Court's review of the alleged "evidence-denigrating" instruction and ancillary comments on the drug package insert made by the District Court at trial,

given the applicable standard of review and Petitioner's untimely objection.

This Court should deny the Petition.

STATEMENT OF THE CASE

A. Factual Background and District Court Proceedings

This is a medical malpractice action arising out of care provided to Petitioner by multiple healthcare providers in 2015 in western North Dakota. Petitioner was initially seen by urologist Dr. Salem Shahin at Mercy Medical Center for symptoms "consistent with a chronic prostate infection," and prescribed Bactrim, an antibiotic, to treat that infection. Pet. App. 2a-5a. Two weeks later, Petitioner presented to the emergency room at Mercy Medical Center with complaints of blurred vision and drainage from his eyes. *Id.* at 3a. The treating physician, Dr. Richard Martin, "was aware that [Petitioner] was taking Bactrim," but he did not have a rash, a common indicator of an adverse reaction to the drug. *Id.* Petitioner was diagnosed with a viral eye infection and prescribed a medicated ointment. *Id.* Dr. Martin did not discontinue Bactrim because, based upon assessment, there was no reason to "believe [Petitioner] was having a reaction" to the drug. *Id.*

That evening, Petitioner went to the emergency department of McKenzie County Healthcare Systems to address his complaints of eye pain and redness, where he was examined by certified physician assistant Jeffrey Adams. *Id.* PA Adams determined the symptoms, including absence of any rash, were not indicative of a reaction to Bactrim. *Id.* Petitioner was treated for a viral infection and instructed to return to his urologist. *Id.* The next day, Petitioner returned to

the emergency room at Mercy Medical Center due to pain. *Id.* Dr. Carol Gilmore examined Petitioner and diagnosed him with bilateral conjunctivitis and oral infections. *Id.* at 4a.

Due to worsening symptoms, Petitioner returned to the emergency room at Mercy Medical Center the following day. *Id.* Petitioner now had a rash and was admitted to the hospital. *Id.* Dr. Paul Andelin diagnosed Petitioner with, and treated him for, Stevens-Johnson Syndrome ("SJS"), an exceedingly rare drug reaction usually associated with a medication. The rash ultimately worsened, and Dr. Andelin transferred Petitioner to a burn center for greater care. *Id.*

Petitioner sued, alleging that Respondents individually and collectively failed to appropriately evaluate, diagnose, and treat his medical condition. *Id.* at 4a-5a. Respondents denied that the care provided was negligent in any respect, that there was a breach of any duty owed to Petitioner, or that the care and treatment provided caused any of Petitioner's alleged injuries or damages. *Id.* at 5a. Following an eleven-day trial, the jury returned a unanimous verdict in favor of all Respondents. *Id.*

A key feature of Petitioner's theory at trial was the Bactrim drug label from the Physician's Desk Reference, which includes information from drug manufacturers. *Id.* at 4a n.3. Petitioner alleged Respondents failed to consult this reference and discontinue the Bactrim. *Id.* at 4a-5a. Consistent with North Dakota substantive law, the District Court provided a limiting instruction—to which Petitioner stipulated—informing the jury that package insert information is not conclusive evidence of the standard of care. *Id.* at 11a, 27a.

The District Court provided further comment regarding the Bactrim drug label following its limiting instruction. Specifically, the District Court explained that drug labels are drafted by manufacturing companies and that, to the extent certain information is not included in a package insert, "it's a case * * * [Petitioner's trial counsel] would love to take on behalf of somebody who is injured as a result of that type of conduct." *Id.* at 28a. The District Court also accurately advised the jury that not every court would admit the Bactrim insert into evidence because there is concern a jury may assign it too much weight. *Id.* at 27a. The District Court specifically informed the jury that "the measure of weight or how important something * * * is, is a decision that you get to make." *Id.* While Petitioner objected to the District Court's comments regarding the purpose of drug inserts, Petitioner did not object to the District Court's comments specifically referencing counsel until after trial. *Id.* at 29a-31a.

The jury returned a unanimous defense verdict. *Id.* at 5a. The District Court entered judgment on November 19, 2021. *Id.* at 35a-36a. Under Civil Rule 59(b), a new trial motion "must be filed no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(b). That timeline cannot be extended under any circumstance. *See* Fed. R. Civ. P. 6(b)(2).

Despite this restriction, Petitioner requested an extension of time to file post-trial motions, which the District Court granted without objection from Respondents. *Id.* at 5a. Petitioner filed a new trial motion on January 13, 2022, 55 days after entry of judgment, challenging both the District Court's comments to the jury and its evidentiary rulings. *Id.* The District Court issued its order denying that motion on April 27, 2022. *Id.* at 6a.

Petitioner filed his Notice of Appeal on May 13, 2022, within 30 days of the District Court's Order denying his Rule 59 Motion, but well beyond the 30-days following the entry of judgment within which to appeal, which—without a proper tolling motion filed within the time prescribed by the Rules for that motion—had expired on December 19, 2021.

B. Procedural History of the Appeal

Petitioner appealed to the Eighth Circuit and argued the District Court erred in four respects: (1) when instructing the jury regarding the Bactrim label; (2) by permitting Respondent Dr. Salem Shahin to present evidence regarding Petitioner's prior treatment with antibiotics; (3) by limiting Petitioner's cross-examination of Respondent Jeffrey Adams PA-C's standard-of-care expert; and (4) by permitting Respondents Mercy Medical Center, Dr. Richard Martin, and Dr. Carol Gilmore to substitute a standard-of-care expert. Petitioner also argued that the district court erred in denying his new-trial motion in which he had raised only the first and third issues he later raised on appeal.

