No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORP.,
Petitioner,
v.
TROY LAMBERT,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court granted certiorari to decide whether Rule 23(f)'s deadline to petition for permission to appeal an order on class certification is subject to equitable exceptions. In the decision below, the Ninth Circuit held that all claim-processing rules are subject to equitable exceptions, and excused Respondent Troy Lambert's untimely Rule 23(f) petition. In doing so, the Ninth Circuit departed from its sister circuits and this Court's precedent, creating an unprecedented equitable standard that will exacerbate the disruption caused by interlocutory appeals and eviscerate Rule 23(f)'s strict 14-day deadline.

This Court has never held that equitable exceptions apply to all claim-processing rules. To the contrary, this Court has recognized that a rule's plain language can "preclude equitable exceptions" when it is written in "emphatic form." *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (collecting cases). The Rule 23(f) deadline is unquestionably emphatic.

Appellate Rule 26(b) provides that a "court may not extend the time to file . . . a petition for permission to appeal," and Appellate Rule 2 explicitly prohibits courts from suspending Appellate Rule 26(b)'s limitations. On multiple occasions, this Court interpreted nearly identical language in former Criminal Rule 45(b) to preclude equitable exceptions. *Carlisle v. United States*, 517 U.S. 416, 421 (1996); *United States v. Robinson*, 361 U.S. 220, 229 (1960).

The majority of Lambert's brief ignores the authority discussed above, the question presented, and the Ninth Circuit's reasoning. Instead, Lambert claims

that his Rule 23(f) petition was timely regardless of any equitable exceptions. Yet the Ninth Circuit already rejected Lambert's specious claims of timeliness and correctly concluded that his petition was late. *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1176–78 (9th Cir. 2017).

When Lambert does finally address the question presented, he contends that claim-processing rules are "generally subject to equitable exceptions" and offers a protracted discussion on the history of the federal rules and this Court's application of equitable exceptions in other contexts. Resp. Br. 5; *see also id.* at 20–34.

In doing so, Lambert misses the point. Even assuming "equitable exceptions can apply to claim-processing rules," Resp. Br. 21, this Court's longstanding precedent demonstrates that at least some rules preclude equitable exceptions. *Carlisle*, 517 U.S. at 421; *Robinson*, 361 U.S. at 230; *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 157 (2013); *United States v. Brockamp*, 519 U.S. 347, 350–52 (1997). Lambert does not and cannot distinguish this authority, nor can he avoid the impact of Appellate Rule 26(b)'s clear, emphatic language.

Still, even if equitable exceptions could apply here (and they cannot), the law is clear that an external obstacle must have caused Lambert to miss the Rule 23(f) deadline. *See Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). That was not the case here, and the overly broad equitable standard the Ninth Circuit adopted contains no such requirement. *Lambert*, 870 F.3d at 1178 (finding equitable exceptions could apply if, for example, "a litigant took some other action similar to filing a

motion for reconsideration within the fourteen-day deadline"). This failure also constitutes reversible error.

ARGUMENT

I. LAMBERT'S RULE 23(f) PETITION WAS LATE

The Ninth Circuit found that "[u]nder the plain text of Rule 23(f)," Lambert's petition was "untimely." *Id.* at 1176; *see also id.* ("[U]nless an exception applies, Lambert's Rule 23(f) petition would be barred."). The Ninth Circuit then "part[ed] ways with" its "sister circuits," and applied equitable exceptions to Rule 23(f). *Id.* at 1174.

Ignoring those holdings, Lambert argues that this Court need not even reach the question presented because his petition was timely. Resp. Br. 4, 9 n.1. All four of Lambert's arguments fail.

A. LAMBERT DID NOT MAKE AN ORAL MOTION

Lambert's first argument is that he made an "oral motion" for reconsideration at a March 2, 2015 status conference. Resp. Br. 12. This argument is foreclosed by both the conference transcript and Lambert's actions. Lambert initially asked the District Court for "leave to file a renewed motion for class certification." Pet. App. 71. After rejecting Lambert's request, the District Court acknowledged that he could file a motion for reconsideration and Lambert represented that he would do so. *Id.* at 74 ("[W]e will want to file a motion for reconsideration."). Lambert ultimately filed his motion ten days later. JA5–6.

