NO. _____

In the
Supreme Court of the United States

HI-TECH PHARMACEUTICALS, INC., corporation; JARED WHEAT, individually and as officers of the corporation; STEPHEN SMITH, individually and as officers of National Urological Group, Inc., and National Institute for Clinical Weight Loss, Inc.; NATIONAL UROLOGICAL GROUP, INC., d.b.a. Warner Laboratories, et al.; THOMASZ HOLDA, individually and as officers of the corporations, et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION; CERTUSBANK, N.A.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed a $40-million contempt sanction based on a standard found nowhere within the four corners of the injunction that Petitioners Hi-Tech Pharmaceuticals, Inc., Jared Wheat, and Stephen Smith allegedly violated. But Federal Rule of Civil Procedure 65(d) mandates, and courts have consistently held, that injunctions must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." More than a decade ago, the district court enjoined Hi-Tech from making certain advertising claims about dietary supplements without "competent and reliable scientific evidence." According to Respondent the Federal Trade Commission's published guidance, that standard is flexible and context-specific, with no "fixed formula for the number or type of studies required." Since then, the FTC has repeatedly asked courts to hold that that injunctive standard can be satisfied only by product-specific, randomized, double-blind, placebo-controlled human clinical trials—the kind of substantiation required for drugs, not dietary supplements.

Until now, courts have consistently rejected this post-hoc reinterpretation of existing injunctions. But the Eleventh Circuit permitted it, concluding that Hi-Tech had waived the argument by failing to anticipate and preemptively challenge the FTC's change in position. In so doing, the Eleventh Circuit discounted the fact that the district court had decided the case on the merits, without mentioning waiver. Instead, it looked to events and evidence outside and after the

entry of the injunction to find waiver and to provide the missing specificity. The questions presented are:

I. Can the FTC unilaterally reinterpret an injunction years after its entry to seek contempt sanctions based on a more restrictive standard found nowhere in the injunction itself or does that violate Fed. R. Civ. P. 65(d) and due process?

II. Did Hi-Tech waive all challenges to the specificity of the injunction in contempt proceedings by not previously raising an argument Hi-Tech couldn't have foreseen?

III. Does an appellate court have discretion to find an issue waived even though the district court did not and its ruling on the merits was necessary to the judgment from which Hi-Tech appealed?

PARTIES TO THE PROCEEDING

Petitioners Hi-Tech Pharmaceuticals, Inc., Jared Wheat, and Stephen Smith were defendants-appellants below. Petitioner National Urological Group, Inc., d.b.a. Warner Laboratories, *et al.*, was defendant-counter-claimant below and Petitioner Thomasz Holda was defendant below. Respondent Federal Trade Commission was plaintiff-counter-defendant-appellee below and Respondent CertusBank, N.A. was plaintiff below.

CORPORATE DISCLOSURE STATEMENT

Hi-Tech Pharmaceuticals, Inc. is not a publicly traded company. It has no parent company and no company owns 10% or more its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit, listed here in chronological order:

- *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga. June 4, 2008), *reported at* 645 F. Supp. 2d 1167;
- *FTC v. Nat'l Urological Grp., Inc.*, No. 09-10617 (11th Cir. Dec. 15, 2009), *reported at* 356 F. App'x 358;
- *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga. May 14, 2014), *available at* 2014 WL 3893796;
- *FTC v. Nat'l Urological Grp., Inc.*, No. 14-13131 (11th Cir. May 5, 2015), *reported at* 785 F.3d 477;
- *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP (N.D. Ga. Oct. 10, 2017), *available at* 2017 WL 6759868;
- *FTC v. Nat'l Urological Grp., Inc.*, No. 17-15695 (11th Cir. Sept. 18, 2019), *reported at* 786 F. App'x 947.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Twelve years ago, the Federal Trade Commission got an injunction against Hi-Tech that imposed one requirement regarding the substantiation needed for claims about dietary supplements. Ten years later, the FTC got—and the Eleventh Circuit affirmed—a $40-million sanction based on the entirely different, and far more exacting, requirement applicable to drugs. The injunction's text didn't change during that decade, just the way the FTC wanted to interpret it. Imposing contempt sanctions—as the district court did here—based on a standard outside that injunction conflicts with Fed. R. Civ. P. 65(d) and the cases applying it, which require that an injunction's scope be discernable from its four corners. But the Eleventh Circuit affirmed that decision, permitting the court to impose crippling contempt sanctions according to its after-the-fact interpretation.

That decision also conflicts with the law governing contempt proceedings. After all, the first step in imposing contempt is establishing that an injunction's operative command is reasonably specific. Here, though, it took ten days of conflicting expert testimony over what the injunction required for the district court to conclude that the injunction's text was sufficiently specific. Indeed, the FTC's experts didn't just disagree with Hi-Tech's experts, but also with each other over what the injunction required. Determining what an injunction requires based on after-the-fact, conflicting expert testimony flies in the face of fundamental due process. "All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

That's what Federal Rule of Civil Procedure 65(d) requires, that's what the Constitution requires, and that's what—until now—cases construing them have required.

The injunction here barred Hi-Tech from advertising its supplements without "competent and reliable scientific evidence" substantiating those claims. That's the standard that applies to dietary supplements like those here. Then and now, according to the FTC's own guidance, that standard has a broad and flexible definition: "[C]ompetent and reliable scientific evidence" means "tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." FTC, Dietary Supplements: An Advertising Guide for Industry 9 (2001), https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf ("Guide").

Years later, the FTC changed its mind, deciding that the same kind of extensive testing required for new drugs should also be required for dietary supplement claims. But that change in position is indefensible: Congress established two different regimes—the more flexible one applicable to dietary supplements under the Dietary Supplement Health and Education Act of 1994, and the more stringent one applicable to drugs under the federal Food, Drug, and Cosmetic Act.

Rather than engage in rulemaking, the FTC chose to reinterpret existing injunctions as requiring dietary supplements to satisfy the heightened standards for drugs and to seek contempt sanctions if they did not. Thus, according to the FTC (or at least its experts), the "competent and reliable scientific evidence" standard adopted by those injunctions has *always* meant that "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials" are required in every case. Any supplement manufacturer under injunction who failed to predict the FTC's new position faces potentially company-ending sanctions.

Permitting the FTC to seek sanctions based on a more restrictive standard outside the injunction arrogates power to the FTC at the expense of litigants' rights to "receive explicit notice of precisely what conduct is outlawed," *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *see* Fed. R. Civ. P. 65(d). "A government of laws and not of men can never tolerate that arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233-34 (2018) (Gorsuch, J., concurring).

