No. 24-____

IN THE
Supreme Court of the United States

BASF CORPORATION,
Petitioner,
v.
BADER FARMS, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"[I]t takes a cross-appeal to justify a remedy in favor of an appellee." *Greenlaw* v. *United States*, 554 U.S. 237, 244-245 (2008). This is an "inveterate and certain" rule, and "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [this Court's] holdings has ever recognized an exception to the rule." *Id.* at 245. But some of the lower courts have. The lower courts "debate whether lack of a cross-appeal deprives the court of appeals of 'jurisdiction' to modify the judgment at the behest of the appellee," or "whether the requirement can be put aside entirely if that seems just." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure-Jurisdiction and Related Matters* § 3904 (3d ed. 2024 update). "The cases are in disarray." *Id*.

The question presented is:

Whether the cross-appeal rule, as applied in civil cases, is a jurisdictional rule that courts must apply (as the First, Second, Fourth, Fifth, and Tenth Circuits have held), a mandatory claim-processing rule that yields only to a party's waiver or forfeiture of its protections (as the Sixth, Eleventh, and Federal Circuits have held), or an informal and flexible rule that yields to any court-crafted exception (as the Third, Seventh, Eighth, Ninth, and D.C. Circuits have held).

PARTIES TO THE PROCEEDING

BASF Corporation, petitioner on review, was appellee in the court of appeals, and defendant in the district court.

Respondent Bader Farms, Inc. was appellant in the court of appeals, and plaintiff in the district court.

Monsanto Company was not a party in the most recent proceedings before the court of appeals, but was BASF Corporation's co-defendant in the district court.

Bill Bader was not a party in the most recent proceedings before the court of appeals, but was Bader Farms' co-plaintiff in the district court.

CORPORATE DISCLOSURE STATEMENT

BASF Corporation is a Delaware Corporation whose shares are not publicly traded. BASF Corporation is a wholly owned subsidiary of BASF USA Holding LLC, a Delaware limited liability company. BASF USA Holding LLC is a wholly owned subsidiary of BASF Nederland BV, a Dutch limited liability company. BASF Nederland BV is a wholly owned subsidiary of BASF SE (Societas Europaea – "SE"), a publicly traded European company. Further, no publicly held corporation owns 10% or more of BASF Corporation's stock.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit:

- *Bader Farms, Inc.* v. *BASF Corporation*, 23-01134 (June 27, 2024)
- *Bader Farms, Inc.* v. *Monsanto Company*, 20-03665 (Sept. 9, 2022)
- *Bader Farms, Inc.* v. *BASF Corporation*, 20-03663 (Sept. 9, 2022)

U.S. District Court for the Eastern District of Missouri:

- *Bader Farms, Inc. et al* v. *Monsanto Company*, 1:16-cv-00299-SEP (Jan. 12, 2023)
- *Bader Farms, Inc. et al* v. *Monsanto Company*, 1:16-cv-00299-SEP (Nov. 25, 2020)
- *In Re: Dicamba Herbicides Litigation*, 1:18-md-02820-SNLJ

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BASF Corporation respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is available at 100 F.4th 944. *See* Pet. App. 1a-10a. The district court's opinion is not reported but is available at 2022 WL 17338014. *See* Pet. App. 13a-19a.

JURISDICTION

The Eighth Circuit entered judgment on April 30, 2024. Pet. App. 11a-12a. That court denied BASF's request for rehearing en banc on June 20, 2024. Pet.

App. 75a-76a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice

from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

INTRODUCTION

Under the cross-appeal rule, "it takes a cross-appeal to justify a remedy in favor of an appellee." *Greenlaw* v. *United States*, 554 U.S. 237, 244-45 (2008). The rule applies where some parts of a district court's judgment are favorable to one party, while other parts are favorable to the other party. In that situation, each party must appeal the portions of the judgment that it seeks to overturn—and if a party does not do so, then the appellate court cannot "take up the unappealed portions of the District Court's orders *sua sponte*." *El Paso Nat. Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999). Thus, "where only one party appeals," "the other is bound by the decree in the court below." *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191 (1937).

Yet, as this Court has recognized, the "Courts of Appeals have disagreed * * * on the proper characterization of the cross-appeal rule: Is it 'jurisdictional,' and therefore exceptionless, or a 'rule of practice,' and thus potentially subject to judicially created exceptions?" *Greenlaw*, 554 U.S. at 245. Despite

acknowledging the split, this Court has twice declined to "decide the theoretical status of such a firmly entrenched rule." *El Paso Nat. Gas*, 526 U.S. at 480; *see also Greenlaw*, 554 U.S. at 245. The limited guidance this Court has provided—noting that "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule," *Greenlaw*, 554 U.S. at 245 (quoting *El Paso Nat. Gas*, 526 U.S. at 480)—has not aided the courts of appeals in resolving this question.

