No. 21-7648

IN THE
SUPREME COURT OF THE UNITED STATES

Luis Fernando Ceja,

Petitioner,

v.

United States,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

REPLY BRIEF FOR PETITIONER

The Ninth Circuit held that because its precedent "permits oral jury trial waivers," petitioner's oral waiver was "adequate." Pet. App. A10-A11. The court of appeals never considered any question of remedy. Contrary to the Government's suggestion, therefore, the issue here is not whether or when a violation of Fed. R. Crim. P. 23(a) requires "revers[al]" of a conviction. BIO I. The issue is simply whether a court violates Rule 23(a) in the first place by procuring an oral jury trial waiver.

As to that question, the Government has precious little to say. Perhaps that is because it is so difficult to argue that oral jury trial waivers are valid. Rule 23(a) provides in starkly absolute terms that waivers "must" be "in writing." Fed. R. Crim. P. 23(a). And if there is one cardinal rule of interpretation that this Court's modern case law establishes, it is that courts may not ignore the plain meaning of the text before them based on perceived legislative purposes or their own notions of practicality or efficiency. This Court should grant review, reverse, and remand on that ground alone.

Even if federal courts somehow have the authority to accept oral waivers, this Court should still grant certiorari. Different courts have adopted different advisements and tests (some mandatory, some voluntary) for deeming oral waivers acceptable. If Rule 23(a) is to be judicially amended to allow oral waivers, this Court—not a hodgepodge of lower court precedent—should establish that critical framework.

I. This Court Should Resolve Whether Oral Waivers of the Right to Jury Trial Are Valid Under Rule 23(a).

1. The Government portrays the Ninth Circuit's decision as "reflect[ing]" harmless-error principles. BIO 10 (citing Fed. R. Crim. P. 52(a)). This is incorrect. A moment's inspection of the briefing and decision below makes clear that the Ninth Circuit held that petitioner's jury trial waiver was valid because it thought there was no Rule 23(a) error in the first place.

Petitioner argued below that his oral jury trial waiver was "invalid" under Rule 23(a) "because it was not in writing." Petr. CA9 Br. 16-18.[1] The Government responded that "Defendant's oral waiver was valid." Gvt. CA9 Br. 29. In support of that argument, the Government cited several Ninth Circuit decisions holding that, "[a]lthough Rule 23 states that the waiver must be in writing, we have held that under certain circumstances an oral waiver may be sufficient," *United States v. Shorty*, 741 F.3d 961, 966 (9th Cir. 2013). Gvt. CA9 Br. 29-31.

The Ninth Circuit accepted the Government's argument. It held that because its precedent "permits oral jury trial waivers," petitioner's oral waiver was "sufficient." Pet. App. A10-A11. The Ninth Circuit never mentioned the concept of harmless error or otherwise considered the issue of remedy. Nor does parallel case law in other circuits rest on harmless-error principles. Rather, other courts of appeals—often citing Ninth Circuit precedent—hold that "strict compliance" with Rule 23(a)'s writing requirement is unnecessary because it would "elevate form over

[1] The briefs filed in the Ninth Circuit appear in the Petition Appendix.

substance." *United States v. Robertson*, 45 F.3d 1423, 1431 (10th Cir. 1995); *see also United States v. Leja*, 448 F.3d 86, 93 (1st Cir. 2006) (same).

The first question presented, therefore, is straightforward. It is whether the rule that the Ninth Circuit and others have adopted—namely, that oral jury trial waivers are valid under Rule 23(a) so long as they are knowing and voluntary—is correct.