Worse, the Eleventh Circuit refused to even consider Hi-Tech's arguments about the injunction's scope based on a novel waiver doctrine endorsed by only one other Circuit and contradicted by all the rest. That holding misinterprets this Court's decision in *McComb v. Jacksonville Paper,* 336 U.S. 187 (1949). The Eleventh Circuit discounted Hi-Tech's arguments because Hi-Tech didn't immediately foresee that the FTC would reinterpret the injunction years later in contempt proceedings to impose a far more stringent standard on different products. Worse still, the

Eleventh Circuit found waiver even though the district court had squarely addressed the injunction's scope as the primary ground for its decision, with no mention of waiver whatsoever.

The Eleventh Circuit's decision creates one conflict and deepens another. No other court has sanctioned the FTC's attempt to regulate the supplement industry by reinterpreting injunctions in violation of Rule 65(d). In breaking rank and endorsing the FTC's approach, the Eleventh Circuit ignored this Court's warnings about ever-expanding administrative power and arbitrary governance. *See, e.g., City of Arlington v. FCC,* 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("[T]he danger posed by the growing power of the administrative state cannot be dismissed."); *see also* Sup. Ct. R. 10(c). Moreover, the Eleventh Circuit's waiver ruling, which stripped Hi-Tech of its statutory right to appeal, deepens an existing circuit split, further justifying this Court's review. *See* Sup. Ct. R. 10(a). This Court should grant certiorari to address these issues.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing en banc is reproduced at App.46-47. The Eleventh Circuit's opinion is reported at 786 F. App'x 947 and reproduced at App.1-26. The opinion of the United States District Court for the Northern District of Georgia is reported at 2017 WL 6759868 and reproduced at App.48-164.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its decision on September 18, 2019. It issued an order denying the petition for

rehearing en banc on January 29, 2020. This Court issued an order on March 19, 2020 extending all deadlines for filing petitions for certiorari to 150 days from denial of a timely rehearing petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 65(d) provides: "Every order granting an injunction … must … state the reasons why it issued," "state its terms specifically," and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."

The Fifth Amendment's Due Process Clause provides in relevant part that "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The relevant portions of the statutory framework governing the FTC's enforcement authority, 15 U.S.C. §§ 45, 52, are reproduced at App.347-61.

The statutory provision governing Hi-Tech's right to appeal the district court's judgment, 28 U.S.C. § 1291, is reproduced at App.362.

STATEMENT OF THE CASE

Hi-Tech sells dietary supplements. Federal law defines a "dietary supplement" as "a product … intended to supplement the diet" that contains a vitamin; mineral; herb or other botanical; amino acid; a dietary substance used to increase total dietary intake; or a combination of any of these ingredients. 21 U.S.C. § 321(ff). Two federal agencies oversee supplements: the FDA, which regulates dietary

supplements and their labeling under the Dietary Supplement Health and Education Act of 1994 ("DSHEA"), Pub. L. No. 103-417, 108 Stat. 4325, and the FTC, which regulates dietary-supplement advertising through general prohibitions against "false advertis[ing]" and "unfair or deceptive acts or practices" in Sections 5 and 12 of the FTC Act. 15 U.S.C. §§ 45(a)(1), 52.

DSHEA was enacted to eliminate "unreasonable regulatory barriers" to marketing dietary supplements. Pub. L. No. 103-417, § 2(13), (14). "Recognizing the health benefits of dietary supplements, Congress enacted DSHEA to ensure that supplements can be marketed and sold without following the stringent requirements imposed on drugs." *United States v. Bayer*, No. CV 07-01(JLL), 2015 WL 5822595, at *3 (D.N.J. Sept. 24, 2015); *see Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 224 (2d Cir. 1998).

After DSHEA, if a supplement isn't marketed as a drug—i.e., the manufacturer does not claim it can "diagnose, mitigate, treat, cure, or prevent a specific disease or class of diseases," 21 U.S.C. § 343(r)(6)—it can't be regulated as a drug. Instead, it must be regulated as a food, Pub. L. No. 103-417, § 3(a), and presumed safe unless the FDA shows it is "adulterated." *See* 21 U.S.C. § 342(f). DSHEA lets a dietary-supplement advertiser make claims about how a supplement affects the human body's structure or function if the claim has "substantiation" rendering

it "truthful and not misleading." 21 U.S.C. § 343(r)(6)(B).[1]

DSHEA does not, however, specify what "substantiation" is required to render structure-function claims like the ones here "truthful and not misleading" and thus permissible under the FTC Act. Guide at 3. Thus, in April 2001, the FTC published an advertising guide for the dietary-supplement industry. Under the Guide, dietary-supplement advertisers may advertise a supplement's efficacy if the claim is supported by "competent and reliable scientific evidence." *Id.* at 21. As noted above, the Guide defines "competent and reliable scientific evidence" broadly. *Id.* It explains that "[t]here is no fixed formula for the number or type of studies required[.]" *Id.* at 9; *Bayer*, 2015 WL 5822595, at *3-4 (rejecting FTC's position that "competent and reliable scientific evidence" in a consent decree required product-specific, randomized, clinical trials for structure-function claim about supplements). And "studies on the precise formula used in the advertised product are not required." *Bayer*, 2015 WL 5822595, at *4.

The FTC has neither withdrawn nor amended the Guide, but after the injunction's entry here, the FTC began a crusade to replace the Guide's "flexible," "context specific" substantiation standard with a "more precise" one. *See* David C. Vladeck, Director,

[1] For example, a weight-loss supplement manufacturer, like Hi-Tech, may state that a product "causes weight loss"—if that statement is supported by adequate scientific "substantiation"—but may not claim that its products cure obesity. 65 Fed. Reg. 1000, 1027 (Jan. 6, 2000).

FTC Bureau of Consumer Protection, Remarks on the Priorities for Dietary Supplement Advertising Enforcement 11 (Oct. 22, 2009). One way it did so was by reinterpreting pre-existing consent decrees and injunctions, which had adopted the Guide's "flexible" standard, as instead incorporating an inflexible one that required product-specific, randomized, clinical trials. *See, e.g., Basic Research v. FTC*, No. 2:09-CV-0779 CW, 2014 WL 12596497, at *4-5 (D. Utah Nov. 25, 2014) (rejecting FTC's effort to require randomized clinical trials for all weight-loss claims); *FTC v. Garden of Life, Inc.*, 845 F. Supp. 2d 1328, 1334-35 (S.D. Fla. 2012) (same), *aff'd in part, vacated in part*, 516 F. App'x 852 (11th Cir. 2013); *Bayer*, 2015 WL 5822595, at *3-4 (similar). No court had agreed with the FTC before the decisions here.

