No. 23-797

In the Supreme Court of the United States

MARCO GONZALEZ,

Petitioner,

v.

SALEM SHAHIN, ET AL.

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents deny that a circuit split exists because a 2016 note from the civil rules advisory committee displaced any adverse decisions, Response 9, 10, although they concede that they would lose in the Sixth Circuit. *Id.* at 24. The argument mistakenly treats a committee note as capable of overruling judicial decisions.

Respondents further fail to grasp the internal inconsistency of treating the court-endorsed timing of a motion for a new trial without objection as subject to appeal upon any subsequent ruling, yet jurisdiction-stripping for purposes of appealing the underlying judgment. Logically, the motion was timely for all purposes or for none. Respondents' favored regime creates the confusion that warrants this Court's review.

Finally, the response brief treats as fact-bound the improper influence on the jury's decision that the district court accomplished through what the Eighth Circuit characterized as an "ill-advised" comment (App. 11a) but was made in the form of an "additional instruction," App. 27a, never discussed with the parties. An instruction is not a mere comment on the evidence, but a direction to the jury on how to weigh evidence. A much later instruction untethered to the evidentiary-weight discussion that tells the jury nothing more than "I have not intended to suggest what I think your verdict should be," App. 20a, cannot have the curative effect the Eighth Circuit accorded it.

These recurring issues of great national importance have sown confusion and conflict in the circuits and warrant the exercise of this Court's discretion to be set straight.

ARGUMENT

I. THIS COURT HAS ATTEMPTED TO ESTABLISH A BRIGHT-LINE RULE THAT THE CIRCUITS HAVE STILL NOT UNIFORMLY IMPLEMENTED.

As the Petition explained, this Court has repeatedly attempted to clarify that deadlines set in rules are subject to waiver and forfeiture, even when described as mandatory. *Hamer v. Neighborhood Housing Serv. of Chicago*, 583 U.S. 17, 19 (2007). Stepping into a field where confusion had reigned, this Court has issued a series of decisions that drew a bright-line distinction between statutory deadlines that create limits on jurisdiction and claims-processing rules, such as those found within the Federal Rules of Civil Procedure, which this Court reiterated recently, holding that a "court will not enforce a procedural rule against a non-complying party if his opponent has forfeited or waived an objection." *Harrow v. Dep't of Def.*, No. 23-21, 2024 WL 2193874, at *3 (U.S. May 16, 2024). Thus, this Court instructed that "most time bars are nonjurisdictional," even when "framed in mandatory terms." *Id.* (citations omitted). At the same time, this Court recognized that a *congressionally enacted jurisdictional requirement* would be enforced even if no party had raised it because it "marks the bounds of a court's power." *Id.* (cleaned up).

What Respondents fail to appreciate is that the relevant time issue was the one for making a motion for a new trial. It was extended by the district court, in violation of the applicable rule but without objection, and subsequently decided by that court. The fact that there was no jurisdictional bar to appealing that decision should apply as well to what then became the final disposition of the matter in the district court, permitting an appellate court to consider the then timely notice of appeal sufficient to assume jurisdiction over the entire appeal.

II. AT LEAST TWO CIRCUITS REMAIN IN CONFLICT WITH THE EIGHTH CIRCUIT.

Respondents attempt two conceits to argue that no circuit conflict exists, but neither one works to accomplish that feat. First, the amendment to Rule 4(A)(4)(A) does not alter the non-jurisdictional nature of claims-processing rules under this Court's precedents and those of the circuits. Second, contrary to Respondents' argument, an advisory committee rule does not overrule circuit precedent to solve the conflict identified in the Petition.

A. An Advisory Committee Note Does Not Overrule this Court or Circuit Decisions.

Respondents' first and main argument is that any pre-2016 circuit decision does not count because the applicable rule's language was changed and the advisory committee note explaining the non-substantive wording change indicates its disagreement with adverse circuit decisions. The argument erroneously treats committee notes as if they override this Court's

decision in *Hamer* and overrule adverse circuit court decisions. Neither argument succeeds.

Respondents rely on a 2016 switch in Rule 4(A)(4)(a) from the word "timely" to the phrase "within the time allowed" to assert incorrectly that no division exists after 2016. Response 9-18. The difference between the two phrases, both of which require timeliness, is elusive at best. As interpreted in the leading civil procedure treatise, even considering the advisory committee's avowed purpose, the current "Rule 4(a)(4)(A) provides that the time for filing a notice of appeal is tolled 'for all parties' by . . . timely filing." 16A Fed. Prac. & Proc. Juris. § 3950.4 (5th ed.). Thus, it explains that "within the time allowed" still means the same thing as "timely."

That switch hardly qualifies as the type of "clear statement" sufficient to satisfy the "high bar" that this Court requires of Congress, *Harrow*, 2024 WL 2193874, at *3.

The Advisory Committee explained to the Standing Committee that its change of words was intended to make the timely filing of a notice of appeal . . . a jurisdictional requirement," even though it recognized that "[c]aselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules." Memorandum from Judge Steven M. Colloton to Judge Jeffrey Sutton, at 5, 4 (May 4, 2015), https://www.uscourts.gov/sites/default/files/ap05-2015_0.pdf.