2. It is not. The plain meaning of Rule 23(a) is manifest and unequivocal. Rule 23(a) provides that trial "must" be by jury "unless the defendant waives a jury trial in writing." Fed. R. Crim. P. 23(a). The word "must" contains no wiggle room; it denotes an absolute requirement. *See* Websters Third New International Dictionary 1492 (1993) ("must" means "is compelled" or "required by law"); *see also Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 432 n.9 (1995) (contrasting "must" with "shall" on the ground that the latter sometimes is merely permissive); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112-15 (2012) (same; the word "must" is a "mandatory" word that "impose[s] a duty"). In fact, "must" is the gold standard under federal law for expressing a mandatory obligation. Guidelines promulgated under the Plain Writing Act, Pub. L. 111-274 (2010), specifically require those drafting federal rules or regulations to use "must" (instead of "shall") "to impose requirements"—that is, "to express a requirement or obligation" that leaves no room for discretion.[2] Bryan Garner takes the same view.

[2] Plain Language Action and Information Network, Shall and Must, https://www.plainlanguage.gov/guidelines/conversational/shall-and-must/; *see also*

See Bryan Garner, A Dictionary of Modern Legal Usage (2d ed. 1995). There accordingly can be no doubt that the word "must" compels the action that follows it.

The phrase "in writing" is similarly crystalline. "In writing" means written down. It does not mean "orally." It does not mean "in open court." Nor does it mean "on the record following a colloquy."

Lest there be any doubt, the Federal Rules of Criminal Procedure use words other than "must" be "in writing" to signal where waivers need not be written. Rule 7(b), for example, provides that certain offenses "may be prosecuted by information if the defendant—*in open court and after being advised of the nature of the charge and of the defendant's rights*—waives prosecution by indictment." (emphasis added). Similarly, Rule 58(b)(3)(A) allows a magistrate, as opposed to a district judge, to take guilty pleas in certain cases "if the defendant consents either in writing *or on the record*." (emphasis added). This provision conforms to 18 U.S.C. § 3401(b), which requires trials in such cases to be conducted before district judges "unless the defendant, after [an] explanation [of his rights], expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge" either "in writing *or orally on the record*." (emphasis added). *See also* Fed. R. Crim. P. 58 advisory committee's note to 1997 amendment. Rule 32.2(d) likewise requires that forfeiture orders be stayed pending appeal "unless the defendant consents in writing *or on the record*." (emphasis added).

Plain Language Action and Information Network, Federal Plain Language Guidelines 25 (May 2011) ("Use 'must' to indicate requirements.").

The Seventh Circuit recently observed that the differing language in the Federal Rules of Criminal Procedure regarding waiving various rights is "clearly not accidental" and dictates differing degrees of flexibility. *United States v. Howell*, 24 F.4th 1138, 1145 (7th Cir. 2022). In particular, where the Rules Committee or Congress wishes to allow oral waivers after colloquies in open court, they obviously know exactly how to say so.

Yet the Ninth Circuit and other courts of appeals have taken it upon themselves to transform Rule 23(a)'s insistence on waivers "in writing" into a discretionary measure. According to their interpretation of the Rule, "an oral waiver may be sufficient" so long as the court "ha[s] an adequate colloquy with a defendant." *Shorty*, 741 F.3d at 966; *see also* Pet. App. A10 (reaffirming the rule enunciated in *Shorty*). "When the purposes of Rule 23(a) have been satisfied by means other than a written waiver, little is served by rigidly requiring compliance with the Rule." *Robertson*, 45 F.3d at 1431; *see also* Pet. 8.

As this Court has observed in another context, this line of reasoning "abstracts from the right to its purposes, and then eliminates the right." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006) (citation omitted); *see also Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792-93 (2022) (When the "plain text" of a statute is clear, the federal courts "have no warrant to elevate vague invocations of statutory purpose over the words Congress chose."). To make the point once more: Rule 23(a) specifically provides that jury trial waivers "must" be "in writing." Any rule deeming oral waivers valid flouts the Rule's plain language and should not be tolerated.