A. Round 1: The district court grants summary judgment and enters a permanent injunction; the Eleventh Circuit affirms.

This litigation began in 2004, when the FTC sued Hi-Tech and others, contending that their advertising violated 15 U.S.C. §§ 45(a), 52. Doc. 1 ¶ 1.[2] The FTC claimed that Hi-Tech was making weight-loss and other efficacy claims about three dietary supplements without a scientific basis. The district court had jurisdiction under 28 U.S.C § 1345.

In 2008, the district court granted summary judgment for the FTC and entered an injunction. That injunction didn't condition future efficacy claims for

[2] Docket citations refer to *FTC v. National Urological Group*, No. 1:04-CV-3294-CAP (N.D. Ga.).

other dietary supplements on "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials." Instead, it prohibited future efficacy claims about any supplement absent "competent and reliable scientific evidence" substantiating those claims. App.244. That standard was borrowed from the Guide, which disavowed a one-size-fits-all, inflexible approach to substantiation. App.234. Nor did the injunction itself mention randomized clinical trials, let alone require them.

On appeal Hi-Tech contended, among other things, that the FTC's substantiation standard improperly restricted commercial speech. The Eleventh Circuit summarily affirmed. *FTC v. Nat'l Urological Grp.*, 356 F. App'x 358 (11th Cir. 2009). But Hi-Tech didn't argue—and couldn't have argued—that that standard wasn't specific enough to require randomized, clinical trials for all supplements. And for good reason: The injunction didn't say it required them, and the FTC's petition for contempt concerning different products wouldn't be filed for another two years.

B. Round 2: The district court holds Hi-Tech in contempt; the Eleventh Circuit vacates and remands.

In 2011, the FTC moved to hold Hi-Tech and others in civil contempt for violating the 2008 injunction based on new claims about four new supplements. *See* Doc. 332. The FTC contended that, despite the injunction's reference to "competent and reliable scientific evidence," only randomized clinical trials could substantiate those efficacy claims.

Doc. 332-1, at 11-23. Based on purported violations of this new, higher standard, the FTC sought kill-the-company sanctions.

In response, Hi-Tech argued that the injunction, which never mentioned randomized clinical trials, was insufficiently specific under Rule 65(d). Doc. 346, at 14-21; Doc. 349; Doc. 396, at 2-15. Hi-Tech explained that the contempt motion addressed new claims about new products never at issue in Round 1 and that the district court had held in Round 1 that "[d]ifferent scientific evidence is required for different claims impacting different products." App.279.

Nonetheless, the district court found Hi-Tech in contempt, holding Hi-Tech collaterally estopped from contending that randomized clinical trials were not required for the new products. App.222-27; App.210-12. It held that even though the injunction never mentioned randomized clinical trials and even though new and different products (and claims) were at issue, Hi-Tech was bound by the FTC's expert opinion on summary judgment in Round 1 that randomized clinical trials should be required for all efficacy claims. App.315-17. The district court thus refused to consider any of Hi-Tech's other substantiation evidence. Doc. 524, at 38; App.165-70.

After a bench trial on remedies, the district court imposed a $40-million sanction. App.183-89.

On appeal, the Eleventh Circuit rejected the district court's collateral-estoppel ruling, vacated the contempt order, and remanded for further proceedings. App.35. It held that collateral estoppel didn't apply because "[t]he issue decided in [Round 1] involved different representations, different products,

and the interpretation of a different legal standard." App.36. Because that holding was enough for vacatur, the Eleventh Circuit didn't reach Hi-Tech's lack-of-specificity argument. Far from deeming it waived or, as the FTC argued, decided in Round 1, the court deemed it "premature." App.38.

C. Round 3: The district court reinstates the contempt sanction; the Eleventh Circuit relies on waiver to affirm.

On remand, Hi-Tech, Wheat, and Smith continued to object, under Rule 65(d), that the injunction didn't specifically require randomized, clinical trials for the efficacy claims at issue. Doc. 876-1, at 3-8; Doc. 883, at 8-12; Doc. 959, at 4-8; Doc. 963, at 1-17; Doc. 965, at 10-19, 31-37 & n.14.

The Round 3 proceedings culminated in 2017 with a 10-day bench trial featuring multiple experts disputing what standard the injunction required for substantiation. Docs. 945-54. The FTC's experts said that only randomized clinical trials—at potentially prohibitive cost—could provide "competent and reliable scientific evidence," while Hi-Tech's experts said other kinds of scientific studies could (and did) provide substantiation.[3] But the FTC's experts couldn't even agree amongst themselves on what would satisfy that standard, differing over how long and how large such studies had to be.

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[3] Some drug-level randomized clinical trials can cost tens or even hundreds of millions of dollars to complete. *See, e.g.,* Aylin Sertkaya et al., *Key Cost Drivers of Pharmaceutical Trials in the United States*, Clinical Trials (2016), https://www.reasearchgate.net/publication/293640487_Key_cost_drivers_of_pharmaceutical_clinical_trials_in_the_United_States.

Petitioners offered six claim-substantiation experts from various fields, including clinical research, nutrition, exercise physiology, weight-loss medicine, and pharmacology. Each of these experts considered the injunction's language and the Guide's instruction. And agreeing that randomized, product-specific, placebo-controlled trials were not the only way to support Hi-Tech's claims, those experts provided substantiation evidence that the FTC's experts couldn't clearly and convincingly overcome.

Despite this battle of experts, the district court again found Hi-Tech in contempt, re-imposing the same $40-million sanction. App.159-64. The court deemed the injunction reasonably specific based not on what was in it, but what was outside it: communications with Wheat's lawyers, prior court rulings, expert opinions, and the failure to immediately anticipate and object to this issue in Round 1. App.57-58, App.60, App.69, App.98-99. From this, the district court concluded, the enjoined parties subjectively "understood their obligations under the injunctions; it is, therefore, clear and unambiguous." App.91.

In reaching that conclusion, the district court considered and rejected on the merits Hi-Tech's arguments that the injunction wasn't reasonably specific. App.71, App.104, App.117. And in that 2017 order, it detailed for the first time the more exacting standard it said Hi-Tech should have anticipated. App.124, App.130-34.

The Eleventh Circuit affirmed, concluding that Hi-Tech, Wheat, and Smith should have objected to the injunction's lack of specificity back in Round 1,

years before the contempt proceedings. App.12-19. The court brushed aside what it called Hi-Tech's "chief argument on appeal," that "the injunction is too ambiguous to be enforced." App.12. Though the Eleventh Circuit acknowledged that the FTC had always borne the burden of showing that the injunction was unambiguous, it deemed Hi-Tech's objection waived, holding that Hi-Tech's argument "has been squarely foreclosed by *McComb v. Jacksonville Paper*, 336 U.S. 187 (1949)." App.11-12.