The Eighth Circuit unanimously held it lacked jurisdiction to review the underlying judgment because Petitioner's notice of appeal was untimely, but that it did have jurisdiction to review the denial of the Rule 59(b) motion. Pet. App. 6a-9a. Relying on the plain language of the applicable Rules, its own precedent, and this Court's precedent, the Eighth Circuit reasoned that Respondents' non-objection to the extension and the District Court's improvident grant of the same did not make Petitioner's post-judgment motion timely under Rule 4(a)(4)(A)'s tolling provision. *Id.* at 7a-8a. The Eighth Circuit explained that, under Rule 6(b)(2), "[a] court may not extend

th[e] 28-day deadline" for a new trial motion. *Id.* at 7a. Under Rule 4(a)(4)(A), however, a post-judgment motion will only toll the time in which to file a notice of appeal if it is "file[d] in the district court * * * within the time allowed by the applicable rules." *Id.* Because Petitioner's "Rule 59 motion was not filed" in accordance with those deadlines, "the time for [Petitioner] to file his appeal" from the underlying judgment "was not tolled." *Id.* Absent tolling, Petitioner's notice of appeal from the underlying judgment was un-timely, and the Eighth Circuit therefore lacked jurisdiction over that aspect of the appeal. *Id.* at 8a-9a

The Eighth Circuit explicitly acknowledged Respondents' non-objection to the requested extension before the District Court and that the District Court acted outside the scope of Rule 6(b)(2)'s direct prohibition against granting the type of extension requested. *Id.* at 8a. As the Eighth Circuit noted, however, Respondents' lack of objection to the extension meant only that the District Court could consider and rule on Petitioner's Rule 59 Motion—and the Eighth Circuit had jurisdiction to review that part of the appeal—but their objection to Petitioner's untimely notice of appeal *from the judgment* deprived the Eighth Circuit of jurisdiction to review the underlying judgment. *Id.*

On the merits, the Eighth Circuit affirmed the District Court's decision, holding that the District Court did not err and that, even if it had, the record was devoid of any evidence that any alleged errors prejudicially influenced the outcome of trial. *Id.* at 11a-14a. This is particularly true with respect to the District Court's comments about the Bactrim drug label. As the Eighth Circuit noted, Petitioner did not

object at trial to the District Court's comments relative to his counsel. *Id.* at 11a. While acknowledging that this comment was "ill-advised," the Eighth Circuit concluded that, absent any evidence in the record to the contrary, this comment did not affect the outcome at trial. *Id.* at 11a-12a. The Eighth Circuit also rejected Petitioner's arguments about the alleged prejudice arising from the District Court's comment about his lawyer. When considering "the complete charge to the jury," the Eighth Circuit held, the District Court accurately instructed the jury as to the manu-facturer information and that the jury itself, and not the District Court, was the ultimate factfinder. *Id.* at 11a.

The Eighth Circuit denied Petitioner's request for rehearing. *Id.* at 32a. Petitioner now seeks a Writ of Certiorari in this Court, the petition for which this Court should deny.

REASONS FOR DENYING THE PETITION

I. Certiorari is unwarranted to review the Eighth Circuit's timeliness decision.

This Court should deny review because there is no actual division among the circuits about whether an untimely post-judgment motion—not objected to as such before the district court by the opposing party—renders that motion timely for tolling purposes under Rule 4(a)(4)(A). Indeed, the Eighth Circuit's holding in this case rests on firm ground supported by this Court's precedent and the rules' plain language. Moreover, this case presents a poor vehicle to address the question presented, where the outcome would be the same under any circuit's approach *and* the arguments Petitioner failed to preserve are meritless.

A. No circuit split exists that warrants this Court's review.

1. Every circuit holds, consistent with the plain text of Rule 4(a)(4)(A), that an untimely post-judgment motion does not toll the time in which to file a notice of appeal from the underlying judg-ment.

Prior to 2016, Appellate Rule 4(a)(4)(A) provided that: "If a party *timely* files in the district court" certain identified post-judgment motions—including a Rule 59(b) motion—"the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion * * * " Fed. R. App. P. 4(a)(4)(A) (2015) (emphasis added).

Over time, a circuit split emerged over the meaning of "timely." Most courts held that failure to object to an untimely post-judgment motion does not render that motion timely for purposes of "toll[ing] the period for filing a notice of appeal." *Blue v. Int'l Bhd. of Elec. Workers Loc. Union 159*, 676 F.3d 579, 583 (7th Cir. 2012). But some courts held that failure to object to an untimely post-judgment motion "makes the motion 'timely' " under Rule 4(a)(4)(A) for purposes of tolling the time to file a notice of appeal. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

In 2016, the Advisory Committee on Appellate Rules sought to mend this division and amended the rule:

> If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure—***and does so within the time allowed by those rules***—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion * * *

Fed. R. App. P. 4(a)(4)(A) (emphasis added). And the Advisory Committee's Note on the 2016 amendment makes plain its intention that this revision was meant to clarify that"[a] motion made after the time allowed by the Civil Rules *will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time*." fact Fed. R. App. P. 4 advisory committee's note, 2016 (emphasis added).[1]

The Advisory Committee further explained that this result "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness." *Id.* The amend-ment both clarified the meaning of the rule and cemented what was already existing law: juris-dictional timing prerequisites, such as the time-frame for filing a notice of appeal, are not subject to waiver or forfeiture. *See Browder v. Director, Dep't of Corr. of Illinois,* 434 U.S. 257, 264 (1978) ("Under Fed.Rule App.Proc. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is mandatory and jurisdictional."); *Bowles v. Russell,* 551 U.S. 205, 209-10 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'") (quotation omitted).