There is therefore no record (*e.g.*, no minute order, docket entry, or the like) of an oral motion, and nothing Lambert's counsel or the District Court said or did suggests an oral motion had been made. As the Ninth Circuit noted, Lambert conveyed merely an "intention to file a motion for reconsideration," *Lambert*, 870 F.3d at 1175, which is "not a filing itself" and therefore not "sufficient to toll the time period" under Rule 23(f). *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 195 & n.7 (3rd Cir. 2008).

B. RULE 59(e)'s DEADLINE IS IRRELEVANT

Lambert's second argument is that his motion for reconsideration was "timely" because he filed it within Rule 59(e)'s 28-day deadline. Resp. Br. 9–13. This argument fails for two independent reasons.

1. Rule 59(e) Does Not Apply

Rule 59(e) governs only a "motion to alter or amend a *judgment*." Fed. R. Civ. P. 59(e) (emphasis added). While Lambert argues that the District Court's order decertifying the class constitutes a "judgment," the other provisions of Rule 59 demonstrate that "judgment" in this context refers to a final judgment. Indeed, every other subsection of Rule 59 specifically references a motion or action that would be taken *after trial*. *See* Fed. R. Civ. P. 59(a)(1) ("Grounds for New Trial"), 59(a)(2) ("Further Action After a Nonjury Trial"), 59(b) ("Time to File a Motion for a New Trial"), 59(c) ("New Trial on the Court's Initiative or For Reasons Not in the Motion"); *see also McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018) ("Rule 59(e) applies only to final judgments."); *Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015) (same).

The advisory committee notes to Rule 59(e) further support this definition of "judgment." Rule 59(e) was "added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York*[,] [146 F.2d 321 (8th Cir. 1944)]." Fed. R. Civ. P. 59(e) advisory committee's note to 1946 amendment. In *Boaz*, a dissenting judge questioned a trial court's authority to "recapture trial proceedings" after "unconditional termination of the trial and discharge of the jury." 146 F.2d at 324 (Johnsen, J., dissenting). Rule 59(e) "makes clear that the district court possesses the power" to do so. Fed. R. Civ. P. 59(e) advisory committee's note to 1946 amendment; *see also White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 450 (1982) (discussing Rule 59(e)'s "clear and narrow aim").

Lambert's reliance on Rule 54(a), which defines a "judgment" as "any order from which an appeal lies," likewise fails. Fed. R. Civ. P. 54(a). Lambert argues that certain courts, relying on Rule 54(a), have held that an appealable interlocutory order constituted a judgment. Resp. Br. 11–12. However, Lambert cites cases that—unlike here—considered appeals *as of right*. *See, e.g.*, *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 6 (1st Cir. 2005) (order appealable under Federal Arbitration Act); *Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397, 400 (2d Cir. 2000) (order appealable under 28 U.S.C. § 1292(a)(1)); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (same).

Here, Lambert could file only a "petition for permission to appeal" under Rule 23(f). He had no right to an appeal, and therefore an appeal did not "lie" within the scope of Rule 54(a). If the law were otherwise, *any* order a district court makes would

constitute a "judgment," because a party can *always* petition for interlocutory appeal under 28 U.S.C. § 1292(b).

It is therefore unsurprising that several courts of appeals have specifically held that an order on class certification does not constitute a "judgment." *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999) (Easterbrook, J.) (explaining that "[a]n order certifying or declining to certify a class is not a 'judgment'" within Rule 59(e)); *cf. Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1063 (11th Cir. 2001) (per curiam).[1]

2. A Motion for Reconsideration Must Be Filed Before the Appeal Deadline Expires

Even assuming Rule 59(e) governed Lambert's motion, it would not render his Rule 23(f) petition timely. That is because the 14-day deadline in Rule 23(f) is shorter than the 28-day deadline in Rule 59(e), and there is no question that Lambert did not file his motion for reconsideration until *after* the Rule 23(f) deadline expired.

Every court of appeals to consider this issue—the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits—has held a motion for reconsideration must be filed *before* the Rule 23(f) deadline expires in order to toll the Rule 23(f) deadline.