3. The Ninth Circuit never reached any question regarding remedy, so this Court need not do so either. Indeed, this Court's "customar[y]" practice is to leave remedial issues not reached by lower courts for remand. *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (per curiam); *see also, e.g.*, *Powell v. Nevada*, 511 U.S. 79, 84-85 (1994). Consistent with that practice, this Court should reverse and remand to the court of appeals to consider in the first instance whether the Rule 23(a) error here requires reversal of petitioner's conviction.

To be clear, however, the Government is incorrect (BIO 10) that petitioner "does not contend" that violations of Rule 23(a)'s writing requirement require automatic reversal. Petitioner argued below—in response to the Government's suggestion that any error here did not warrant reversal—that violations of Rule 23(a) constitute "structural error." CA9 Reply Br. 5. He would renew that argument on remand.

And there is a solid basis for petitioner's position. Errors are structural when they "affec[t] the framework within which the trial proceeds." *Gonzalez-Lopez*, 548 U.S. at 148 (citation omitted). The overall choice between judge and jury as factfinder is a core aspect of a trial's framework. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968). Foreclosing harmless-error review here would also harmonize Rule 23(a) with Rule 11. That rule expressly states that "variance[s] from" the requirements for taking guilty pleas are "harmless error if [they do] not affect substantial rights." Fed. R. Crim. P. 11(h). Rule 23(a) contains no similar language, indicating that variances from its writing requirement cannot be harmless. *See, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("A textual judicial

supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

Even if violations of Rule 23(a) could be deemed harmless, the test for harmlessness surely would not be the rule the Government advocates here—namely, that a violation may be excused on appeal so long as an oral waiver was "constitutionally valid." BIO 10. As the Government acknowledges the page before, Rule 23(a)'s writing requirement exceeds what is "constitutionally mandated." BIO 9. It would thus render the Rule a dead letter to hold that a jury trial waiver is tolerable whenever the waiver satisfies the "constitutional minimum"—that is, "as long as [the defendant orally waived the right] knowingly, intelligently, and voluntarily." BIO 9, 11 (citation omitted). The whole point of the writing requirement is to require more.

For good reason. Writing requirements, such as the statute of frauds, have existed in the law for centuries. They carry out "not only an evidentiary but also cautionary" functions." 9 Richard A. Lord, Williston on Contracts § 21:1, at 172 (4th ed. 1999). Particularly for those not well-versed in the law, a requirement that a waiver be in writing signals a decision of great consequence and "promotes deliberation, seriousness, certainty," and "helps to ensure" that a waiver is not made "improvidently." *Id.* at 172 n.12 (citation omitted). At the very least, therefore, no judgment secured after an oral jury trial waiver should be upheld without proof that requiring a written waiver—and the extra attention and deliberation it would have triggered—would not have made any difference.

II. If This Court Is Inclined To Permit Oral Waivers, It Should Grant Certiorari Here To Establish the Requirements for Procuring Such Waivers.

If Rule 23(a) somehow allows oral jury trial waivers, this Court should decide what kinds of admonitions district courts must give before accepting such waivers.

1. Federal and state courts disagree over whether defendants, before orally waiving the right to jury trial, must be advised that juries are comprised of members of their communities and that defendants have a right to participate in jury selection. The Government notes that the Seventh Circuit has held that "the failure of a district court to engage in the precise colloquy outlined by [*United States v. Delgado,* 635 F.2d 889, 890 (7th Cir. 1981),] does not automatically" require reversal. BIO 14-15. But this assertion once again conflates rights and remedies. In the case the Government cites, the Seventh Circuit stressed that "*Delgado* remains this court's view about the exchange that should occur before the court accepts a waiver of the right to trial by jury." *United States v. Rodriguez*, 888 F.2d 519, 527 (7th Cir. 1989). And nothing in *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022), undermines that view; contrary to the Government's suggestion (BIO 15), *Tsarnaev* simply restated long-settled rules governing the use of supervisory authority. The colloquy here, therefore, would have been insufficient in the Seventh Circuit.