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[1] This Court routinely looks to the Advisory Committee's notes in interpreting the Federal Rules of Procedure. *See, e.g.*, *City of San Antonio, Texas v. Hotels.com, L.P.*, 593 U.S. 330, 339 (2021); *United States v. Vonn*, 545 U.S. 55, 64 (2002); *Torres v. Oakland Scavenger Co. et al.*, 487 U.S. 312, 315-16 (1988).

Against this background, Petitioner's claimed split is illusory. Under Rule 4(a)(4)(A)'s *plain text*, "where a district court mistakenly 'extends' the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits," but that motion does not "count as a 'timely' one that, under Rule 4(a)(4), tolls the time to appeal." https://www.uscourts.gov/sites/default/files/ap05-2015_0.pdf. Petitioner has not identified any actual circuit split on the issue.

In particular, the cases Petitioner cites that post-date the 2016 amendment universally apply Appellate Rule 4 in a manner consistent with the Eighth Circuit's application in this case. *See Shuler v. Orangeburg Cnty. Sheriff's Dep't*, 71 F.4th 236, 240 (4th Cir. 2023) (holding untimely notice of appeal deprives an appellate court of jurisdiction); *Ueckert v. Guerra*, 38 F.4th 446, 453 (5th Cir. 2022) (holding the timeliness of a notice of appeal is a jurisdictional prerequisite); *Ruiz v. Wing*, 991 F.3d 1130, 1137-38 (11th Cir. 2021) (explaining untimely post-judgment motions do not extend the time within which to appeal); *Frew v. Young*, 992 F.3d 391, 395-96 (5th Cir. 2021) (holding an untimely post-judgment motion does not toll the deadline to appeal, divesting the appellate court of jurisdiction to consider the same); *Bunn v. Perdue*, 966 F.3d 1094, 1098 (10th Cir. 2020) (holding improperly filed post-judgment motions do not toll the time for appeal); *Nutrition Distribution LLC v. IronMag Labs, LLC*, 978 F.3d 1068 (9th Cir. 2020) (holding the timely filing of a notice of appeal is a non-waivable jurisdictional requirement, not subject to tolling by a non-qualifying post-judgment motion).

Indeed, every circuit holds, consistent with the plain text of Rule 4(a)(4)(A), that an untimely post-judgment motion does not toll the time in which to file a notice of appeal from the underlying judgment. Even Petitioner correctly recognizes that the First, Third, Seventh, Eighth, and Tenth Circuits employ the same approach. Pet. 21. These courts hold that the time in which to file a post-judgment motion is a non-jurisdictional claim-processing rule, but that an untimely post-judgment motion does not toll the time in which to file a notice of appeal from the underlying judg-ment.

For example, in *Lizardo v. United States*, the Third Circuit held that the 28-day deadline for a Rule 59(e) motion to alter or amend the judgment "is a claim-processing rule," meaning that "an objection based on the untimeliness of a Rule 59(e) motion may be forfeited." 619 F.3d 273, 278 (3d Cir. 2010). But, the court continued, "[a]n *untimely* Rule 59(e) motion does not toll the time for filing an appeal under Rule 4(a)(4)(A)." *Id.* (emphasis added). That is so "even if the party opposing the motion did not object to the motion's untimeliness and the district court considered the motion on the merits." *Id.* Applying this Court's longstanding precedent that a timely-filed notice of appeal is a jurisdictional requirement, the Third Circuit held it lacked jurisdiction over the notice of appeal of the underlying judgment having been untimely filed. *Id.* at 276, 280 (citing *Bowles*, 551 U.S. at 212-13).

As Petitioner acknowledges, the First, Seventh, Eighth, and Tenth Circuits are in accord. Pet. at 24. Thus, where the notice of appeal of the *underlying judgment* is untimely, absent tolling, the court lacks jurisdiction over any appeal from the judgment. By

contrast, if the notice of appeal of the post-judgment *motion* itself is timely, the court may hear the appeal from the denial *of that motion*. *See, e.g.*, *Vaqueria Tres Monjitas, Inc. v. Comas-Pagan*, 772 F.3d 956, 958 (1st Cir. 2014); *Blue*, 676 F.3d at 582; *Williams v. Akers*, 837 F.3d 1075, 1078 (10th Cir. 2016).

Despite Petitioner's contention, the remaining circuits do not apply a different approach. Petitioner attempts to manufacture a split between the Second, Sixth, and D.C. Circuits and the Fourth, Fifth, Ninth, and Eleventh circuits by arguing that these courts apply a different approach from the approach discussed. *See* Pet. 22-24, 26. But there is no basis for these supposed distinctions and Petitioner never attempts to actually identify one.

For example, the Second Circuit has long held that, under Rule 4(a)(4)(A), "an appellant can toll[] the time within which to file an appeal of the underlying order by timely filing a motion under Rule 59." *Lora v. O'Heaney*, 602 F.3d 106, 110 (2d Cir. 2010). "In order for the appeal period to be tolled, however, any such motion must have been timely filed * * * ." *Id.* A notice of appeal from an *untimely* post-judgment motion does "not act to toll the time for appealing the underlying order" and is "timely only with respect to the ruling on the [post-judgment] motion." *Id.* Because "[t]he failure to file a timely notice of appeal is a jurisdictional defect," in that situation, the court has jurisdiction to review the ruling on the post-judgment motion but lacks jurisdiction to review the underlying order. *See id.* at 110-11.

Petitioner's citation to *Legg v. Ulster County*, 820 F.3d 67 (2d Cir. 2016), backfires. *Legg* only involved an appeal from the denial of an untimely *post-trial motion*—not an appeal from the underlying judgment.