The Eleventh Circuit defended its holding even over Hi-Tech's argument that it was entitled to appeal the merits because they were the basis for the district court's decision. "We don't disagree," the court said. App.17. But, relying on a single word ("ostensibly"), it held that the district court had alternatively found waiver by noting that, back in Round 1 before the contempt proceedings, Petitioners "did not object to any of the provisions they *ostensibly* challenge" now. App.18 (emphasis in original).

The court further concluded that the FTC had won the battle of experts, that Hi-Tech should have had product-specific, randomized, double-blind, placebo-controlled clinical trials for claims about the four new products, and that the $40-million sanction would stand. App.19-26.

Hi-Tech petitioned for rehearing, which was denied. This petition followed.

REASONS FOR GRANTING THE PETITION

Neither the district court nor the appellate court concluded that the injunction's plain language required the type of clinical trials required for drugs. Instead, the district court derived that standard only

after a ten-day bench trial with competing expert testimony over what the injunction meant. By affirming that decision, and thus permitting the FTC to reinterpret the injunction based on matters outside its four corners, the Eleventh Circuit's decision conflicts with Rule 65(d), the case law applying it, and due process. And by holding that Hi-Tech had waived any challenge to the injunction's scope, the decision conflicts with this Court's precedents, deepens an existing circuit split, and impermissibly flips the burden of proof in a contempt action. Finally, by concluding that Hi-Tech had waived its right to challenge the grounds for the district court's re-imposition of sanctions, the Eleventh Circuit denied Hi-Tech the right to appeal that judgment. Each error alone warrants review. Together, they cry out for it.

I. The Eleventh Circuit's decision conflicts with Fed. R. Civ. P. 65(d), the cases applying it, and the due process principles underpinning it.

By permitting the FTC to rewrite injunctions after the fact, the Eleventh Circuit's decision ignores regulated parties' due process rights, deviates from this Court's case law, and conflicts with lower court cases.

A. The FTC's rule-by-injunction violates Rule 65(d).

The injunction here is "too vague to be sustained as a valid exercise of federal judicial authority." *Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 73-74 (1967). When it was entered, no reasonable person would have understood its text—drawn from the FTC's own Guide—to be satisfied *only*

by double-blind, product-specific, placebo-controlled studies when the injunction contained no such requirement, and when the Guide disavowed any fixed formula for substantiation. Holding Hi-Tech to that new standard now violates Rule 65(d), offends due process, and conflicts with this Court's case law, and that of other Circuits.

1. Notice of legally binding rules is the most basic requirement of due process. *See, e.g.*, *Connally v. Gen. Constr.*, 269 U.S. 385, 391 (1926). Accordingly, "those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 444 (1974); *Schmidt*, 414 U.S. at 476 (same). Rule 65(d) "embodies" that "fundamental due process requirement of notice." *United States v. Wilson*, 908 F.2d 968 (4th Cir. 1990); *see* U.S. Const., amend. V. Thus, Rule 65(d)'s specificity provisions "are no mere technical requirements," but exist "to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt,* 414 U.S. at 476.

To comport with due process, Rule 65 requires an injunction to say precisely what the enjoined party must do or not do; accordingly, every injunction must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d).

2. Here, the injunction prohibited future efficacy claims about supplements absent "competent and reliable scientific evidence" substantiating those

claims. App.244. It never conditioned future efficacy claims for other products on "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials"—the standard applied and upheld below. Because this higher standard is found nowhere within the injunction's four corners, that should have been the end of the matter. It wasn't. Instead, the Eleventh Circuit held that matters outside the injunction's text and after its entry—including expert testimony and Hi-Tech's subjective knowledge—supplied the textual specificity lacking on the injunction's face.

That ruling conflicts with this Court's jurisprudence and that of other Circuits. "Rule 65(d) protects the party against which an injunction is issued by requiring clear notice as to what that party must do or refrain from doing." *Abbott v. Perez*, 138 S. Ct. 2305, 2321 (2018). Appellate courts have thus held that unless an injunction is "a standalone separate document that spells out within its four corners exactly what the enjoined parties must or must not do," it "does not comply with Rule 65(d)." *Auto Driveaway Franchise Sys. v. Auto Driveaway Richmond*, 928 F.3d 670, 676 (7th Cir. 2019); *see also, e.g., Farmer v. Banco Popular of N. Am.*, 557 F. App'x 762, 766-67 (10th Cir. 2014) (A "strict approach" to Rule 65(d) "mandates that the parties be able to interpret the injunction from the four corners of the order"); *Max's Seafood Cafe ex rel. Lou-Ann v. Quinteros*, 176 F.3d 669, 673 (3d Cir. 1999) (limiting injunction's scope to "what is within the four corners"); *United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005) ("The test is whether the putative contemnor is able to ascertain from the four corners of the order

precisely what acts are forbidden."). Even the Eleventh Circuit has understood (and followed) this fundamental principle in the not-so-distant past. *See LabMD v. FTC*, 894 F.3d 1221, 1235-36 (11th Cir. 2018) (holding that "[b]eing held in contempt and sanctioned pursuant to an insufficiently specific injunction is … a denial of due process," and that an "indeterminable standard of reasonableness" only ascertainable through expert testimony was unenforceable).

Here, however, the Eleventh Circuit affirmed a $40-million contempt sanction based on a standard determined only after a 10-day bench trial. That conflicts with Rule 65(d), this Court's case law, and case law from other Circuits.

3. Even assuming extrinsic evidence were relevant, Hi-Tech *still* had no notice from the injunction that the more stringent standard would apply to all supplements. The injunction's "competent and reliable scientific evidence" standard was borrowed from FTC guidance, which sets forth a flexible definition that varies by product. Guide at 9. The injunction never mentioned randomized clinical trials, let alone required them. *Cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."). At no time would a reasonable person have equated "competent and reliable scientific evidence" with (and only with) "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials."