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[1] While Lambert cites two Fifth Circuit cases—*McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) and *Robertson v. Monsanto, Co.*, 287 F. App'x 354, 358 (5th Cir. 2008) (unpublished)—both simply assumed, without analysis, that an order on class certification constitutes a "judgment."

See, e.g., *Gary v. Sheehan*, 188 F.3d 891, 892 (7th Cir. 1999) ("[I]f the request for reconsideration is filed more than [14] days after the order . . . [then] appeal must wait until the final judgment."); *Gutierrez*, 523 F.3d at 193; *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (per curiam); *Blair*, 181 F.3d at 837; *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006); *Shin*, 248 F.3d at 1064. Even the Ninth Circuit reached this conclusion below. *See Lambert*, 870 F.3d at 1178.[2]

This Court has adopted the same rule. As it held in *United States v. Healy*, a motion for reconsideration "filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the Court disposes of the petition." 376 U.S. 75, 77–78 (1964) (emphasis added)); *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (per curiam) (considering appeal timely where motion filed *before* 30-day appeal deadline in Appellate Rule 4(b) had expired); *United States v. Dieter*, 429 U.S. 6, 7 (1976) (per curiam) (same).

Lambert tries to distinguish *Healy* because it did not involve "any statute or rule governing the effect of rehearing petitions." Resp. Br. 15. That distinction is irrelevant here. *Healy*'s holding that a motion for reconsideration filed "within the permissible time for

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[2] Lambert relies on *Limtiaco v. Camacho*, 549 U.S. 483 (2007), but that case did not involve an expired appeal deadline. The petitioner lost at the Guam Supreme Court and nine days later *timely* petitioned for review by the Ninth Circuit. Brief for Respondent, *Limtiaco v. Camacho*, 549 U.S. 483 (2007) (No. 06–116), 2006 WL 3760843, at *15.

appeal" can postpone an appeal deadline did not depend upon the presence or absence of a rule governing motions for reconsideration. 376 U.S. at 77–78. It was based on "traditional and virtually unquestioned practice." *Dieter*, 429 U.S. at 8 n.3 (citing *Healy*, 376 U.S. at 79).

Lambert cannot cite any authority for his argument that a motion for reconsideration filed *after* an appeal deadline has lapsed can somehow resurrect that expired deadline. Resp. Br. 13–18.

Were Lambert correct, any litigant who knowingly ignored an appeal deadline could resurrect that deadline simply by filing a motion for reconsideration, which in many districts can be filed months or even a year after an order. *See, e.g.*, C.D. Cal. L.R. 7–18 (containing no deadline for motions for reconsideration). This Court has cautioned against the creation of such an illogical and impractical rule. *See Healy*, 376 U.S. at 77 ("[W]e are not faced with an attempt to rejuvenate an extinguished right to appeal."); *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1289 (11th Cir. 2007) ("[I]n American law, a revival of an enforceable right is an exceptional event.").

Lambert's argument is particularly inappropriate in this context, as it would eviscerate Rule 23(f)'s purpose of creating a deliberately short filing window "to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment; *see also Fleischman*, 639 F.3d at 31 ("[C]onstruing Rule 23(f) to authorize us to permit interlocutory appeal of the denial of a motion to amend a class certification order, at least when such a motion

is filed outside the fourteen-day window, would eviscerate its deliberate and tight restriction on interlocutory appeals.").

C. APPELLATE RULE 4(a) IS INAPPOSITE

Lambert's third argument is that his Rule 23(f) petition is timely under Appellate Rule 4(a)(4)(A)(iv). Resp. Br. 17. But Appellate Rule 4 is inapplicable on its face. It expressly applies only to "Appeals as of Right" and the "Time for Filing a Notice of Appeal." Fed. R. App. 4(a)(1); *see also Blair*, 181 F.3d at 837 (explaining that Appellate Rule 4 governs appeals of "the kind of motions that follow entry of a final decision"). Here, Lambert filed a "petition for permission to appeal" under Rule 23(f); accordingly, Appellate Rule 5 governs—not Appellate Rule 4. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment (explaining that Appellate Rule 5 was specifically "modified to establish the procedure for petition for leave to appeal under [Rule 23(f)]").