The district court had initially granted an extension for post-trial motions but later denied those motions as untimely, on the theory that it lacked authority under Rule 6(b)(2) "to grant an extension" because those time limitations were "jurisdictional." *Id.* Joining "every other circuit to consider the question," the Second Circuit held that Rule 6(b)(2) is a non-jurisdictional claim-processing rule subject to waiver or forfeiture. *Id.* at 79 (collecting cases). But there, the opposing party's lack of objection to the untimely post-judgment motion simply meant the Court of Appeals had jurisdiction to consider the appeal of *that motion*. *See Legg v. Ulster Cnty.*, 979 F.3d 101, 113 (2d Cir. 2020). *Legg* did not implicate the court's jurisdiction with respect to *the underlying judg-ment* because no one had sought to appeal the underlying judgment.

The Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits have all similarly held that an untimely post-judgment motion does not toll the time in which to file a notice of appeal. *See, e.g.*, *Perez-Amaya v. United States*, 836 Fed. App'x 188, 189 (4th Cir. 2021) ("Because Perez-Amaya filed his Rule 60(b) motion more than 28 days after the entry of judgment, the motion did not toll the appeal period."); *Frew,* 992 F.3d at 395-96 ("[P]laintiffs' motion * * * was untimely for purposes of Rule 4—it failed to toll the deadline to appeal" the order); *Fender Musical Instruments Corp. v. Swade*, 772 F. App'x 282, 285, n.2 (6th Cir. 2019) (stating Rule 60 motion did "not trigger an extension under Rule 4 because it was not timely filed"); *Hanson v. Shubert*, 968 F.3d 1014, 1017-18 (9th Cir. 2020) ("The filing of an untimely motion will not toll the running of the appeal period.") (quotation omitted); *Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323 (11th Cir. 1996) ("Untimely motions under Rules

59 and 60 will not toll the time for filing an appeal."); *Satterlee, v. Comm'r of Internal Revenue Serv.*, No. 16-5342, 2017 WL 2348059, at *1 (D.C. Cir. Mar. 31, 2017) ("Appellant's [untimely] Rule 60(b) * * * did not toll the time to appeal").

2. There is likewise no actual split on the question of whether "a court's permission and an opposing party's acquiescence" render an otherwise untimely post-judgment motion timely for purposes of tolling the period in which to appeal the underlying judgment, in the face of Rule 4(a)(4)(A)'s express admonition to the contrary. *Cf.* Pet. 22. Petitioner's argument in this regard rests on a misreading of circuit precedent and purposeful ignorance of the 2016 amendment to Rule 4 on this precise issue.

Indeed, the circuit courts to squarely consider this issue have held that a district court's erroneous extension of time to file post-trial motions does not make an untimely motion timely for purposes of tolling Rule 4(a)(4)(A). In *Green v. DEA*, the district court erroneously granted an extension of time to file a Rule 59(e) motion. 606 F.3d 1296, 1299 (11th Cir. 2010). Analyzing Rule 6(b)(2)'s prohibition, the Eleventh Circuit deemed the motion untimely and, therefore, ineffective to "toll the period for filing a notice of appeal" of the underlying judgment. *Id.* at 1300-1302. Indeed, the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits all agree that unauthorized extensions of time to file a post-judgment motion do not toll the time to appeal from the underlying judgment. *See, e.g.*, *Garcia-Valazquez v. Frito Lay Snacks Caribbean*, 358 F.3d 6, 10-11 (1st Cir. 2004); *Lizardo*, 619 F.3d at 278; *Panhorst v. United States*, 241 F.3d 367, 373 (4th Cir. 2001); *In re Crescent Res., L.L.C.*, 496 Fed. Appx. 421, 424 (5th

Cir. 2012); *Blue*, 676 F.3d at 583; *Torricellas v. Davidson*, 279 F. App'x 504, 505 (9th Cir. 2008); *see also, e.g.*, *In re Robertson,* 774 F. App'x 453, 466 (10th Cir. 2019) (reaching the same conclusion in an analogous context applying bankruptcy rules).

And where those same circuits have had occasion to address the issue of whether a lack of objection to an untimely motion renders it timely for tolling purposes (in the Third, Seventh, Eighth, and Ninth), they have correctly concluded it does not. *See e.g.*, *Lizardo*, 619 F.3d at 278; *Blue*, 676 F.3d at 583; *Torricellas v. Davidson*, 279 F. App'x 504, 505 (9th Cir. 2008).

Moreover, Petitioner's argument lacks merit because every case he cites as support for a purported split falls into one of two categories: either (1) it is a pre-2016 amendment decision relying on language that no longer exists in the rule; or (2) it does not address any issue actually relevant to his petition. For example, Petitioner points to the Sixth Circuit's decision in *National Ecological Foundation v. Alexander*, in which that court held an untimely post-judgment motion tolls the time period to appeal absent timely objection. 496 F.3d 466 (6th Cir. 2007). Not only does Rule 4(a)(4)(A)'s 2016 amendment invalidate that conclusion, but the Advisory Committee *expressly rejected* the *National Ecological Foundation* approach, identifying *National Ecological Foundation* by name in its comment on the amendment. *See* Fed. R. App. P. 4, advisory committee's note, 2016 ("The amendment adopts the majority approach *and rejects the approach taken in National Ecological Foundation* * * * .") (emphasis added). Petitioner glosses over this critical point by claiming that the Sixth Circuit has "made clear" that *National Ecological* "remains the law of the circuit," supporting this assertion with a

citation to a 2014 case that *also* predates the 2016 rule change. Pet. 24 (citing *Wallace v. FedEx Corp.*, 764 F.3d 571, 584 & n.7 (6th Cir. 2014)). Petitioner does not cite *a single case*—and Respondents are not aware of any—following *National Ecological Foundation*'s approach after the Advisory Committee's express repudiation of that decision in 2016.