Every court of appeals has weighed in on the split, and yet no consensus has been built around the right answer. Some courts hold that the rule is jurisdictional. *See, e.g.*, *Art Midwest, Inc.* v. *Atl. Ltd. P'ship XII*, 742 F.3d 206 (5th Cir. 2014) ("Although the circuits have split on this issue, and the Supreme Court has declined to decide the theoretical status of the cross-appeal rule, this circuit has characterized the cross-appeal rule as jurisdictional.") (internal citations, alterations, and quotation marks omitted). Other courts hold that it is a mandatory claim-processing rule, which yields to waiver or forfeiture but nothing else. *See, e.g.*, *Georgia-Pac. Consumer Prods. LP* v. *NCR Corp.*, 40 F.4th 481, 487 (6th Cir. 2022) ("The cross-appeal requirement is not jurisdictional, making it a claim-processing rule forfeitable when no party raises it."). Still others—like the Eighth Circuit below—hold that the cross-appeal rule is neither jurisdictional nor mandatory, and can be ignored in any situation in which the court finds its application inappropriate. *See, e.g.*, *Gross* v. *FBL Fin. Servs., Inc.*, 588 F.3d 614, 621 (8th Cir. 2009) ("[T]he cross-appeal

requirement is a non-jurisdictional rule of practice that can be avoided in the discretion of the court.").

Applying a flexible approach to the cross-appeal rule, the Eighth Circuit below altered the district court's judgment to Petitioner BASF's detriment, even though Respondent Bader Farms had failed to cross-appeal. BASF appealed a judgment that it was jointly and severally liable for its co-defendant's punitive damages. Although BASF won on that point, the Eighth Circuit refused to make the only alteration to the judgment permitted under the cross-appeal rule: striking BASF's name from the portion of the judgment discussing punitive damages. Instead, the Eighth Circuit entirely vacated the portion of the judgment discussing punitive damages, and remanded the case for a new damages trial. The reason? The Eighth Circuit disagreed with the District Court's unappealed judgment that Bader Farms' evidence was insufficient to hold BASF individually liable for punitive damages. The Eighth Circuit should not have "take[en] up the unappealed portion[] of the District Court's orders *sua sponte*." *El Paso Nat. Gas*, 526 U.S. at 479. The Eighth Circuit was able to do so only because this Court has not clarified that the cross-appeal rule is jurisdictional or otherwise mandatory.

This Court has waited long enough to answer this question. The confusion among the courts of appeals has become intolerable for litigants. And this case is the ideal vehicle for review. BASF preserved its objection to the Eighth Circuit's application of the cross-appeal rule. And the facts of this case illustrate the serious practical consequences of the rule's mis-application. BASF faces a trial on remand—a retrial of the punitive damages phase that previously resulted in a

$60 million damages award—because the Eighth Circuit decided to unravel an order that BASF's opposing parties failed to appeal, and that BASF never had the chance to defend with briefing and argument.

The Court should grant the petition and reverse.

STATEMENT

BASF markets Engenia, a low-volatility dicamba herbicide. BASF's co-defendant in the trial court, Monsanto Company, markets Xtend, a line of dicamba-tolerant cotton and soybean seeds. After years of testing and preparation, BASF put Engenia on the market in 2017. Monsanto, however, had released its Xtend seed two years earlier. Bader Farms sued both companies, alleging that herbicides improperly applied by third parties to Monsanto's seeds moved onto Bader Farms' land. Before and after trial, the District Court ruled that, because Monsanto alone controlled the early seed release that caused Bader Farms' injury, only Monsanto's conduct warranted punitive damages. When crafting the final judgment, the District Court nevertheless held BASF liable for Monsanto's punitive damages because the jury had found that the defendants were in a joint venture. BASF successfully appealed the joint-venture finding. Although Bader Farms did not appeal, the Eighth Circuit ordered a new trial in which a new jury would be permitted to find BASF individually liable for punitive damages.

A. Initial District Court Proceedings

Dicamba is a herbicide that has been used by farmers for years. But traditional dicamba herbicides can harm non-target crops through volatility, meaning

that, in some circumstances, the herbicide can vaporize and move off target. Pet. App. 25a.

To address this problem, in the mid-2000s, Monsanto and BASF Corporation independently began to develop dicamba-tolerant seeds and lower-volatility dicamba herbicides. *Id.* In 2015, before any lower-volatility dicamba herbicide was approved for sale, Monsanto released a dicamba-tolerant cotton seed. *See id.* The next year, it released a dicamba-tolerant soybean seed. *Id.* at 26a. BASF was not involved in Monsanto's decision to release these seeds; BASF did not even have advance knowledge of Monsanto's decision. *Id.* at 40a-44a. BASF's lower-volatility dicamba herbicide was first approved for sale for the 2017 crop year. *Id.* at 26a.

Bader Farms "sued Monsanto and BASF for negligent design and failure to warn," alleging that dicamba improperly applied by third parties moved onto Bader Farms' land and damaged its peach trees. *Id.* Bader Farms claimed its peach orchards had been harmed by other farmers' use of traditional dicamba in 2015 and 2016, and by Defendants' negligently designed low-volatility dicamba products in 2017 and 2018. *Id*.