Notwithstanding the above, Lambert claims that Appellate Rule 4 applies because Rule 23(f) "is silent as to the effect of reconsideration motions on the time to appeal," Resp. Br. 17, and Appellate Rule 5 provides: "The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal." Fed. R. App. Proc. 5(a)(2).

Yet by Appellate Rule 5(a)(2)'s plain terms, Appellate Rule 4(a) applies only if a statute or rule *does not* specify the time for filing a *petition for permission to appeal*—not a motion for reconsideration. In this case, Rule 23(f) *does* specify a deadline of 14 days to file

a petition. Consequently, there is no justification for applying Appellate Rule 4(a).

D. THE DISTRICT COURT'S ORDER DID NOT RESTART THE RULE 23(f) DEADLINE

Lambert's fourth argument is that the District Court's order denying his motion for reconsideration created a new deadline under Rule 23(f). Resp. Br. 19–20. The Ninth Circuit did not adopt this argument, *Lambert*, 870 F.3d at 1181 n.8, and for good reason. The plain language of Rule 23(f) permits interlocutory appeals only of orders "granting or denying class-action certification." Fed. R. Civ. P. 23(f). And every court of appeals to address this issue has unanimously held that "[a]n order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class action certification,'" and thus does not trigger a new Rule 23(f) deadline. *Carpenter*, 456 F.3d at 1191; *Jenkins*, 491 F.3d at 1291–92; *Gutierrez*, 523 F.3d at 193; *Nucor*, 760 F.3d at 343.[3]

"To hold otherwise would leave Rule 23(f)'s deadline toothless." *In re DC Water & Sewer Auth.*, 561 F.3d 494, 496–97 (D.C. Cir. 2009). Because a party may move to alter or amend a certification decision at any

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[3] The only case Lambert cites—*Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002)—did not reach a contrary conclusion. The district court initially certified a class that the Eighth Circuit characterized as a "limited group" and then subsequently entered an order expanding the class definition "to individuals working through an entire network of mortgage brokers across the nation." *Id.* at 959. Accordingly, the later order changed the status quo and constituted an order "granting or denying class certification." Fed. R. Civ. P. 23(f).

time "before final judgment," Fed. R. Civ. P. 23(c)(1)(C), Lambert's proposed rule would enable litigants to "easily circumvent Rule 23(f)'s deadline by filing a motion to amend or decertify the class at any time after the district court's original order." *Fleischman*, 639 F.3d at 31; *Gary*, 188 F.3d at 893.

In light of the above, the District Court's order denying Lambert's motion did not open a new Rule 23(f) filing window because the District Court did not alter its prior ruling decertifying the class. Pet. App. 27–49. That the District Court also ordered Lambert to provide notice to class members of the prior decertification order certainly did not "change the status quo" and therefore could not have created a new Rule 23(f) deadline. *Gutierrez*, 523 F.3d at 193.

II. CLAIM-PROCESSING RULES CAN PRECLUDE EQUITABLE EXCEPTIONS

Lambert's brief devotes over 14 pages to the general argument that "equitable exceptions can apply to nonjurisdictional claim-processing rules." Resp. Br. 20–34. Lambert rests his argument on the purported "history of the Federal Rules" and notes that this Court has applied the "unique circumstances doctrine" to federal rules in the past. *Id.* at 25–29. Lambert's arguments are nonresponsive.

Even assuming "equitable exceptions can apply to nonjurisdictional claim-processing rules," *id.* at 21, this Court's longstanding precedent demonstrates that at least some rules are not subject to equitable exceptions. *See* Pet. Br. 17–21.

This Court has repeatedly recognized that the plain language of a rule can preclude equitable exceptions.

See Auburn Reg'l Med., 568 U.S. at 157 (rejecting equitable exceptions to a provision that "speaks in no uncertain terms" and where tolling "would essentially gut" its purpose); *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (holding that equitable tolling was "inconsistent with the text of the relevant statute"); *Brockamp*, 519 U.S. at 350–52 (holding that the "unusually emphatic" language, detail, and "the explicit listing of exceptions," demonstrate that other equitable exceptions are not available); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 26–27 (1989) (holding that a provision was not "subject to equitable modification" where its "language . . . could not be clearer").