Indeed, the Second and D.C. Circuit cases Petitioner suggests evidence a *current* circuit split on this issue both pre-date the 2016 amendment and do not squarely address the question presented. *See, e.g.*, *Weitzner v. Cynosure, Inc.*, 802 F.3d 307 (2d Cir. 2015) (holding an untimely post-judgment motion does not toll the time for appeal absent an equitable exception); *Mobley v. C.I.A.*, 806 F.3d 568 (D.C. Cir. 2015) (analyzing the unique circumstances doctrine in the face of a timeliness objection). The D.C. Circuit, in *Obaydullah v. Obama*, held that a post-judgment motion is timely for tolling purposes when the appellee expressly waives its timeliness objection *on appeal*. 688 F.3d 784, 787 (D.C. Cir. 2012). But in that case, the government "*waive*[*d*] any objection to the fact that" the appellant's post-judgment motion "was not timely filed." *Id.* at 788 (emphasis added). Because Rule 4(A)(4)'s timeliness provision is non-jurisdictional, *id.* at 791, in light of the gov-ernment's express waiver, the court had no occasion to consider whether forfeiting a timeliness objection before the district court renders that motion "timely" for purposes of tolling. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("[F]orfeiture is the failure to make the timely assertion of a right"; "waiver is the intentional relinquishment or abandonment of a known right.") (quotations omitted).

In short, there is no division among the circuit courts that warrants certiorari. The circuits are in accord that an untimely post-judgment motion does not toll the time to appeal under Rule 4(a)(4)(A). There similarly is no conflict on whether non-objection to an untimely post-judgment motion alone renders that motion timely for tolling purposes, in the face of Appellate Rule 4's express intent to the contrary. Certiorari should be denied.

B. The decision below was correct.

In limiting its review to the District Court's denial of Petitioner's new trial motion, the Eighth Circuit's decision is firmly grounded in this Court's precedent and the text of Appellate Rule 4. Certiorari review of the decision below is accordingly unwarranted.

As this Court explained in *Bowles v. Russell*, Rule 4 "carries § 2107 into practice." 551 U.S. at 208. This Court held, consistent with a long line of cases dating back to the 1960s, that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Id.* at 209 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curium)). Jurisdictional bars are absolute; they cannot be excused by "unique circumstances," they cannot be forfeited, and they cannot be waived, even by consent. *See id.* at 214; *see also, e.g.*, *Browder*, 434 U.S. at 263 (holding court of appeals lacked jurisdiction where post-trial motions were untimely and, therefore, did "not toll the running of time to appeal under Rule 4(a)," rendering the notice of appeal untimely). In contrast, this Court explained, filing deadlines adopted only for the "the orderly transaction of [court] business* * * are not jurisdictional" and are subject to waiver or forfeiture. *Bowles*, 551 U.S. at 211 (quotation marks omitted).

In *Hamer v. Neighborhood Housing Services of Chicago*, this Court unequivocally re-affirmed that the 30-day time prescription for a notice of appeal is "mandatory and jurisdictional," but clarified that non-statutory time prescriptions are merely "claim-processing rules." 583 U.S. 17, 27 (2017) (quotation omitted). Claim-processing rules can be mandatory or nonmandatory. A claim-processing rule is considered mandatory where it evinces "a clear intent to preclude tolling." *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019). "If properly invoked, mandatory claim-processing rules must be enforced," although—unlike jurisdictional limit-ations—mandatory claim-processing rules "may be waived or forfeited." *Hamer*, 583 U.S. at 20.

"The Federal Rules of Appellate and Civil Procedure work in combination to set forth the rules governing when notices of appeal must be filed." *Nutrition Distribution*, 978 F.3d at 1072. Because the 30-day period outlined in Appellate Rule 4 is based in statute, it is a "non-waivable jurisdictional requirement." *Id.* (quoting *Stephanie-Cardona LLC v. Smith's Food & Drug Ctrs., Inc.*, 476 F.3d 701, 703 (9th Cir. 2007)). "Any other construction * * * would defeat its purpose." *Browder*, 434 U.S. at 264 (quoting *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943)).

Rule 4(a)(4)(A) also provides that this time period may be tolled if a party files certain qualifying post-judgment motions "within the time allowed by those rules." For example, as is relevant here, a new trial motion pursuant to Rule 59 must be filed within 28 days following the entry of judgment and that deadline cannot be extended. Fed. R. Civ. P. 59(b); Fed. R. Civ. P. 6(b)(2). Thus, an untimely Rule 59(b) motion is not made "within the time allowed by those rules" and so

cannot toll the 30-day notice-of-appeal deadline. *See also Nutraceutical Corps.*, 139 S. Ct. at 714 (where the rules "single out" a certain provision "for inflexible treatment," the rules "express a clear intent to compel rigorous enforcement," meaning the rule is mandatory).

Because Rule 4(a)(4)(A) is mandatory, courts cannot make exceptions to it "merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving." *Nutraceutical Corps.*, 139 S. Ct. at 714. Were there any doubt, the Advisory Committee expressly confirmed Rule 4(a)(4)(A)'s mandatory nature in the 2016 Amendment, explaining that "[a] motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time," even if "a court order * * * sets a due date that is later than permitted by the Civil Rules" or the opposing party "fail[s] to object to the motion's lateness" before the district court. Fed. R. App. P. 4 advisory committee's note, 2016.