BASF moved for judgment as a matter of law on Bader Farms' punitive-damages claim. *Id.* at 14a. The District Court agreed with BASF that, as a matter of law, the evidence was insufficient for a jury to find BASF individually liable for punitive damages. *See id.*

The jury returned a verdict in Bader Farms' favor, found that Monsanto was liable for punitive damages in 2015-2016, and ruled that BASF and Monsanto took part in a joint venture and a conspiracy. *Id*. at 63a-64a. After a separate punitive-damages phase,

the jury awarded $250 million in punitive damages against Monsanto. *Id.* at 64a. The District Court later reduced the damages award to $60 million. *Id*. at 61a-62a.

After trial, the District Court adopted a judgment under which BASF and Monsanto would be jointly and severally liable for the $60 million punitive-damages award that the jury pinned on Monsanto. *Id*. The joint and several liability was premised on the jury's finding that BASF participated in a joint venture with Monsanto. *Id.* at 63a-70a. The court reiterated, however, its earlier ruling that BASF was not *individually* liable for punitive damages. *Id.* at 64a-65a.

B. The Eighth Circuit's Decision In *Bader I*

BASF appealed.[1] Among other issues, BASF challenged the jury's joint venture finding and the district court's consequent imposition of joint punitive-damage liability. With respect to the joint venture finding, BASF argued that the evidence did not support a finding that BASF and Monsanto had partnered in any relevant way. *See id.* at 26a-27a, 38a-44a. And, with respect to punitive damages, "BASF argue[d] that, after instructing the jury to assess punitive damages against Monsanto only, the district court erred in holding Monsanto and BASF jointly and severally liable for punitive damages." *Id*. at 48a. As BASF explained, Missouri law requires that punitive damages rest on individual culpability. *Id*. at 51a. It was therefore wrong, BASF argued, for the district court to hold BASF liable for Monsanto's punitive damages. *Id*.

In both of these two respects, the Court of Appeals agreed with BASF: First, the Eighth Circuit agreed

[1] BASF's co-defendant, Monsanto, also appealed.

that Monsanto and BASF had not formed a joint venture. As the court explained, "there is no question that Monsanto maintained full control over the critical aspects of the project," and "[b]ecause the record does not support a finding that BASF 'had any voice, much less an equal voice' over the critical aspects of the enterprise, Bader's joint-venture claim fails as a matter of law." *Id*. at 39a-44a. And second, the Eighth Circuit agreed that BASF could not be held responsible for the punitive damages that the jury awarded against Monsanto. *Id.* at 50-55a. "If Monsanto and BASF had formed a joint venture, a judgment holding BASF jointly and severally liable for punitive damages based on Monsanto's conduct may have been appropriate," but having found that the evidence did not support the joint venture finding, the court could not sign off on BASF's joint liability for Monsanto's punitive damages. *Id*. at 52a-55a.

Bader did not cross-appeal from the district court's ruling dismissing Bader's individual punitive damage claim against BASF. *See id.* at 16a-19a, 21a. Nor did Bader brief that issue as an alternative ground for affirmance.

Despite Bader's failure to cross-appeal, in the same opinion that released BASF from joint and several liability, the Eighth Circuit reversed the District Court's ruling that BASF could not be held individually liable for punitive damages, *id*. at 53a-54a, and sent the case back to the District Court for a retrial on punitive damages in which the jury would be directed to individually apportion punitive damages liability between BASF and Monsanto, *id*. at 55a-56a.

BASF petitioned for panel rehearing, pointing out that the Eighth Circuit had altered the judgment to

reverse an unappealed order. The Eighth Circuit denied that petition. *Id*. at 73a-74a.

C. Proceedings Before The District Court On Remand

On remand, Bader Farms settled with Monsanto but pushed for the new trial against BASF that the Eighth Circuit had ordered. Pet. App. 20a-21a. The District Court rebuffed that request because of Bader Farms' failure to challenge the sufficiency-of-the-evidence ruling before the Court of Appeals. *Id*. at 16a-19a, 21a.

As the District Court explained, "this Court ruled at the conclusion of the original trial that Plaintiff did not make a submissible case for punitive damages against BASF individually," and "no party appealed that ruling." *Id*. at 16a, 21a. Although acknowledging that there was some language in the Eighth Circuit's opinion suggesting a retrial, the district court concluded that "[t]he Eighth Circuit's discussion regarding the appropriateness of the punitive damages submission against BASF appears to be *dicta*," because "no party appealed [Jury] Instruction 9 (allowing the negligence claims for 2015-16 against Monsanto only), nor did any party appeal the ruling that BASF could not be responsible for punitive damages for 2015-2016." *Id.* at 17a-18a. In short, the "matter of an individual punitive damages claim against BASF was not before the Eighth Circuit because no one raised it." *Id.* at 17a.