The FTC doesn't really think that this language requires randomized clinical trials either. In other cases, the FTC has sought more aggressive injunctions that expressly require randomized clinical trials for certain claims, including weight-loss claims, *see, e.g.*, Doc. 744-25 at 6-7 (*Iovate* consent decree). Because the FTC didn't do that here, it had to argue that two patently distinct standards were in fact the same. But the FTC's use elsewhere of different, clearer language requiring randomized clinical trials tacitly concedes that the injunction here didn't require them. *See In re HealthyLife Scis.,* File No. 122 3287, 2014 WL 4651907, at *27 (F.T.C. Sept. 11, 2014) (consent order requiring randomized clinical trials); *In re Brown*, 152 F.T.C. 466, 481-82 (F.T.C. 2011) (same); *In re Nestlé HealthCare Nutrition*, 151 F.T.C. 1, 11, 13 (F.T.C. 2011) (same); *FTC v. Cal. Pac. Research,* No. CV-N-88-602BRT, 1991 WL 208470, at *1 (D. Nev. Aug. 27, 1991) (injunction requiring the same).

4. But assume that's not true, and that "competent and reliable scientific evidence" can be plausibly interpreted as meaning (without actually saying) "only independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials." Under this counterfactual scenario, that standard is susceptible to at least two meanings and therefore *still* fatally ambiguous. It's hard to seriously dispute this. To figure out what the injunction meant required a 10-day bench trial with expert testimony and other extrinsic evidence where even the FTC's own experts couldn't agree over what would satisfy the injunction.

That, too, conflicts with existing contempt case law because when courts are faced with an ambiguous order, the tie goes to the defendant. "The longstanding, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt." *Drywall Tapers & Pointers of Greater N.Y. v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n*, 889 F.2d 389, 400 (2d Cir. 1989) (Mahoney, J., concurring in part). Permitting the FTC to redefine injunctions in contempt proceedings "would turn [their] normal construction … upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in judgment). And because an injunction has both criminal and civil applications, *Int'l Union v. Bagwell*, 512 U.S. 821, 827-28 (1994), "the rule of lenity governs its interpretation in both settings." *Whitman v. United States*, 574 U.S. 1003, 135 S. Ct. 352, 353-54 (2014) (mem.); *see United States v. Thompson/Ctr. Arms*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *id.* at 519 (Scalia, J., concurring in judgment).

B. The Eleventh Circuit's decision improperly lets the FTC redefine an injunction in contempt proceedings and conflicts with the decisions of other courts.

1. As the administrative state ballooned, Congress passed the Administrative Procedure Act as a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards." *FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009)

(Kennedy, J., concurring). Here, the FTC sought to avoid those procedural safeguards by reinterpreting broadly worded injunctions to impose a new standard at odds with DSHEA. Accordingly, the FTC asserts that companies enjoined from making efficacy claims without "competent and reliable scientific evidence"—like Hi-Tech—now must come up with "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials" to support their claims.

If the FTC believed that was the appropriate standard, it could have tried to promulgate a rule establishing it. It didn't, for obvious reasons.[4] Or it could have brought a new enforcement action against Hi-Tech. It didn't do that either. It didn't even seek prospective modification of the injunction to incorporate this new, more demanding standard. Instead, the FTC instituted contempt proceedings, contending that its change in position could be enforced by reading it backwards into an injunction

[4] The FTC would have failed. "Placebo-controlled, double-blind testing is not a legal requirement for consumer products." *FTC v. QT*, 512 F.3d 858, 861 (7th Cir. 2008); *see id.* ("Nothing in the Federal Trade Commission Act, the foundation of this litigation, requires placebo-controlled, double-blind studies."). In *POM Wonderful v. FTC*, 777 F.3d 478, 497 (D.C. Cir. 2015), the D.C. Circuit impliedly rejected the FTC's position. There, the consent decree provision at issue explicitly required "randomized and controlled human clinical trials." *Id.* at 497, 502. The D.C. Circuit distinguished that provision, which pertained to "disease-related" claims, from another, which pertained to "more general claims about health benefits," and which required only "competent and reliable scientific evidence" not "randomized, controlled, human clinical trials support." *Id.* at 489 (emphasis omitted).

issued more than a decade earlier. That flouts this Court's recent caution that administrative agencies' abuse of equitable remedies cannot be tolerated. *Cf. Liu v. SEC*, No. 18-1501, slip op. (U.S. June 22, 2020).[5]

2. Even more problematic, the FTC sought to enforce its new "rule" in contempt proceedings bereft of the normal safeguards applicable to enforcement actions. Civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring in judgment); *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (noting that the contempt power is uniquely "liable to abuse"). So courts are "bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *Int'l Longshoremen's Ass'n,* 389 U.S. at 76 (Contempt "is a potent weapon. When it is founded upon a decree too

[5] Decided the week this petition was filed, *Liu* supports vacatur here for an independent reason: the $40-million sanction against Hi-Tech was based on its gross revenue, not net profits. Doc. 902 at 50-51, 56; Doc. 945 at 14; Doc. 953 at 118-21, 125-27; Doc. 965 at 62. That's impermissible under *Liu*, where this Court held, "[b]y incorporating these longstanding equitable principles into [15 U.S.C.] § 78u(d)(5), Congress prohibited the SEC from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing." Slip op. at 12. Because the statute here, 15 U.S.C. § 45, authorizes "equitable relief" in the same way as § 78u(d)(5), it incorporates this same principle and is therefore subject to the same limitation recognized in *Liu*. For this reason alone, this Court should grant this petition, vacate the sanction, and remand for recalculation in light of *Liu*.

vague to be understood, it can be a deadly one"). "Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *Int'l Longshoremen's Ass'n*, 389 U.S. at 76. Both courts below ignored these requirements.

3. This isn't the only case where the FTC has sought to reinterpret existing language in injunctions or consent decrees to require a more stringent standard. But this is the only one where the FTC's after-the-fact revision was affirmed. Every other court to have considered the attempt has rejected it.

In *Bayer*, the court held that "competent and reliable scientific evidence does not require drug-level clinical trials, and the Government cannot try to reinvent this standard through expert testimony." 2015 WL 5822595, at *15. "The Government cannot seek contempt on the basis of a lone expert who proposes a standard that was not disclosed to industry until the day the government filed its contempt motion," the court explained, especially "where, as here, that testimony is inconsistent with the agency's own guidance." *Id.* The court reiterated that "[t]he Government cannot enter into a consent decree using the general competent and reliable scientific evidence standard and then subsequently require [randomized clinical trials] through the expert testimony it produces in a contempt action." *Id.* at *15.

Similarly, in *Basic Research*, the court rejected the FTC's effort to require randomized clinical trials for all weight-loss claims. The court held that a consent decree requiring "competent and reliable

scientific evidence" to support certain representations did not require randomized clinical trials. 2014 WL 12596497, at *4-5. The court held that demanding "Gold Standard" clinical trials "exceed[ed] the requirements" of the consent decree. *Id.* at *4, 13.