Here "a simple scan of Rule 6(b)(2) would have provided [Petitioner] notice that the district court lacked authority to grant an extension of time to file the" Rule 59 motion. *Dill v. Gen. Am. Life Ins. Co.,* 525 F.3d 612, 620 (8th Cir. 2008). Petitioner could have taken "any of the other steps to extend his time to appeal as permitted by Appellate Rule 4(a)." *Green,* 606 F.3d at 1302. He could have timely filed his Rule 59 motion and then sought an extended briefing schedule. *See* Fed. R. Civ. P. 59(b) (requiring "[a] *motion* for a new trial must be filed no later than 28 days after the entry of judgment" but not requiring same for supporting brief) (emphasis added). He could have timely filed a notice of appeal from the underlying judgment and then filed an "amended

notice of appeal" from the denial of his post-trial motion, notwithstanding his feigned practical concerns suggesting otherwise. Fed. R. App. P. 4(a)(4)(B)(ii); *see, e.g., Ross v. Marshall*, 426 F.3d 745, 751-52 (5th Cir. 2005). Petitioner did none of these things. And whether his extension was wrongly granted or whether Respondents objected to the extension before the District Court does not change that Petitioner *did not toll his time to appeal from the judgment itself* by filing one of the identified motions "within the time allowed by those rules" governing such motions. Fed. R. App. P. 4(a)(4)(A).

The Eighth Circuit correctly applied these principles to hold that it "lack[ed] jurisdiction to review the underlying judgment." Petitioner's notice of appeal was due on December 18, 2021, unless he filed a timely tolling motion before that date. Petitioner filed his Rule 59(b) motion on January 13, 2022, 55 days after the district court entered judgment, and only filed his notice of appeal on May 13, 2022, 175 days after entry of judgment. Pet. App. 9a. "Accordingly, because the Rule 59 motion was not 'file[d] in the district court * * * within the time allowed by" the applicable rules, the time for [Petitioner] to file his appeal was not tolled," and his notice of appeal remained due on the original date—December 18, 2021. Pet. App. 7a. (quoting Fed. R. App. P. 4(a)(4)(A)). Petitioner's notice of appeal was not filed until "well beyond the 30-day period after denying the judgment." *Id.* And Respondents "properly invoked" their Rule 4(a)(4)(A) objection in the Court of Appeals—the only court in which a challenge to appellate jurisdiction could be raised. *Hamer*, 583 U.S. at 20. The Eighth Circuit was therefore correct to strictly "enforce" Rule 4(a)(4)(A)'s tolling requirement and dismiss Petitioner's untimely notice of appeal of

the underlying judgment for lack of jurisdiction. Pet. App. 2a, 7a.

Petitioner suggests (at 16, 28) that the Eighth Circuit held Rule 4(a)(4)(A)'s *tolling language* "jurisdictional," contrary to *Hamer*. Petitioner is wrong. Consistent with *Hamer*, *Bowles,* and *Browder*, among others, the Eighth Circuit explained that Rule 4(a)'s 30-day *appeal period* is jurisdictional. Pet. App. 8a. The Court did not hold that the tolling deadlines in or referred to in Rule 4(a)(4)(A) are jurisdictional. Indeed, they are not.

Nor is there any "contradiction" in the Eighth Circuit's disparate approach to Petitioner's appeals of the underlying judgment and the Rule 59(b) motion. *Contra* Pet. 3-4. Whether the District Court had authority to consider a late-filed Rule 59(b) motion is distinct from whether a party filing such a motion falls within Rule 4(a)(4)(A)'s tolling provision. "[T]he [D]istrict [C]ourt had the authority to rule on [Petitioner's] Rule 59 motion," absent objection from Respondents. Pet. App. 8a. Respondents did not object to the timeliness of the Rule 59(b) motion *itself*, and Petitioner filed his notice of appeal within 30 days of the denial of that motion. *Id.* at 7a. Accordingly, the Eighth Circuit had jurisdiction to review that denial. *Id.* at 8a-9a. But Respondents did properly object to the timeliness of his notice of appeal *from the underlying judgment* because Petitioner filed his notice of appeal more than 30 days after its entry. Accordingly, the Eighth Circuit lacked jurisdiction to review this aspect of the appeal having properly concluded Petitioner's notice of appeal was not timely. *Id.*

Finally, there is nothing contradictory about treating the same notice of appeal as sufficient for one ruling

but insufficient for another. *Contra* Pet. 15-18. As the Eighth Circuit explained, the fundamental question is whether the notice of appeal was filed "within 30 days of th[e] ruling" the appellant seeks to appeal. Pet. App. 9a. If the notice of appeal was timely for purposes of appealing one ruling but not another, the court of appeals only has jurisdiction as to the timely-appealed ruling. To grant review and hold otherwise would "contravene a 'century's worth of precedent and practice' regarding the limitations on an appeal from one court to another." *Blue*, 676 F.3d at 583 (quoting *Bowles*, 551 U.S. at 209-10 & n.2). The Petition should be denied.

C. This case is a poor vehicle to address the question presented, which does not warrant this Court's review.

As explained above, the Eighth Circuit and every other circuit court to consider this question has properly treated Rule 4(a)(4)(A)'s tolling provision as a mandatory claim-processing rule that dictates whether Rule 4(a)(1)'s jurisdictional 30-day notice-of-appeal-requirement has been satisfied. *Supra pp.* 9-16. To the extent the circuits were ever confused about that point, *Hamer* cleared it up. *See, e.g.*, *Demaree v. Pederson*, 887 F.3d 870, 876-877 (9th Cir. 2018) at (overruling pre-*Hamer* precedent holding that Rule 4(a)(4)(A)'s "timeliness rule" was jurisdictional). But even if this question warranted review, this case is a poor vehicle to consider whether non-objection to an untimely post-judgment motion renders it timely for purposes of tolling under Rule 4(a)(4)(A), for several reasons.