D. The Eighth Circuit's Decision In *Bader II*

Bader appealed, and the Eighth Circuit reversed.[2] Pet. App. 3a, 10a. The Eighth Circuit acknowledged in this second appeal that "[a]t the original trial, the district court found that BASF could not be individually liable for punitive damages," and Bader failed to cross-appeal that ruling. *Id*. at 9a. The Eighth Circuit nevertheless held that the cross-appeal rule did not preclude the *Bader I* Panel from overriding the District Court's original individual liability ruling for two reasons.

First, the Eighth Circuit explained that it could consider an unappealed issue of individual punitive damages liability because BASF had raised the related argument of its joint-and-several punitive damages liability: "The issue of BASF's individual assessment for punitive damages was * * * before this court" in *Bader I* because "BASF (as appellant) had argued 'that punitive damages should not have been awarded without a jury's individualized assessment of its wrongdoing.'" *Id*. at 7a.

Second, the Eighth Circuit held that the cross-appeal rule did not preclude the *Bader I* Panel from overriding the District Court's original individual liability ruling because the Panel's alterations of the judgment "did not benefit Bader Farms." *Id*. at 9a-10a. The Panel reasoned that its alterations to the judgment—"vacating the award of punitive damages, changing the defendants' theory of liability for punitive damages, and remanding for a new trial to re-determine punitive damages"—had "left Bader Farms in a worse position" than Bader Farms had been in before

[2] The same judge authored *Bader I* and *Bader II*.

BASF's appeal, making the cross-appeal rule "inapplicable here." *Id*. The Eighth Circuit did not find it relevant that BASF was harmed by the alterations to the judgment.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION PRESENTED.

As this Court recognized in *Greenlaw*, "Courts of Appeals have disagreed * * * on the proper characterization of the cross-appeal rule: Is it 'jurisdictional,' and therefore exceptionless, or a 'rule of practice,' and thus potentially subject to judicially created exceptions?" 554 U.S. at 245. This Court previously declined to resolve the split because, with respect to the criminal sentencing at issue in *Greenlaw*, a criminal statute clarified that courts must defer to the government's decision not to cross-appeal a sentence. *See id*. 245-246; *see also infra* at 29-30. The Court's guidance in *Greenlaw* with respect to criminal sentencing has not resolved the split in civil cases. Even after *Greenlaw*, the courts of appeals remain deeply divided on whether the cross-appeal rule is a jurisdictional rule, a mandatory claim-processing rule that yields only to a party's waiver of its protections, or an informal and flexible rule that yields to any court-crafted exception.

A. Five Courts Of Appeals Hold That The Cross-Appeal Rule Is Jurisdictional.

The First, Second, Fourth, Fifth, and Tenth Circuits hold that the cross-appeal rule creates a jurisdictional bar to altering the judgment in favor of the appellee who has not cross-appealed. Citing the many instances in which this Court has noted that "[t]he filing

of a notice of appeal is a jurisdictional requirement," these courts hold that they lack the power to alter the judgment in favor of a non-appealing party. *Suiero Vazquez* v. *Torregrosa de la Rosa*, 494 F.3d 227, 233 (1st Cir. 2007) (citing *Bowles* v. *Russell*, 551 U.S. 205, 211 n.3 (2007) and *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001)).

1. Take, for example, the Fifth Circuit's decision in *Art Midwest, Inc.* v. *Atlantic Ltd. Partnership XII*, 742 F.3d 206 (5th Cir. 2014), a case that parallels BASF's in every way except the final result because the Fifth "[C]ircuit has characterized the cross-appeal rule as jurisdictional." *Id*. at 213 (internal quotation marks and alteration omitted).

The plaintiffs there had two claims: (1) a claim alleging that the defendants had defrauded them, and (2) a claim seeking a declaration that the plaintiffs did not breach a contract with the defendants. *Id.* at 209. The district court entered judgment in plaintiffs' favor on the breach-of-contract claim, but dismissed the fraud claim. *Id.* The defendants appealed; the plaintiffs did not. *Id.*

In this first appeal (brought by the defendants), the Fifth Circuit agreed with the defendants and reversed the district court's judgment on the breach-of-contract claim. This initial Fifth Circuit decision concluded with a statement that "a determination of liability and damages must be decided anew." *Id*. at 210 (quoting *Art Midwest, Inc.* v. *Clapper*, 242 Fed. Appx. 130, 132 (5th Cir. 2007) (per curiam)).

On remand, the plaintiffs sought to re-assert its previously dismissed fraud claim before the district court. *Id.* at 210. The plaintiffs cited the Fifth Circuit's instruction that the court must consider the case

"anew." *Id.* However, the district court denied the plaintiffs' request, citing the plaintiffs' failure to file a cross-appeal of the initial judgment dismissing the fraud claim. *Id.* at 210. The plaintiffs then appealed the district court's remand judgment, arguing that "[t]here was no need to appeal their affirmative defense of fraud because they won at the first trial on their breach of contract claims." *Id.* at 211 (quotation marks omitted).