This Court reaffirmed that principle in *Kontrick*. Although it did not decide whether equitable exceptions apply to the claim-processing rules at issue there, this Court explained that whether such exceptions could apply depends on "whether the time restrictions in th[e] rules are in such emphatic form as to preclude equitable exceptions." 540 U.S. at 458 (alteration in original) (citation omitted).

In so holding, *Kontrick* cited two decisions from this Court—*Robinson* and *Carlisle*—that construed Criminal Rule 45(b) to preclude equitable exceptions. *Kontrick*, 540 U.S. at 458 (citing *Carlisle*, 517 U.S. at 419–433 and *Robinson*, 361 U.S. at 222–230). Lambert relegates his discussion of *Robinson* and *Carlisle* to the back of his brief, but they are crucial to this case because they construed language nearly identical to Appellate Rule 26(b). Finding that "[t]here is simply no room in the text" for equitable exceptions, *Carlisle* held that Criminal Rule 45(b) barred an extension even where "the defendant was legally innocent" or the late

filing was a result of "attorney error." 517 U.S. at 421, 419. Likewise, *Robinson* held that Criminal Rule 45(b) precluded an extension for "excusable neglect." 361 U.S. at 221–22 & n.1, 229–30.

Lambert resists *Robinson* by questioning whether it "is still good law." Resp. Br. 44. But while this Court has disapproved of *Robinson*'s characterization of the deadline to file a notice of appeal as "jurisdictional," this Court has reaffirmed *Robinson*'s holding that Criminal Rule 45(b) is insusceptible to equitable exceptions. *Kontrick*, 540 U.S. at 548; *see also Eberhart v. United States*, 546 U.S. 12, 17 (2005) ("*Robinson* is correct . . . because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked.").

As for *Carlisle*, Lambert claims that the case "did not hold that Criminal Rule 45(b) 'precluded equitable exceptions.'" Resp. Br. 45. Yet the exceptions *Carlisle* rejected—*e.g.*, "legal innocence" or "attorney error," 517 U.S. at 420, 426—were plainly "equitable" in nature, as *Kontrick* confirms, 540 U.S. at 458 (citing *Carlisle* when discussing whether mandatory rules "can preclude equitable exceptions"). In fact, the district court excused Carlisle's failure to timely file a motion for judgment of acquittal because of the "grave injustice" that would result from enforcing the deadline where a defendant was legally innocent. *Carlisle*, 517 U.S. at 419.

The precedent discussed above stands for the simple proposition that judges do not have discretion to alter or ignore plain language in the federal rules. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) ("[F]ederal courts have no more discretion to

disregard [a federal rule] than they do to disregard constitutional or statutory provisions."). Lambert is wrong to suggest otherwise.

The purpose of a claim-processing rule is "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shineski*, 562 U.S. 428, 435 (2011). That purpose is best served when a rule is applied consistently and strictly according to its text. *See Carlisle*, 517 U.S. at 431 ("We see neither simplicity, nor fairness, nor elimination of delay in a regime that makes it discretionary whether an untimely [filing] will be entertained.").

This Court has therefore repeatedly held that claim-processing rules are "unalterable" and "mandatory" when they are properly invoked. *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017); *Kontrick*, 540 U.S. at 456; *Eberhart*, 546 U.S. at 15.

III. THE RULE 23(f) DEADLINE IS INSUSCEPTIBLE TO EQUITABLE EXCEPTIONS

Just like Criminal Rule 45(b), the rules governing the time to file a Rule 23(f) petition—Rule 23(f) and Appellate Rules 5(a)(2), 26(b), and 2—create a strict and unyielding deadline that precludes equitable exceptions. Lambert's attempts to distinguish these rules and their purpose fail.

A. THE FEDERAL RULES PRECLUDE EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

The federal rules create a three-layered prohibition against untimely Rule 23(f) petitions. Pet. Br. 21–27.

First, Appellate Rule 5(a)(2) states that a Rule 23(f) petition "must" be filed within 14 days of an order granting or denying class certification. Fed. R. App. P. 5(a)(2).