First, even if Petitioner had identified an actual split between the circuit courts, Respondents would win under any approach the other circuits apply, with the

exception of the Sixth Circuit, whose decision in *National Ecological Foundation* was explicitly rebuked by Rule 4's 2016 amendment and has—to Respondents' knowledge—not revisited the issue since the amendment. *Supra* pp. 18-19. An untimely post-judgment motion simply does not toll the time to file a notice of appeal, regardless whether the appellee objected on timeliness grounds before the District Court. Petitioner failed to cite a single case holding that failure to object alone renders an untimely post-judgment motion timely for purposes of tolling. Moreover, Petitioner has never invoked equity or identified any unique circumstances to excuse his belated filing, and, in any event, the unique circumstances doctrine was abrogated in this context in *Bowles.* 551 U.S. at 214. *See also Harrow v. Dep't of Defense*, No. 23-21 (May 16, 2024), slip op. 9 (refusing to address arguments about applicability of equitable tolling where respondent "did not broach the issue below" and the appellate court "did not address it").

Second, even if the Eighth Circuit had considered the merits of the arguments Petitioner failed to preserve, they are meritless and the ultimate result would have been the same. When asserting an evidentiary error subject to abuse-of-discretion review, the asserting party must also establish that the alleged error prejudicially influenced the outcome of trial. *Coterel v. Dorel Juvenile Grp., Inc.*, 827 F.3d 804, 807 (8th Cir. 2016); *see also Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013) ("We will order a new trial only if the error mislead the jury or had a probable effect on its verdict.") (quotation omitted). Whether considering the evidentiary issues raised in his new trial motion or the issues Petitioner first

raised on appeal, Petitioner has identified no prejudice that adversely affected the outcome at trial.

The Court must look to the jury's verdict to determine whether evidentiary errors "prejudi-cially influenced the outcome of the case." *Coterel*, 827 F.3d at 808. The jury returned a unanimous defense verdict, finding that each named Defendant was not at fault in their care and treatment of Petitioner. Pet. App. 5a. The District Court entered judgment accordingly. *Id.* at 35a-36a.

On this record, the Eighth Circuit concluded that the record did not evidence prejudice to Petitioner and he had not identified any. Pet. App. 10a-14a. Indeed, no court could conclude on this record that "the jury used the challenged evidence for an improper purpose." *Coterel*, 827 F.3d at 808. Instead, Petitioner asks this Court—as he previously asked the lower courts—"to guess about the course and content of the jury deliberations." *Id.* Rote speculation is the only way to conclude "any of the alleged evidentiary issues actually prejudiced" Petitioner. *Id.* Without question, speculation is an insufficient basis to set aside a jury's verdict. *Id.*; *see also Regions Bank v. BMW N. Am., Inc.,* 406 F.3d 978, 980 (8th Cir. 2005*)* (holding speculation is not a sufficient basis to find a plaintiff's substantial rights were affected or set aside a jury's verdict).

In addition, the District Court's instruction on the Bactrim drug label, the *only* specific evidentiary issue raised in the Petition, would have been analyzed for abuse of discretion irrespective of whether it was considered in the context of the District Court's denial of Petitioner's Rule 59 motion or from the judgment itself. *White Commc'ns*, *LLC v. Synergies3 Tech. Servs.*, *LLC*, 4 F.4th 606, 613 (8th Cir. 2021); *Reed v.*

Malone's Mech., Inc., 765 F.3d 900, 910 (8th Cir. 2014). The same is true with respect to all evidentiary issues Petitioner asserted on appeal, even those the Eighth Circuit declined to consider for want of jurisdiction.

II. Certiorari is unwarranted to review the Eighth Circuit's fact-bound decision regarding the District Court's comments at trial.

Petitioner also asks this Court to review the Eighth Circuit's determination that the District Court did not abuse its discretion in its comments to the jury at trial. Any difference in outcomes on this question is a result of different facts and postures, not different legal standards. This fact-bound question plainly does not merit certiorari.

First, there is no circuit split over the proper standard for evaluating a judge's comments to a jury. Every circuit applies the same basic standard, explaining that the judge has broad discretion to comment on evidence in order to assist the jury, but that it must make clear the jury remains the ultimate arbiter of the facts and cannot unduly prejudice one party.

Petitioner points to the Eleventh Circuit and argues that court "requires a more searching inquiry and more pointed curative instruction than the Eighth Circuit undertook." Pet. 37. Petitioner supports this characterization with language from *United States v. Hope*, 714 F.2d 1084 (11th Cir. 1983), which explained that "[a] trial judge may comment upon the evidence as long as he instructs the jury that it is the sole judge of the facts and that it is not bound by his comments and as long as the comments are not so highly prejudicial that an instruction to that effect cannot cure the error." Pet. 37 (quoting *Hope*, 714 F.2d at

1088). But, as the Eighth Circuit here explained, district courts "ha[ve] broad discretion in commenting on evidence and may do so in order to give appropriate assistance to the jury." Pet. App. 10a (quoting *Reed v. Malone's Mech., Inc.,* 765 F.3d 900, 910 (8th Cir. 2014)). A court "may express its opinion upon the facts so long as it does so fairly and impartially and makes it clear to the jury that all matters of fact are submitted to their determination, so long as the court's comments do not preclude a fair evaluation of the evidence by the jury." Pet. App. 10a (quotation omitted). That explanation is materially identical to the standard applied by Petitioners' preferred cases. *See, e.g., Hope*, 714 F.2d at 1088.

In its decision, the Eighth Circuit applied the same basic standard as every other circuit to evaluate a judge's comments to the jury, including in those cases cited by Petitioner. *See, e.g.*, *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9, 11 (2d Cir. 1981) (a court's comments on the record should be fair and objective); *Spencer v. Ashcroft*, 147 F. App'x 373, 375 (4th Cir. 2005) (the complaining party must show a judge's comments affected the outlook or deliberations of the jury); *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 425 (5th Cir. 1990) (a district court "has the right and the duty to comment on the evidence * * * measured against a standard of fairness and impartiality) (internal quotations omitted); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 472 (9th Cir. 1977) (recognizing trial judges have broad discretion in explaining and commenting upon the evidence).