The colloquy likewise would have been insufficient in Washington, D.C., and South Carolina. *See Lopez v. United States*, 615 A.2d 1140, 1146-47 (D.C. 1992) (reversing where foreign defendant was not given advisements at issue); *State v. Arthur*, 374 S.E.2d 291, 293 (S.C. 1988) (colloquy must inform defendant of

"essential ingredients of a jury trial," which are defined in the case the court cited for this proposition—*Commonwealth v. Williams*, 312 A.2d 597, 600 (Pa. 1973)—as including the advisements at issue here). Decisions from those jurisdictions, of course, do not rest on Rule 23(a). BIO 17. But they underscore that courts take differing approaches to what is necessary to procure oral jury trial waivers. And many state courts look to federal practice to inform the implementation of their own rules of procedure. *See, e.g.*, *Davis v. State*, 809 A.2d 565, 570-72 (Del. 2002). Accordingly, a required set of admonitions from this Court would influence trial practice not just in the federal courts but state courts as well.

2. The Government is also wrong on the merits. If Rule 23(a) allows oral waivers, this Court should require defendants to be advised that juries are comprised of members of their communities and that defendants have a right to participate in jury selection—at least where, as here, objective factors indicate that defendants have little familiarity with the American jury system. The Government says that defendants need be advised only of the how the jury trial right applies "in general," not in any specific situations. BIO 11 (citation omitted). But the aspects of the right at issue here *are* the general features—indeed, the very core—of the jury trial right. *See* Pet. 16-17; *compare United States v. Ruiz*, 536 U.S. 622, 629–30 (2002) ("specific" aspects include the particular people "who will likely serve on the jury"). At the very least, an understanding of these aspects is necessary to substitute for the cautionary cue and solemnity of a written waiver.

The Government objects that federal courts cannot create supervisory rules that "circumvent or supplement" constitutional requirements. BIO 15 (citation

omitted). But neither may they nullify or ignore Federal Rules of Procedure. Consequently, if Rule 23(a)'s writing requirement does not mean what it says, it surely provides federal courts the power—whether characterized as statutory interpretation or an exercise of supervisory authority—to adopt *some* measures that partially carry out the Rule's spirit. Otherwise, Rule 23(a) is nothing more than a toothless and empty directive. That cannot be right.

III. This Case Is an Excellent Vehicle for Considering the Questions Presented.

The Government does not dispute (nor could it) that the facts of this case perfectly tee up both questions presented. As a final plea for avoiding review, however, the Government invokes the plain-error doctrine. BIO 19–20. This ploy is a nonstarter.

The Government never argued below that the plain-error standard applied, and the court of appeals reviewed petitioner's claim de novo. The Government, therefore, has "waived its right to rely on plain-error review." *United States v. Murguia-Rodriquez*, 815 F.3d 566, 574 (9th Cir. 2016) (quoting *United States v. Salem*, 597 F.3d 877, 884 (7th Cir. 2010)); *see also id.* at 574 & n.9 (noting that other every other circuit to consider the question follows the same rule).

The Government suggests this Court could nevertheless exercise discretion to forgive its waiver and to conduct plain-error review. BIO 19 n.*. But the Court may override waivers only in "exceptional cases," *Wood v. Milyard*, 566 U.S. 463, 473 (2012), and the Government does not advance *any* case-specific reason for doing so here. Nor does any exist. The Government expressly asked the Ninth Circuit to

conduct "de novo" review. Gvt. CA9 Br. 29. It therefore would be "an abuse of discretion" to deviate now from that prior request. *Day v. McDonough*, 547 U.S. 198, 202 (2006). In any event, the plain-error doctrine would be particularly ill-suited to a claim a waiver was not properly procured. It is the district court's job to procure waivers correctly, not the defendant's to object that he is not renouncing his rights properly. *See United States v. Garrett*, 727 F.2d 1003, 1013 (11th Cir. 1984)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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