Respondents realize that the switch of words does not self-evidently, as a textual matter, change anything, so it invokes the committee note, which recites its intention to resolve the existing circuit conflict and assure that an untimely post-judgment motion

> will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact 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.

Fed. R. App. P. 4 advisory committee's note, 2016. The advisory committee further explicitly "rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007)." *Id.*

Regardless of how helpful a committee note is in guiding courts and counsel in construing a rules change, unlike the Rule itself, the note is not a mandatory precedent that requires conformity in the courts. As originally conceived, they had "no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases." Henry P. Chandler, *Some Major Advances in the Federal Judicial System, 1922-1947*, 31 F.R.D. 307, 503 (1963) (quoting 3A William W. Barron & Alexander Holtzoff, Federal Practice and Procedure (1958) (quoting the introductory statement)). Although explanatory notes are now *de rigueur,* this Court has made

plain that it "will 'treat a procedural requirement as jurisdictional only if Congress clearly states that it is." *Harrow*, 2024 WL 2193874, at *3 ((quoting *Boechler, P.C. v. Comm'r of Internal Revenue,* 596 U.S. 199, 203 (2022)). Moreover, as the Second Circuit explained, because procedural rules are "promulgated and amended by the Supreme Court pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071–2077, an individual rule is jurisdictional only if it is codified by statute in language that clearly reflects Congress's intent to treat it as jurisdictional." *Legg v. Ulster Cnty.*, 820 F.3d 67, 79 (2d Cir. 2016).

No further proof of its limited effect is needed than looking at the Sixth Circuit's position on the first Question Presented. The committee note specifically disclaimed its decision in *Nat'l Ecological Found.,* which the party opposing the motion is capable of forfeiting" and, if forfeited, does not deny jurisdiction over an appeal. Yet, the decision remains that circuit's most recent declaration of mandatory precedent. The committee note cannot overrule it. Only an en banc sitting of that court or a decision of this Court can. *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017). It then remains mandatory precedent within the Sixth Circuit. The committee note does not alter that status.

B. The Circuit Conflict Continues.

Respondents erroneously claim that the circuits uniformly treat a late post-judgment motion in which no objection was interposed as jurisdictional on the underlying appeal. Response 12. As already demonstrated, that claim is certainly not true in the Sixth

Circuit where *Nat'l Ecological Found.* remains good law.

The other circuits identified in the Petition also remain in conflict post-2016. Respondents suggest, for example, that *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012) (per curiam), *cert. denied*, 570 U.S. 926 (2013), should not count because it predates the 2016 rules amendment. However, the D.C. Circuit has continued to adhere to the same approach it took in *Obaydullah* since the 2016 amendment. In 2022, it held that post-judgment motion timing rules remain "simple claim-processing rules" that are subject to forfeiture when no objection is made, which "permits us to excuse the motion's untimeliness" and thereby "extend the appeal period" so that a notice of appeal becomes timely. *United States v. Three Sums Totaling $612,168.23 in Seized United States Currency*, 55 F.4th 932, 938 (D.C. Cir. 2022).

Thus, conflict with the Eighth Circuit and similarly holding circuits continue with at least the Sixth and D.C. circuits, as the Petition laid out.

C. No Better Vehicle Can Exist to Address the Effect of a Claims-Processing Rule's Timing without Objection and its Effect on the Subsequent Proper Timing of a Notice of Appeal.

Moreover, as the Petition further explained, if the motion for a new trial is entertained and decided because no objection was raised to its timeliness, the better view is that no final judgment exists until the new-trial motion is disposed of and a notice of appeal

filed as measured from the denial of that motion. Because an untimely new-trial motion is no longer untimely when extended without objection, there should be no categorical jurisdiction-stripping rule that treats it otherwise for purposes of a notice of appeal.

After all, piecemeal appeals are strongly discouraged for it "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). In fact, "Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration," which avoids "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The motion for a new trial, if successful, obviates the need for a plenary appeal, which would make the filing of an earlier appeal, as Respondents assert should have occurred, an unnecessary collateral action because an order that grants a new trial is "interlocutory in nature and therefore not appealable." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). If the motion for a new trial is granted, it moots the appeal of the underlying judgment. On the other hand, if the motion is denied and appeal is taken, the "propriety or impropriety of the new trial grant following the initial trial no longer is relevant." 9B Fed. Prac. & Proc. Civ. § 2540 (3d ed.). Either way,

one or the other appeal becomes superfluous, a result that makes the process insensible.

That status supports Petitioners' argument about the incongruity of holding that the motion for a new trial is not waived by an unobjected-to extension of time to make it, but somehow does not count as keeping the matter before the trial court for purposes of a notice of appeal. Yet, by the measure that applies to new-trial motions, the unobjected-to motion was "seasonably made and entertained," so that the time for appeal should "not begin to run until the dis-position of the motion." *Leishman v. Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943).