In this second appeal (brought by the plaintiffs), the Fifth Circuit affirmed the district court's refusal to permit the plaintiffs to re-assert the previously dismissed fraud claim. The court explained that "[e]ven though [the plaintiffs] prevailed on many of their claims in the first district court proceeding," the plaintiffs should have "filed a 'protective' or 'conditional' cross-appeal of the adverse fraud finding." *Id.* at 212. "[B]y not cross-appealing the fraud finding," the plaintiffs forfeited their right to request alterations to the judgment in their favor. *Id*.

In reaching this conclusion, the Fifth Circuit explicitly acknowledged that "the circuits have split on this issue," citing an Eighth Circuit case that held the cross-appeal "rule is 'prudential, not jurisdictional.'" *Id*. at 212 (quoting *Kessler* v. *Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000)). But the Fifth Circuit reaffirmed that "[t]his circuit follows the general rule that, in the absence of a cross-appeal, an appellate court has no jurisdiction to modify a judgment so as to enlarge the rights of the appellee or diminish the rights of the appellant." *Id.* at 211-212 (citation omitted). And it is "[t]his jurisdictional characterization" that the court said "prevent[ed]" it "from deciding

whether the panel's 'decide anew' language warrants an exception to the rule." *Id.* at 213.[3]

2. The decisions of the First, Second, Fourth, and Tenth Circuits follow the same pattern.

For example, in *Delgado-Caraballo* v. *Hosp. Pavia Hato Rey, Inc.*, 889 F.3d 30 (1st Cir. 2018), the First Circuit held that it lacked jurisdiction to rewrite the remedy to the detriment of non-appealing parties. The plaintiffs there had sued a hospital and its employees in connection with a family member's death, bringing both federal and state law claims. *Id.* at 32. The district court granted summary judgment to the defendants, finding it lacked federal question or diversity jurisdiction over the federal claims, and declining to exercise supplemental jurisdiction over the state law claims. *Id*. at 33-34. The district court then dismissed the state claims *without prejudice*. *Id*. at 34. The family appealed. The defendants did not. Before the First Circuit, the defendants argued that the district court "judge should have dismissed the local-law claims *with prejudice*." *Id*. at 39 (emphasis added). The First Circuit declined to do so, because that change in judgment "would lessen [the plaintiffs'] rights." *Id*. at 39 n.15. Consequently, the court concluded that because the defendants had not "filed any cross-appeal, we

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[3] *See also, e.g.*, *Sayers Constr., L.L.C.* v. *Timberline Constr., Inc.*, 976 F.3d 570, 574 n.2 (5th Cir. 2020) ("Because the subcontractors did not cross-appeal the district court's without-prejudice dismissal, we cannot consider whether the case should be dismissed with prejudice for Sayers's violation of the FAA's service-of-process rules."); *United States* v. *Kaluza*, 780 F.3d 647, 656 (5th Cir. 2015) ("declin[ing] to decide whether the district court erred in deciding" an issue because "Defendants failed to cross-appeal" that issue, and therefore "the issue is not properly before us").

could not explore their * * * issue even if we wanted to." *Id*.[4]

The Second Circuit employed the same reasoning in *Swatch Group Management Services Ltd.* v. *Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014). The plaintiff there appealed from a district court judgment granting summary judgment to the defendant on a claim of copyright infringement. The defendant cross-appealed from the same judgment, but also challenged a district court order that was not part of that judgment. Citing this Court's holding that the filing of a notice of appeal is a jurisdictional requirement, the Second Circuit noted that defendant's "notice of cross-appeal" did not designate the challenged lower court order. *Id.* at 93 (citing *Gonzalez* v. *Thaler*, 565 U.S. 134, 147 (2012)). Reasoning that it "cannot reasonably read [the defendant's] notice of cross-appeal to contemplate review of an order that did not issue until nearly two months afterward," the Second Circuit concluded that it had "no jurisdiction to review it." *Id*.[5]

The Tenth Circuit reached the same result in *Johnson* v. *Spencer*, 950 F.3d 680 (10th Cir. 2020). The defendants in that case filed no cross-appeal after the plaintiffs had noticed their own appeal of an order. *Id.* at 722-723. The defendants nonetheless argued that

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[4] *See also, e.g.*, *Haley* v. *City of Boston*, 657 F.3d 39, 53 (1st Cir. 2011) ("Because the City never filed its own notice of appeal, its effort to make this favorable ruling even more favorable comes to naught." (citation omitted)).