And again in *Garden of Life*, the court held that a consent decree speaking only of "competent and reliable scientific evidence" couldn't be redefined through expert testimony that would "require [the] Court to read additional requirements into the Consent Decree," which it would have to do if randomized clinical trials were required.[6] 845 F. Supp. 2d at 1334-35.

Despite this previously unbroken line of authority, the district court concluded the opposite—and worse yet, the Eleventh Circuit affirmed. That warrants granting certiorari.

II. The Eleventh Circuit's decision incorrectly relieved the FTC of its burden to show that the injunction specifically prohibited Hi-Tech's conduct.

To affirm the $40-million contempt sanction and find waiver, the Eleventh Circuit looked outside the injunction's four corners to, among other things, Hi-Tech's purported subjective knowledge and expert testimony. It justified doing so because Petitioners had not anticipated and objected to this rewriting

[6] The FTC did not appeal *Bayer* or *Basic Research*. Although it did appeal *Garden of Life*, it didn't argue that randomized clinical trials were the only way to satisfy the competent-and-reliable-scientific-evidence requirement. Brief for Plaintiff-Appellant FTC at *5, *FTC v. Garden of Life*, 516 F. App'x 852 (11th Cir. 2013) (No. 12-12382-AA), 2012 WL 2872220.

immediately in Round 1. In so holding, the Eleventh Circuit misapplied this Court's decision in *McComb v. Jacksonville Paper*, 336 U.S. 187 (1949), and deepened a circuit split regarding when an enjoined party must assert its lack-of-specificity argument.

A. The decision below misapplies this Court's precedent.

The Eleventh Circuit wrongly inferred from *McComb* that an enjoined party must immediately object to even latent uncertainties when an injunction is entered or forever waive its right to challenge that injunction. That's not what *McComb* says. *McComb* merely held that the enjoined party should have objected upon entry of the injunction, where the injunction cross-referenced two statutes that "provide[] the formula by which the amounts [of wages and overtime pay] can be simply computed." 336 U.S. at 194. Critically, the statutes provided detailed formulas, down to the hour and the cent, for paying wages. *See id.* Thus, the injunction was specific enough, despite the statutory cross-reference, to put a reader immediately on notice of precisely what it required—and thus enable the enjoined party to object on that basis.

But that isn't the case here, where the injunction called for "competent and reliable scientific evidence," a standard which requires "the expertise of professionals" to determine what is required for each product. App.234, App.240-44. The standard is broad by design and, without more, unclear about what it requires in any given case. All that was clear when the injunction was entered was that it did *not* require randomized clinical trials in every case.

Subsequent Supreme Court cases painted *McComb's* already narrow exception into a corner, emphasizing the due process guarantee that "those against whom an injunction is issued should receive fair and precisely drawn notice" in the injunction itself "of what the injunction actually prohibits." *Granny Goose Foods*, 415 U.S. at 444. Indeed, in *International Longshoremen's Association*, this Court reversed a civil-contempt finding "founded upon a decree too vague to be understood," calling the error "serious and decisive." 389 U.S. at 76. And in *Schmidt*, a decree telling defendants "not to enforce the present Wisconsin scheme against those in the appellee's class" could not support a contempt finding because "it plainly does not satisfy the important requirements of Rule 65(d)." 414 U.S. at 476-77 (cleaned up). The Eleventh Circuit's decision here cannot be squared with those cases.

B. The decision below deepens a lopsided Circuit split.

The Eleventh Circuit's decision also adds to an uneven circuit split regarding whether an accused party may be held in contempt for violating an injunction that does not clearly encompass the accused conduct.

1. Consistent with this Court's precedent, nearly every Circuit has for decades consistently answered that question with a resounding "no." The majority rule is that defendants can challenge the specificity of an injunction in contempt proceedings. *See, e.g., H.K. Porter v. Nat'l Friction Prods.*, 568 F.2d 24, 26-27 (7th Cir. 1977), *as amended* (Jan. 5, 1978) (contempt proceedings "were improper because the … order …

failed to comply" with Rule 65(d)); *Williams v. United States*, 402 F.2d 47, 48-49 (10th Cir. 1967) (considering fully defendant's specificity argument on appeal from contempt); *Russell C. House Transfer & Storage v. United States*, 189 F.2d 349, 351 (5th Cir. 1951) (holding that a defendant can challenge the scope of an injunction in a contempt proceeding).

Moreover, courts have consistently sustained those challenges where the injunction does not clearly encompass the complained-of conduct. *See, e.g., Imageware v. U.S. W. Commc'ns*, 219 F.3d 793, 797 (8th Cir. 2000) (reversing contempt finding for violating a protective order because the alleged contemnors "could reasonably, even if perhaps erroneously, have believed that [the documents in question] were not subject to [the protective order]"); *NBA Props. v. Gold*, 895 F.2d 30, 31-33 (1st Cir. 1990) (reversing contempt finding where sustaining it would require "reading the decree rather strongly against, rather than to the benefit of, the person charged with contempt" (cleaned up)); *Polo Fashions v. Stock Buyers Int'l*, 760 F.2d 698, 700 (6th Cir. 1985) (while "the *validity* of the injunction is not an issue in … contempt [proceedings]," specificity is, and an injunction must be "sufficiently *clear and specific* to provide the basis for … contempt" (emphasis added)); *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971) (finding injunction unenforceable in contempt proceedings because "the provisions of the order contain no prohibitory language explicitly addressed to" the acts at issue); *see also CPC Int'l v. Skippy*, 214 F.3d 456, 459 (4th Cir. 2000) ("terse and sweeping injunction" "d[id] not comply with the requirements of Rule 65(d)"); *Gates v. Shinn*, 98 F.3d 463, 467-72 (9th Cir.

1996) (reversing contempt finding because the consent decree lacked specificity, "a predicate to a finding of contempt"); *Doe v. Gen. Hosp. of D.C.*, 434 F.2d 423, 424-25 (D.C. Cir. 1970) (declining to find defendants in contempt given "possible confusion" regarding injunction's meaning).

3. Until now the only court to rule differently was the Federal Circuit, which, in a 7-5 en banc decision, relied on *McComb* to find a lack-of-specificity defense waived because it had not been raised immediately on the injunction's entry—even though the injunction itself didn't directly address the question. *TiVo v. EchoStar*, 646 F.3d 869, 884-88 (Fed. Cir. 2011). But as *TiVo*'s powerful—and correct—dissent observes, "no other court has read *McComb* in this way." *Id.* at 896-97 (Dyk, J., dissenting in part and collecting cases). That was true, at least until the Eleventh Circuit's decision here.