Respondents purposely ignore this argument in their response, preferring instead to treat the date of the jury's verdict as the measure of when the notice of appeal was due, leaving the new-trial issue to the have an independent life of its own for a separate appeal. While, as Respondents argue, *Bowles* held that the deadline for filing an appeal from a district court's decision in a civil case is jurisdictional, the question presented in this appeal is when that district court decision is final. Petitioner submits that when the motion for a new trial entertained by the district court and denied, as the rules contemplate, the jurisdictional time limit will begin to run.

Any other approach makes little structural sense and treats the claims-processing nature of the rule as relevant only for one deadline and not the others that otherwise would be measured from it. The issue deserves this Court's attention to harmonize the conflicting treatment of the same post-judgment motion.

And this Court's recent decision in *Harrow* makes plain that this Court's attempt to delineate the jurisdictional import of claims-processing rules remains confusing in the lower courts. As *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)), correctly observed, the differences between jurisdictional limits and those subject to waiver, "[w]hile perhaps clear in theory . . . can be confusing in practice." *Id*. at 161.

III. THE ISSUE OF THE JUDGE'S EVIDENCE-DENIGRATING "ADDITIONAL INSTRUCTION" PRESENTS A LEGAL ISSUE OF SUBSTANTIAL CONSEQUENCE AND A CONFLICT IN THE CIRCUITS.

A. The "Additional Instruction" Reflected Bad Law and Is Not a Fact-Bound Issue.

The response brief treats the second Question Presented as a fact-bound issue involving perfectly reasonable comments that express an unobjectionable opinion to assist the jury. Yet, the jury was told that they were getting an "additional instruction," App. 27a, not the judge's opinion. The instruction told the jury not to give too much weight to the warnings because:

> these are written by drug companies and lawyers that include all sorts of information to protect principally drug companies from having a lawsuit like this; . . . [if] they don't put it into an insert like that and they have a lawsuit as a [377]result, it's a case that I'm sure [plaintiff's lawyer] Mr. Leventhal would

> love to take on behalf of somebody who is injured as a result of that type of conduct.

App. 28a.

In denying that he misstated the purpose of the warnings, the district court judge justified it as "a matter of common sense," App. 30a, and sloughed off his statement about plaintiff's counsel in his written denial of a new trial motion as a "joke . . . maybe it was a bade [sic] joke." App. 20a. The prejudicial impact of this "instruction" should be obvious to anyone who has participated in trial court proceedings. That is why appellate courts review the "correctness of jury instructions [a]s a question of law . . . de novo. *Gibson v. City of Louisville*, 336 F.3d 511, 512 (6th Cir. 2003) (citation omitted); *see also Artis v. Santos*, 95 F.4th 518, 530 (7th Cir. 2024) (citation omitted) ("we review a given instruction de novo to determine whether it fairly and accurately states the governing law."). In addition to accurately stating the law, an instruction must also "adequately illuminate the law applicable to the controverted issues in the case without unduly complicating matters or misleading the jury." *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 175 (1st Cir. 1998); *see also Ridgeway v. Walmart Inc*, 946 F.3d 1066, 1081 (9th Cir. 2020). Plainly, this misstatement of the purpose of the warning labels as they appear in the Physician's Desk Reference (PDR) misled the jury and, as the Petition explained, was inconsistent with the Nation's drug-safety regime. Pet. 30-32.

Defendants deny that deviation from the PDR constitutes a prima facie case in North Dakota, as it is in other states. Response 29 (citing *Wasem v. Laskowski*, 274 N.W.2d 219, 221 (N.D. 1979)). However, all that the North Dakota Supreme Court expressed in that case was a reluctance to instruct the jury that it constituted a prima facie case in light of the ambiguity in how the term is used and the absence of a statute that uses that terminology. Even so, it remained "evidence of negligence," *id.* at 223, rather than, in this context, evidence of a denial of manufacturer liability, a reach that was significantly outside the record. Equally important, the North Dakota Supreme Court has recognized that a plaintiff can rely on "expert medical opinion in establishing a prima facie case." *Fortier v. Traynor*, 330 N.W.2d 513, 517 (N.D. 1983). At trial in this case, three medical experts testified that Respondents' failure to consult the PDR departed from the standard of care, *see, e.g.,* Tr. 497:15-500:3, thereby earning prima-facie status.

The prejudicial nature of this erroneous "instruction" is reflected further by jury research. As one leading jury scholar has explained, "[j]ury instructions rarely receive the attention from the parties and their lawyers that is consistent with the attention that the instructions receive from the jury." Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 Buff. L. Rev. 717, 752 (2006). Jurors pay close attention to a judge's instructions, and this Court has repeatedly held that a "jury is presumed to follow its instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (citing *Weeks v. Angelone*, 528

U.S. 225, 234 (2000)). They did, and it led them astray.

B. A Circuit Split Exists.

Respondents deny that Petitioner even claims a circuit split exists and does nothing to refute the substantial one identified in the Petition. *See* Pet. 35-38. This Court should not credit that mischaracterization and should resolve the identified split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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