Second, Appellate Rule 26(b) states that "the court may not extend the time to file . . . a petition for permission to appeal" under Rule 23(f). Fed. R. App. P. 26(b). That language is nearly identical to former Criminal Rule 45(b) that *Carlisle* and *Robinson* interpreted to preclude equitable exceptions. *See Robinson*, 361 U.S. at 223 ("[T]he court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal" (quoting Fed. R. Crim. P. 45(b)).[4] Indeed, this Court has already recognized that Appellate Rule 26(b), like Criminal Rule 45(b), is "not subject to equitable tolling." *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (explaining

[4] Both Appellate Rule 26(b) and Criminal Rule 45(b) are patterned on similar language in Rule 6(b), which courts had also defined as non-extendable before Appellate Rule 26(b) was adopted. *Kontrick*, 540 U.S. at 456 n.10; *Robinson*, 361 U.S. at 228–29.

that Appellate Rule 26(b) can withdraw a court's "broad equitable discretion").[5]

Third, Appellate Rule 2 specifically prohibits courts of appeals from suspending Appellate Rule 26(b)'s limitations. Fed. R. App. P. 2 ("[A] court of appeals may . . . suspend any provision of these rules . . . except as otherwise provided in Rule 26(b)."); *see also Torres*, 487 U.S. at 314–15 (applying Appellate Rule 2 to hold that Appellate Rule 26(b) is non-extendable).

Lambert responds to these bright-line rules by distorting them. He takes principal aim at Appellate Rule 26(b), claiming that it "simply prohibits a court from extending the time to file . . . based upon the forgiving good-cause standard," but does not prohibit "permitting a Rule 23(f) petition to be filed after the deadline expires." Resp. Br. 39. Yet these are two sides to the same coin: if a court can permit a late filing, Appellate Rule 26(b)'s prohibition on deadline extensions would be meaningless.

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[5] Lambert argues that this Court has applied equitable exceptions to "emphatic" language. Resp. Br. 34–35. But each case he cites involved a lone provision setting out a deadline, unlike the triple-layered proscription in Appellate Rules 26(b), 2, and 5(a)(2). For example, *United States v. Kwai Fun Wong* applied equitable tolling to a statute of limitations stating that untimely claims "shall be forever barred." 135 S. Ct. 1625, 1634 (2015). But that language was "commonplace in federal limitations statutes for many decades surrounding" enactment of the statute. *Id.* Nor did *Kwai Fun Wong* involve a provision like Appellate Rules 26(b)(2) or 2 that specifically denies a court's equitable discretion. Lambert's reliance on *Schacht v. United States* fails for the same reason. 398 U.S. 58, 64 (1970) (rejecting argument that the Court could not consider an untimely petition for a writ of certiorari because "Rule 22(2) contains no language that calls for so harsh an interpretation").

In any event, this Court already rejected Lambert's argument in *Robinson*. The version of Criminal Rule 45(b) at issue there allowed a court to "enlarge[]" a deadline or "permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect," but it prohibited the court from "enlarg[ing] . . . the period for taking an appeal." 361 U.S. at 223. Just like Lambert, the court of appeals believed that the "rule seems plainly to allow the District Court discretion to permit . . . a late notice of appeal" because doing so "would not be to 'enlarge' the period for taking an appeal, but rather would be only to 'permit the act to be done' after expiration of the specified period." *Id.*

This Court reversed, holding that "to recognize a late notice of appeal is actually to 'enlarge' the period for taking an appeal." *Id.* at 224; *see also Torres*, 487 U.S. at 315 (holding that "[p]ermitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal" in violation of Appellate Rules 26(b) and 2).

Furthermore, numerous courts of appeals have applied Appellate Rule 26(b) to reject Rule 23(f) petitions that were filed after the deadline expired. *Guttierez*, 523 F.3d at 193 n.5; *Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004); *Fleischman*, 639 F.3d at 31.

Lambert also claims that "[f]orfeiture and waiver both involve a court overlooking a violation of a claim-processing rule." Resp. Br. 40. As an initial matter,

that argument ignores the "normal operation of our adversarial system," where "courts are generally limited to addressing the claims and arguments advanced by the parties." *Henderson*, 562 U.S. at 434. But in any event, this Court has made clear that claim-processing rules are "unalterable on a party's application." *Kontrick*, 540 U.S. at 456. And in this case, it is undisputed that Nutraceutical timely objected to Lambert's Rule 23(f) petition as untimely. *See* JA41, JA103. Accordingly, the Ninth Circuit had a duty to dismiss the appeal. *Manrique*, 137 S. Ct. at 1272.