C. The decision below flips the burden for civil contempt.

The Eleventh Circuit's holding isn't really about waiver. Instead, it rests on a fundamental error about the issue presented. The relevant question isn't whether the injunction is invalid because it is vague. (It is, but that's not the point.) Rather, it's whether a court can lawfully hold a party in contempt where the injunction does not unambiguously prohibit the purportedly contumacious conduct.

That subtle but important difference determines who bears the burden of proof. In a constitutional vagueness challenge, "the complainant"—i.e., Hi-Tech—"must demonstrate that the law is impermissibly vague." *Vill. of Hoffman Estates v.*

Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982). But in a contempt proceeding, the "petitioning party"—here, the FTC—must "clearly and convincingly show the district court that (1) the injunction was valid and lawful; [and] (2) the order was clear, definite, and unambiguous." App.11.

The Eleventh Circuit made no pretense of holding the FTC to its burden. It never said that the injunction was specific or unambiguous, only that it was "reasonable, particularly when we consider that the defendants did not object to the phrase." App.17. Instead, it rejected Hi-Tech's argument on this point without any explanation, citing *McComb* to conclude that "[t]o the extent that the defendants make this argument to suggest that ambiguity objections can *never* be waived, we find that contention to be meritless." App.16-17.

But calling a contention "meritless" doesn't make it so. A contempt finding cannot be based on an ambiguous or non-specific injunction. It was the FTC's burden to show that the injunction unambiguously prohibited Hi-Tech's conduct. It couldn't—as shown by the district court needing a ten-day bench trial to determine what the standard should be. "Waiver" has no place here, where the Eleventh Circuit didn't explain how Hi-Tech could waive something that the FTC had the burden to show.

III. The Eleventh Circuit's decision stripped Hi-Tech of its right to appeal the district court's judgment.

If the above were not enough, the opinion below also denied Hi-Tech its statutory right to appeal by holding that Hi-Tech had abandoned its specificity

arguments. The district court decided that issue on the merits, with no mention of waiver or forfeiture. This Court should grant review to clarify that, under 28 U.S.C. § 1291, a Court of Appeals cannot ignore the district court's stated ground for judgment by finding waiver of an issue the district court passed upon.

1. Under § 1291, "[t]he courts of appeals … have jurisdiction of appeals from all final decisions of the district courts of the United States." The "[j]urisdiction of the courts of appeals is not discretionary," but instead is conferred as a "'matter of right.'" *Adsani v. Miller*, 139 F.3d 67, 77 (2d Cir. 1998); *see Hall v. Hall*, 138 S. Ct. 1118, 1124 (2018). To arbitrarily deprive an appellant of that right violates due process. *See* U.S. Const. amend. V; *Adsani*, 139 F.3d at 76-77 (citing *Lindsey v. Normet*, 405 U.S. 56, 77 (1972)).

This Court has never addressed the question presented here. But another line of cases reveals that there's only one right answer. When deciding whether to grant review of a federal question in "a judgment rendered by the highest court of a State" under 28 U.S.C. § 1257(a), this Court may grant review even if the parties had not pressed the issue if the State court passed on it. *See, e.g.*, *Schad v. Arizona*, 501 U.S. 624, 630 n.2 (1991); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). Thus, when a State's highest court decides an issue, this Court may review it even if the parties had never pressed it. What might otherwise have been waiver or forfeiture is cured by the State court's decision.

That makes good sense. After all, waiver and forfeiture rules exist primarily to serve the interests of "judicial efficiency and finality." *Holguin-*

Hernandez v. United States, 140 S. Ct. 762, 767 (2020) (Alito, J., concurring). Thus, "[r]equiring a party to bring an error to the attention of the court enables the court to correct itself, obviating the need for an appeal. At the very least, the court can explain its reasoning and thus assist the appellate process." *Id.* But finding a fully briefed-and-considered issue waived, like the Eleventh Circuit did here, serves neither interest and offends "the public policy favoring disposition of cases on their merits." *E.g.*, *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002).

2. Although many Circuits—including the Eleventh—have held that a district court's deciding an issue can cure an appellant's prior failure to have raised and pressed it, the Circuits disagree over whether addressing such an issue on appeal is mandatory or discretionary.

Generally, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Nor are federal appellate courts required to address an issue raised for the first time on appeal. *Nelson v. Adams USA*, 529 U.S. 460, 469 (2000). And the Circuits agree that an issue may be waived or forfeited for a later appeal where a party could have raised it in an earlier appeal but didn't. *See, e.g.*, *AngioDynamics v. Biolitec AG*, 823 F.3d 1, 4 (1st Cir. 2016); *Howe v. City of Akron*, 801 F.3d 718, 741-43 (6th Cir. 2015). But in each instance, an appellate court retains discretion to decide whether to address an abandoned issue. *Exxon Shipping v. Baker*, 554 U.S. 471, 487 (2008). Here, the court's discretion breaks in favor of review on the merits.

Consistent with that principle, several Circuits hold that a district court's deciding an otherwise waived or forfeited issue cures the failure to raise it. *See, e.g.*, *Hi-Tech Pharm. v. HBS Int'l*, 910 F.3d 1186, 1194 (11th Cir. 2018); *Firestone Fin. v. Meyer*, 796 F.3d 822, 825-26 (7th Cir. 2015); *Ahanchian v. Xenon Pictures*, 624 F.3d 1253, 1260 n.8 (9th Cir. 2010); *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707-08 (D.C. Cir. 2009). Take, for example, the First Circuit's rule: When "an argument is raised belatedly in the district court but that court, without reservation, elects to decide it on the merits, the argument is deemed preserved for later appellate review." *Negrón-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008).

But the Circuits split over the nature of the cure. "Views vary about whether application of the [forfeiture] rule is discretionary." *United States v. Murphy*, 769 F. App'x 631, 640 (10th Cir. 2019) (acknowledging Circuit split).

Six Circuits view deciding the issue on the merits as taking the issue outside the waiver or forfeiture doctrines altogether, with the result that appealing it becomes a matter of right. *See, e.g.*, *Negrón-Almeda*, 528 F.3d at 26 (1st Cir.); *United States v. Clariot*, 655 F.3d 550, 556 (6th Cir. 2011) ("[T]here can be no forfeiture where the district court nevertheless addressed the merits of the issue." (cleaned up)); *Moriarty v. Svec*, 164 F.3d 323, 328 (7th Cir. 1998) (an "appellant can always challenge the legal theory upon which the district court relied in its decision"); *PFS Distribution v. Raduechel*, 574 F.3d 580, 598 (8th Cir. 2009) ("We cannot say [cross-appellant] waived these

arguments, however, because the district court did address the arguments in its order …"); *Hernandez-Rodriguez*, 352 F.3d at 1328 (10th Cir.) (appeal from a district court's sua sponte ruling governed not by plain error, but by the normal standard of appellate review); *Blackmon-Malloy*, 575 F.3d at 707 (D.C. Cir.) (discretionary forfeiture rule "does not apply where the district court nevertheless addressed the merits of the issue").