[5] *But see SEC* v. *Ahmed*, 72 F.4th 379, 399 & n.9 (2d Cir. 2023) (suggesting, in *dicta*, that *Swatch* stands only for the proposition that the "requirement that a notice of cross-appeal identify the challenged district-court order" is jurisdictional, and opining that the "cross-appeal rule" as described in *Greenlaw* "is not jurisdictional") (citations and internal quotation marks omitted).

the district court had erred in granting a motion that the plaintiff had filed. *Id*. at 722-723. Declining to consider that argument, the Tenth Circuit held that "the fundamental problem is that [defendants] did not cross-appeal the district court's order." *Id.* at 723. Thus, the court said that it "lack[ed] jurisdiction to afford the defendants any relief based on their arguments." *Id.*[6]

Fourth Circuit decisions are similar. For example, in *K.C. ex rel. Africa H.* v. *Shipman*, 716 F.3d 107 (4th Cir. 2013), the Fourth Circuit dismissed an appeal on standing grounds that turned on the effect of the cross-appeal rule. In that case, the district court had entered a preliminary injunction requiring one of the three defendants to carry out a statutory duty. The enjoined defendant did not appeal the order; the other two defendants did. But the Fourth Circuit dismissed the appeal because it was "powerless to provide the very relief" the appellants requested, namely, reversing the preliminary injunction that ran against the non-appealing party. *Id.* at 117. As the court explained, "[i]t is basic to appellate practice that a judgment will not be altered on appeal in favor of a party

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[6] *See also, e.g.*, *Courthouse News Serv.* v. *N.M. Admin. Off. of Cts.*, 53 F.4th 1245, 1254 n.4, 1273 n.13 (10th Cir. 2022) ("To the extent Courthouse News is seeking to modify the preliminary injunction or appeal its denial in part, these requests are not properly before this court because Courthouse News did not file a cross appeal."); *June* v. *Union Carbide Corp.*, 577 F.3d 1234, 1248 n.8 (10th Cir. 2009) (Defendants "assert that the dismissal should have been with prejudice rather than without prejudice. * * * [T]heir failure to cross-appeal on this issue precludes us from remanding for entry of a dismissal with prejudice.") (citations omitted).

who did not appeal." *Id*. at 116 (quotation marks omitted).[7]

B. Three Courts Of Appeals Hold That The Cross-Appeal Rule Is A Mandatory Claim-Processing Rule That Yields Only To A Party's Waiver Or Forfeiture Of Its Protections.

The Sixth, Eleventh, and Federal Circuits hold the cross-appeal rule is a mandatory claim-processing rule. These courts hold that the cross-appeal rule, although not jurisdictional, is "mandatory" in the sense that "a court generally must enforce a mandatory rule (just as much as a jurisdictional one) when a party properly invokes it." *Georgia-Pac. Consumer Prods.*, 40 F.4th at 487 (internal quotation marks and citation omitted). Thus, for example, these courts will consider an appellee's request "to enlarge its own rights" if the appellant does not "object" to that consideration, *id.* at 483, 487, but these courts will not "overlook the [appellee's] failure to file a cross-appeal" in the face of an

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[7] *See also, e.g.*, *Cities4Life, Inc.* v. *City of Charlotte*, 52 F.4th 576, 582 (4th Cir. 2022) ("Absent a cross-appeal, an appellee may not attack a judgment with a view to enlarging his own rights thereunder. Plaintiffs seek to do just that. But they didn't cross-appeal, so we won't consider the issue.") (alterations and internal citation omitted); *Mayor of Baltimore* v. *Azar*, 973 F.3d 258, 295 (4th Cir. 2020) ("[I]f we were to adopt Baltimore's argument and remove the geographic scope from the district court's vacatur of the Final Rule, it would require us to modify the court's judgment below and enlarge Baltimore's rights thereunder. Baltimore has not cross-appealed * * * . Therefore, we decline to consider this argument.") (internal citations omitted); *but see United States* v. *Hill*, 927 F.3d 188, 209 n.7 (4th Cir. 2019) (applying a different rule in a criminal case).

appellant's objection. *United States* v. *Burch*, 781 F.3d 342, 345 (6th Cir. 2015).

1. The Sixth Circuit's decision in *Georgia-Pacific Consumer Products LP* v. *NCR Corp.*, 40 F.4th 481 (6th Cir. 2022), illustrates how this waiver-focused interpretation of the cross-appeal rule works.

The plaintiff there, Georgia-Pacific, had been found liable in an earlier action under a federal environmental statute for the release of certain chemicals into the Kalamazoo River. *Georgia-Pac. Consumer Prod. LP* v. *NCR Corp.*, 32 F.4th 534, 538 (6th Cir. 2022). Georgia-Pacific then initiated a lawsuit against three other companies, NCR Corporation, International Paper, and Weyerhaeuser, to secure their contribution to the clean-up. *Id.* at 539. The district court found the defendants liable on the contribution claim, and issued a judgment that allocated responsibility among the four parties. *Id.* at 540. "All four parties appealed, but [Georgia-Pacific], NCR, and Weyerhaeuser dismissed their appeals, leaving [International Paper] as the sole appellant." *Id*. The Sixth Circuit reversed the district court's judgment on the contribution claim, concluding that Georgia-Pacific's contribution claim was filed too late and was therefore barred on statute of limitations grounds. *Id*. at 547-548. Although only International Paper was the appellant at this point, the Sixth Circuit's reversal had the effect of vacating the contribution order against NCR and Weyerhaeuser as well.