B. LAMBERT'S RELIANCE ON OTHER FEDERAL RULES AND DOCTRINES IS MISPLACED

Seeking to avoid the dispositive impact of Appellate Rules 5(a)(2), 26(b), and 2, Lambert attempts to rely upon a series of other federal rules that are facially inapplicable.

For example, Lambert argues that Appellate Rule 3—which sets forth the procedure for filing a "notice of appeal" for appeals "as of right"—implicitly authorizes equitable exceptions to Rule 23(f). Fed. R. App. Proc. 3. Lambert claims "it is noteworthy that when Appellate Rule 3(a)(2) discusses missteps that can 'affect the validity of the appeal' it refers only to late-filed notices of appeal—and not petitions for permission to appeal." Resp. Br. 37.

But it's far from "noteworthy" that Appellate Rule 3 refers only to notices of appeal. Such notices are the entire subject of the rule. *See* Fed. R. App. P. 3. Nor is it surprising that "petitions for permission of appeal"

aren't mentioned in Appellate Rule 3, since such petitions are the subject of a different rule: Appellate Rule 5. Fed. R. App. Proc. 5; *see also Carlisle*, 517 U.S. at 442 (rejecting argument based on a facially unrelated federal rule).

Lambert also claims that Rule 23(f) must be subject to equitable exceptions because "a timely motion for reconsideration postpones the time for appeal." Resp. Br. 27. But that conclusion does not follow from the premise. Even *jurisdictional* deadlines—which are impervious to equitable exceptions—can be delayed pending a timely motion for reconsideration. *See Healy*, 376 U.S. at 77–79. That is because this exception is not an equitable exception at all, but rather "a well-established procedural rule for criminal, as well as civil, litigation." *Id.* at 80; *see also Ibarra*, 502 U.S. at 4 n.2 (noting that these circumstances do not involve "[p]rinciples of equitable tolling," but are "better described as [determining when the appeal period] began to run").

C. EQUITABLE EXCEPTIONS CONTRAVENE RULE 23(f)'s PURPOSE

Lambert next contends that "the purpose of Rule 23(f) confirms that tolling is available," because a Rule 23(f) petition "may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Resp. Br. 35 (quoting Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment).

To be sure, courts of appeals have discretion to accept or deny *timely* filed Rule 23(f) petitions based on their view of the merits, but Lambert's petition here was *untimely*. And Lambert does not and cannot cite

a single case to support his contention that Rule 23(f) gives courts of appeals discretion to grant untimely petitions.

Nor would any such rule make sense given that Rule 23(f) created a "deliberately small" 14-day filing window, *Gary*, 188 F.3d at 893, that is "designed to reduce the risk that attempted appeals will disrupt continuing proceedings," Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. Every other court of appeals to consider this issue has recognized that Rule 23(f)'s 14-day deadline is "strict and mandatory" in light of its purpose. *Gutierrez*, 523 F.3d at 199; *see also, e.g.*, *Gary*, 188 F.3d at 893 ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."); *Jenkins*, 491 F.3d at 1290; *Fleischman*, 639 F.3d at 31.

IV. EVEN IF EQUITABLE EXCEPTIONS COULD APPLY, THE NINTH CIRCUIT'S DECISION BELOW WOULD STILL NEED TO BE REVERSED

Because the equitable exceptions the Ninth Circuit adopted are overly broad, unworkable and wholly inconsistent with the governing standards this Court has established, the decision below requires reversal even if equitable exceptions could apply to Rule 23(f).

A. WHETHER THE NINTH CIRCUIT ADOPTED AN ERRONEOUS EQUITABLE EXCEPTION IS PROPERLY BEFORE THIS COURT

Lambert's brief asserts numerous arguments that the Ninth Circuit did not adopt or even consider. *See supra* section I. Yet, in the same breath, Lambert accuses Nutraceutical of exceeding the question presented. Resp. Br. 52–54. This is clearly not the case.

Nutraceutical's argument is that the equitable exceptions the Ninth Circuit adopted are inconsistent with the standards set by this Court. *See* Pet. Br. 41. That is a legal issue—not a "factbound challenge," as Lambert asserts. Resp. Br. 54.