But in at least three other Circuits, it is within the appellate court's discretion to review the issue. *See, e.g.*, *Roberts v. Capital One, N.A.*, 719 F. App'x 33, 35 (2d Cir. 2017) (choosing to "exercise our discretion to address the merits" of an issue not pressed but decided); *Lampton v. Diaz*, 639 F.3d 223, 227 n.14 (5th Cir. 2011) (asking whether addressing the otherwise forfeited issue would prejudice appellee); *Comcast of Sacramento I v. Sacramento Metro. Cable Television Comm'n*, 923 F.3d 1163, 1168-69 (9th Cir. 2019) (stating that "the waiver rule does not have obvious application here" and exercising discretion to address issue). Flipping traditional waiver doctrine on its head, the rule in these Circuits erroneously permits discretion that works to deny, rather than to afford, review on the merits.

On this point, there is even equivocation within some Circuits. *Compare, e.g.*, *Ahanchian*, 624 F.3d at 1260 n.8 (Ninth Circuit's waiver rule "does not apply where the district court nevertheless addressed the merits of the issue" not explicitly raised by the party (cleaned up)) *and Blackmon-Malloy*, 575 F.3d at 707-08 (D.C. Cir.) (discretionary forfeiture rule "does not apply where the district court nevertheless addressed

the merits of the issue") *with Comcast of Sacramento I*, 923 F.3d at 1168-69 (9th Cir.) (treating matter as discretionary) *and Al Bahlul v. United States*, 767 F.3d 1, 48 (D.C. Cir. 2014) (Rogers, J., concurring and dissenting) ("*De novo* review of a forfeited issue is permitted where the lower court has nevertheless addressed the merits of the issue." (cleaned up)).

Exacerbating this confusion, the decision below throws a wrench into the Eleventh Circuit's own case law. The waiver ruling here, App.17-18, conflicts with the Eleventh Circuit's prior holding that, "after the district court considered the merits of at least two of [appellee]'s three arguments and relied on them in granting the motion to dismiss, [appellant] was entitled to challenge those arguments on appeal whether or not it had done so in the district court." *Hi-Tech Pharm.*, 910 F.3d at 1194.

This split is significant: Under one view, the Court of Appeals must address the issue; under the other, it may (or may not). In other words, under one view, there is a right to appeal, under the other, at best a possibility.

The latter view is wrong. As explained above, where the district court decides an issue and relies on the decision to support its judgment—as here—the aggrieved party should have an absolute right to appeal it under § 1291. Discretion that denies review on the merits cannot be part of this calculus, otherwise the right to appeal isn't really a *right*.

3. This case clearly implicates the split. Before finding Hi-Tech in contempt, the district court first decided that the injunction had stated "its terms specifically," which is always required by Rule 65(d).

See Granny Goose Foods, 415 U.S. at 444. That question was fully briefed, App.60-62, App.69-101, App.103-04, App.117, App.150-51 n.29 (addressing specificity and clarity of injunction), and was an essential predicate for holding Petitioners in contempt, App.69-70 (proving civil contempt requires clear and convincing evidence that, among other things, the injunction order was clear).

To be sure, the District Court questioned whether Petitioners should have attacked the injunction's lack of specificity immediately by taking it up back in their 2008 appeal, App.73-74, App.85-86, App.97-99. But it never held that the issue had been forfeited, let alone affirmatively waived. Instead, it viewed that absence as evidence that the injunction was specific, i.e., that Petitioners must have known subjectively what it meant. App.85-86. In fact, the district court addressed the issue head-on precisely because it did "*not* find the absence of a timely appellate challenge [in 2008] *dispositive*." App.86 (emphasis added); *accord* App.71, 72, 99 (the district court "will proceed through the civil contempt framework … while addressing each of the defendants' defenses thereto," "will address" the issue, and "will address the argument again"—and doing so).

Because the district court's opinion plainly didn't contain a waiver or forfeiture ruling, the Eleventh Circuit had to create one. Glossing over the 40 pages analyzing how the injunction was specific under Rule 65(d) in light of the evidence from the ten-day bench trial, App.60-62, App.69-101, App.103-04, App.117, App.150-51 n.29, and giving dispositive weight to a single adverb, the Eleventh Circuit ignored the ruling that was there in favor of one that wasn't, and held the

issue waived because it wasn't raised in 2008. "[T]he [district] court said that 'the defendants were given an opportunity to object to the scope of the injunctions before they were entered, but they did not object to any of the provisions they *ostensibly* challenge now.'" App.18. "So there can be no doubt," the Court of Appeals said, "that the district court in fact concluded that the defendants had waived their ambiguity arguments." App.18. But the record leaves no doubt that, throughout the post-remand contempt proceedings in 2017, Petitioners repeatedly challenged whether the injunction was specific. Doc. 876-1, at 3-8; Doc. 879, at 4-6; Doc. 883, at 7-10; Doc. 957, at 7-11; Doc. 963, at 1-12, 17-23; Doc. 965, at 10-14, 31 n.14. And the Court never explained how it could have concluded that the issue was "premature" in the first contempt appeal if it was in fact waived.

Hi-Tech challenged whether the injunction was specific, and the district court decided it was specific enough. Accordingly, Hi-Tech was entitled to appeal that ruling per § 1291, and the Eleventh Circuit had no discretion to deny that right.

4. This issue warrants review. Otherwise, some appellants may be afforded their right to appeal under § 1291, while others—like the Petitioners here—may not. The latter scenario violates due process. *See Adsani*, 139 F.3d at 76-77.

Confirming the right to appeal from what the district court actually and necessarily decides wouldn't dilute waiver or forfeiture doctrines. Appellate courts could still, for example, decline to address issues where waiver or forfeiture provides an alternative ground for the district court's judgment.

Granting review here would, however, clarify the waiver doctrine's scope in relation to § 1291. Because the Circuits disagree over that basic question, a consistent answer that applies across the country is important to litigants. *See* Sup. Ct. R. 10.

This Court should grant certiorari and hold that, consistent with § 1291, the Courts of Appeals lack discretion to disregard as waived an issue that the district court necessarily decided.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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