Georgia-Pacific petitioned for rehearing and rehearing en banc. As relevant here, Georgia-Pacific argued that the panel should not have applied its holding on the statute-of-limitations issue to Weyerhaeuser because Weyerhaeuser had not cross-appealed. The

Sixth Circuit denied rehearing, but the panel added an appendix to its original opinion to explain why its grant of relief to Weyerhaeuser did not violate the cross-appeal rule. *See Georgia-Pac. Consumer Prods.*, 40 F.4th at 483.

The Sixth Circuit explained that, although its earlier cases had "held that the cross-appeal requirement is jurisdictional," "the Supreme Court's recent case law convince us that the narrowing of the term 'jurisdictional' has abrogated our court's earlier cases holding that the cross-appeal requirement goes to our jurisdiction." *Id*. at 484-485. The Sixth Circuit reasoned that the cross-appeal rule is not jurisdictional because, in its view, the cross-appeal rule is "not clearly required" by a statute. *Id*. at 485 (internal quotation marks omitted). The court was careful to "note" that it did "not denigrate or dispute the cross-appeal requirement's utility, importance, or mandatory nature (when properly invoked)." *Id*. at 487. But because it considered the cross-appeal rule "not jurisdictional," it must be "forfeitable when no party raises it." *Id*. And "[t]hat is what happened here: [Georgia-Pacific] did not object to Weyerhaeuser's argument in an appellate brief or at oral argument." *Id*. at 483-484 (citations omitted).[8]

2. The Eleventh and Federal Circuits apply the same rule for the same reasons.

The Eleventh Circuit's decision in *Rubinstein* v. *Yehuda*, 38 F.4th 982 (11th Cir. 2022), mirrors the Sixth Circuit decision just discussed. The plaintiff there had

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[8] *See also, e.g.*, *Gunter* v. *Bemis Co., Inc.*, 906 F.3d 484, 493 (6th Cir. 2018) ("Federal Appellate Rule 4(a)(3) establishes only a mandatory claim-processing rule, not a limit on our jurisdiction.").

secured a favorable judgment in district court. The defendants appealed. And while the plaintiff did file a cross-appeal, that cross-appeal was untimely. *Id*. at 999. Observing that the defendants "raised no objection" to the plaintiffs' untimely cross-appeal, the Eleventh Circuit considered "whether the rule governing timeliness of cross-appeals is a jurisdictional rule or a claims-processing rule that can be waived if unobjected to." *Id*. Measuring the court of appeals' older caselaw against more recent Supreme Court decisions, the Eleventh Circuit concluded that its "circuit precedent" had been "abrogated," and "[b]ecause the timeliness of cross-appeals is governed by court-imposed, rather than Congressionally-imposed rules, it is not jurisdictional." *Id.* at 1000. The court therefore concluded that it "ha[d] jurisdiction to hear the cross-appeal," and would "consider it because the [defendants] raised no objection." *Id.*

The Federal Circuit's decision in *In re IPR Licensing, Inc.*, 942 F.3d 1363 (Fed. Cir. 2019), is much the same. There, a patentee had appealed a Patent Trial and Appeal Board determination that all of the challenged claims in its patent were unpatentable for obviousness. The challenger had not cross-appealed. *Id*. at 1370. The patentee therefore argued that the Federal Circuit lacked "jurisdiction to remand as to non-instituted grounds." *Id.* In response, the Federal Circuit reviewed this Court's recent decisions regarding jurisdiction and concluded that "intervening Supreme Court precedent makes clear that our earlier decisions mischaracterized the jurisdictional effects" of failure to cross appeal. *Id*. at 1372 (internal quotation marks and alteration omitted). "The cross-appeal deadline is therefore properly treated as a claim-processing rule, *i.e.*, it promotes the orderly progress of litigation by

requiring that the parties take certain procedural steps at certain specified times but does not withdraw a case from our jurisdiction." *Id*. at 1371 (internal quotation marks and alteration omitted). Having concluded that the cross-appeal rule was a claim-processing rule, the Federal Circuit explained that it would nevertheless reject the challenger's request for a remand because the challenger had "waive[d] * * * its request." *Id.* at 1372.

C. Five Courts Of Appeals Hold That The Cross-Appeal Rule Is An Informal And Flexible Rule That Yields To Any Court-Crafted Exception.

The Third, Seventh, Eighth, Ninth, and D.C. Circuits hold that the cross-appeal rule is an informal and flexible rule. These courts have made various exceptions to the rule, some of which are based on well-articulated standards, and many of which are not.

1. The Eighth Circuit might fairly be described as one of the courts that has deliberately crafted an exception to the cross-appeal rule, as opposed to haphazardly excusing noncompliance with the rule. That court applies a "related argument exception" to the cross-appeal rule. Under this exception, the court of appeals may alter the judgment to benefit an appellee as long as the appellee's argument in support of the change is related to an argument made by the appellant.