The issue is also "fairly included" within the question presented. Sup. Ct. R. 14(1)(a); *see also* Pet. Br. i. Whether the Ninth Circuit erred in adopting equitable exceptions to the Rule 23(f) deadline necessarily encompasses the subsidiary issue of whether the standard the court adopted is legally sound. *See Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978) (considering "subsidiary issues fairly comprised by the question presented" (citations omitted)); *United States v. Mendenhall*, 446 U.S. 544, 551–52 n.5 (1980) (same).

Still, even if this issue were outside the question presented, that would not preclude this Court's review. *Procunier,* 434 U.S. at 559 n.6 ("[O]ur power to decide is not limited by the precise terms of the question presented."). In circumstances similar to those here, this Court has exceeded the question presented to

determine whether the "record facts" justified equitable tolling. *Holland v. Florida*, 560 U.S. 631, 652 (2010); *see also* Brief for Petitioner, *Holland v. Florida*, 560 U.S. 631 (2010) (No. 09–5327), 2009 WL 5133492, at *i (setting forth a pure issue of law in the question presented).

B. THE NINTH CIRCUIT ADOPTED OVERLY BROAD AND IMPROPER EQUITABLE EXCEPTIONS

This Court has held that equitable exceptions may apply to untimely filings only "where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control," *Menominee Indian Tribe*, 136 S. Ct. at 756 (equitable tolling), or where the litigant relied on a court's mistaken albeit "specific assurance" of timeliness, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989) (unique circumstances doctrine). In other words, an external obstacle must have caused the litigant to miss the deadline.

The Ninth Circuit's standard contains no such requirement. *See Lambert*, 870 F.3d at 1178 (directing courts to consider "whether external circumstances, such as a deadline imposed by the district court, affected the litigant"). The decision below will therefore improperly provide relief to parties who were not misled or prevented from making a timely filing, but rather simply failed to follow applicable rules. This alone requires reversal. *See Menominee Indian Tribe*, 136 S. Ct. at 757 (rejecting equitable tolling where the "mistake was fundamentally no different from a garden variety claim of excusable neglect" (citation omitted)).

It is also precisely what happened here. It is undisputed that the District Court never told Lambert that his Rule 23(f) petition would be timely. Indeed, the District Court had no idea that Lambert was even considering filing an interlocutory appeal because Lambert never once mentioned an appeal or Rule 23(f) before he filed his petition. Pet. App. at 68–77.

Lambert's reliance on the unique circumstances doctrine, as applied in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. I.N.S.*, 375 U.S. 384 (1964), is misplaced. In stark contrast to the circumstances here, those cases arose under a federal rule (Rule 73(a)) that specifically *allowed* for extensions of time upon a demonstration of "excusable neglect." *Harris Truck Lines*, 371 U.S. at 216; *Thompson*, 375 U.S. at 387–88. By contrast, numerous federal rules expressly *prohibit* extending the Rule 23(f) deadline. *See* Fed. R. App. Proc. 2, 5(a)(2), 26(b).

Moreover, the unique circumstances doctrine has long been dormant and is inconsistent with the last several decades of this Court's jurisprudence. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (describing the doctrine's "40-year slumber"); *cf. Houston v. Lack*, 487 U.S. 266, 282 (1988) (Scalia, J., dissenting) (explaining that the Court's "later cases . . . effectively repudiate the *Harris Truck Lines* approach"). To the extent it should ever be revived, this is not the case.[6]

Here, just like in *Osterneck*, where this Court unanimously rejected the application of the unique

[6] The Ninth Circuit made clear that it did not apply the unique circumstances doctrine below. *Lambert*, 870 F.3d at 1177 n.2.

circumstances doctrine, no court "ever affirmatively represented to [Lambert] that [his] appeal was timely filed, nor did [Lambert] ever seek such assurance from [a] court." 489 U.S. at 178–79 (citation omitted); *see also Gutierrez*, 523 F.3d at 198–99 (holding that where a district court "made no affirmative statements about the effect of the extension of time on Petitioners' ability to appeal [under Rule 23(f)]," the "unique circumstances doctrine provides no relief").

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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