Petitioner's real issue is not with the *standard* applied by the circuit courts, but with the variations in its *application.* That is a classic fact-bound determination that does not warrant certiorari review.

Indeed, as Petitioner acknow-ledges, each case is fact-specific and dependent upon the entire trial record. *See United States v. Portillo*, 969 F.3d 144, 181 (5th Cir. 2020); *United States v. Rosario-Perez*, 957 F.3d 277,296 (1st Cir. 2020); *Scott v. Mitchell*, 209 F.3d 854, 878-79 (6th Cir. 2000); *Wilson v. Bicycle S., Inc.*, 915 F.2d 1503, 1509 (11th Cir. 1990); *United States v. Tello*, 707 F.2d 85, 88 (4th Cir. 1983); *United States v. James*, 576 F.2d 223, 228-229 (9th Cir. 1978); *United States v. Natale*, 526 F.2d 1160, 1167-68 (2d Cir. 1975); *United States v. Blair*, 456 F.2d 514, 519-520 (3d Cir. 1972); *United States v. Meltzer*, 100 F.2d 739 (7th Cir. 1938); *Quercia v. United States*, 289 U.S. 466 (1933).

In this case, the District Court's comment takes up less than a minute during an eleven-day trial. Pet. App. 20a ("It was a comment made in a matter of seconds during the course of a twelve-day [sic] complex medical malpractice jury trial."). To address the second question as framed by Petitioner would require a fact-intensive inquiry comparing one circuit's decisions with another's based on the entirety of the record below, an inquiry this Court need not undertake. There simply is no circuit split that warrants this Court's review.

Second, absent a split, Petitioner attempts to suggest a broader conflict with "the Nation's drug safety regime." Pet. 31 (capitalization altered). This argument turns on the assertion that the District Court instructed the jury that the label's "only purpose was to avoid liability," when, in fact, drug labels also serve other purposes under federal law. *See* Pet. 31-32. That is not, however, what the District Court said. It instead provided a jury instruction that was consistent with North Dakota law. *See* Pet. App. 27a-

28a. Regardless, the idea that this fact-bound question somehow implicates an issue of national importance is fanciful at best.

Petitioner cannot show error because the District Court instructed the jury in accordance with substantive North Dakota law, which controls in this case premised on diversity jurisdiction. Under North Dakota law, deviation from a drug manufacturer's instructions is not prima facie evidence of negligence. *Wasem v. Laskowski*, 274 N.W.2d 219, 221 (N.D. 1979). Instead, North Dakota requires expert testimony in medical malpractice cases like this one to establish "the applicable standard of care, violation of that standard, and a causal relationship between the alleged violation and the harm complained of." *Winkjer v. Herr*, 277 N.W.2d 579, 583 (N.D. 1979); *VanVleet v. Pfeifle*, 289 N.W.2d 781, 784 (N.D. 1980). Permitting Petitioner to argue that the Bactrim drug label is conclusive evidence of the applicable standard of care or a deviation therefrom would obviate the need for expert testimony, and directly contradict longstanding North Dakota law. *See, e.g.*, *Cichos v. Dakota Eye Inst., P.C.*, 2019 ND 234, 933 N.W.2d 452; *Pierce v. Anderson*, 2018 ND 131, 912 N.W.2d 29; *Haugenoe v. Bambrick*, 2003 ND 93, 663 N.W.2d 175; *Jaskoviak v. Gruver*, 2002 ND 1, 638 N.W.2d 1; *Fortier v. Traynor*, 330 N.W.2d 513, 517 (N.D. 1983). The jury was properly instructed. Pet. App. 27a-28a.

Third, Petitioner cannot show the prejudice required to reverse a denial of a new trial motion. The propriety of a district court's comments to the jury is analyzed in the context of the complete instructions given to the jury, and, as is the case here, do not constitute an abuse of discretion so long as the district court does not invade the province of the jury as the ultimate

factfinder in the case. *United States v. Neumann*, 867 F.2d 1102, 1104 (8th Cir. 1989); *Reed*, 765 F.3d at 911. As the Eighth Circuit correctly held, the jury was left with no doubt, given the District Court's instructions as a whole, that it—not the District Court—was the sole arbiter of all factual questions, including the weight assigned to the Bactrim drug label. Pet. App. 11a.

Fourth, Petitioner's challenge to the District Court's commentary about his lawyer, made in the context of the limiting instruction, does not warrant review. The Eighth Circuit properly reviewed this alleged error with a more exacting standard—plain error—but not because it lacked jurisdiction to review the underlying judgment, as Petitioner suggests. Instead, irrefutably, Petitioner failed to raise this objection at trial. Pet. App. 11a. "'No procedural principle is more familiar to this Court than that a * * * right[]' * * * 'may be forfeited * * * by the *failure to make timely assertion of the right before a tribunal having jurisdiction to determine it*.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (emphasis added) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

Plain error exists only when there has been a clear error under the law that caused prejudice and "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Borders*, 829 F.3d 588, 564 (8th Cir. 2016). As outlined above, and consistent with the Eighth Circuit's holding, the record is devoid of any evidence of prejudice. Indeed, even now Petitioner has failed to explain "how this comment affected the outcome of trial," and, as the Eighth Circuit rightly noted, "[w]ithout more, [a court] cannot conclude that this

remark was sufficiently pervasive or that it resulted in a miscarriage of justice." Pet. App. 11a.

Petitioner does not claim that a circuit split exists on this specific issue and does not suggest that he can surmount the exacting plain-error standard. Nothing about the Eighth Circuit's conclusion was erroneous, let alone warrants an exercise of this Court's certiorari jurisdiction.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

DATED: May 20, 2024.

Respectfully submitted,

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