The Eighth Circuit's decision in *Arkansas State Conference NAACP* v. *Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), illustrates how this works. There, voters sued Arkansas, and the district court dismissed the suit without prejudice for lack of subject matter jurisdiction. The voters appealed, and

the court of appeals held that the voters were right—"the district court had jurisdiction all along." *Ark. State Conf. NAACP*, 86 F.4th at 1217-18. But the court of appeals went on to award Arkansas relief that it had not cross-appealed to ask for: the panel "modif[ied]" the judgment from a dismissal *without prejudice* for lack of jurisdiction to a dismissal *with prejudice* for failure to state a claim. *Id.* The voters sought panel rehearing and rehearing en banc, and the Eighth Circuit denied that request. Concurring in the denial, members of the panel majority explained that the related-argument exception permitted the panel to bypass the cross-appeal rule because the voters' appellate jurisdictional arguments had "clear implication[s]" for their merits claims. *Ark. State Conf. NAACP* v. *Ark. Bd. of Apportionment*, 91 F.4th 967, 968-969 (8th Cir. 2024) (Stras, J., concurring); *see also id*. ("It has long been the law in this circuit that the cross-appeal requirement is a non-jurisdictional rule of practice. It makes no difference that the disposition changed.") (internal quotation marks and citation omitted).[9]

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[9] *See also, e.g.*, Pet. App. 8a-10a; *Duit Const. Co. Inc.* v. *Bennett*, 796 F.3d 938, 941–942 (8th Cir. 2015) ("We consider this cross-appeal requirement 'non-jurisdictional.' Therefore, we *may* consider additional issues if our ruling on appeal requires a new trial and 'injustice would result' by limiting the trial to certain issues.") (citation omitted).

The Eighth Circuit also cited a second, potential exception to the cross-appeal rule in the decision below. In the Eighth Circuit's view, the cross-appeal rule does not apply where alterations to the judgment harm the appellant but do not benefit the appellee. *See* Pet. App. 9a-10a. Pursuant to this exception, the court of appeals can reopen unappealed rulings to alter the judgment to the detriment of the appellant, so long as the appellee is also harmed. *See id*.

2. The Seventh Circuit has tied application of the cross-appeal rule to the substance of the briefing before the court. *See Oneida Nation* v. *Vill. of Hobart*, 968 F.3d 664, 686-687 (7th Cir. 2020). In the court's words: "we will not unnecessarily police the sometimes blurry line between arguments that seek to expand the judgment and those that do not," "particularly * * * where the underlying issue is fully briefed and where considering the issue does not result in affirmance." *Id*. at 686. As the court explained, "[t]he decision to file a cross-appeal can be difficult, comes with high stakes, and must be made quickly," so "[d]oubts about the scope of a judgment should be resolved against finding that the appellee's failure to file a cross-appeal forfeited his right to argue an alternative ground." *Id*. at 686-687.

3. Still other courts apply more amorphous exceptions.

Like the Eighth Circuit, the Ninth Circuit holds that a court may review the unappealed portion of the district court judgment when it is "interrelated to the issues properly on appeal." *Mahach-Watkins* v. *Depee*, 593 F.3d 1054, 1063 (9th Cir. 2010). But that is not the only reason an appellee could offer to excuse its failure to cross appeal. In a pre-*Greenlaw* decision that is still regularly cited in the Ninth Circuit, that court suggested "consider[ing] factors such as the interrelatedness of the issues on appeal and cross-appeal," "whether a notice of cross-appeal was merely late or not filed at all," "whether the nature of the district court opinion should have put the appellee on notice of the need to file a cross-appeal," "prejudice to the appellant," and "whether the scope of the issues that could be considered on appeal was clear." *Mendocino*

Env't Ctr. v. *Mendocino Cnty.*, 192 F.3d 1283, 1299-1300 (9th Cir. 1999); *see also, e.g.*, *Ctr. for Biological Diversity* v. *Esper*, 958 F.3d 895, 903 n.2 (9th Cir. 2020) (applying *Mendocino* factors and concluding excuse of failure to cross appeal was not warranted). The Ninth Circuit grounds this flexible, multifactor test in its belief that the non-jurisdictional nature of the rule grants the court "broad power to make such dispositions as justice requires." *Mahach-Watkins*, 593 F.3d at 1063 (internal quotation marks and citation omitted).[10]

The Third Circuit takes a similar, all-things-considered tack. *See Mathias* v. *Superintendent Frackville SCI*, 876 F.3d 462, 470, 471-472 (3d Cir. 2017). After recognizing that the potentially jurisdictional nature of the cross-appeal rule "has divided the Courts of Appeals," the Third Circuit held that the rule is "nonjurisdictional" and "waiver" of the cross-appeal rule "is appropriate in the interest of justice." *Id*. at 471-473 (quotation marks omitted). The court explained that the "factors informing" that judgment "include: prejudice, merits, willfulness, and extraordinary circumstance." *Id.* at 473. On the facts of that case, the court found waiver appropriate as there was "no reason to believe the [defendant-appellant] would suffer any prejudice by opposing [plaintiff-appellee's] claims while litigating its own appeal"; the issues in the

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[10] *See also, e.g.*, *Ariz. All. for Cmty. Health Ctrs.* v. *Ariz. Health Care Cost Containment Sys.*, 47 F.4th 992, 998 (9th Cir. 2022) ("Plaintiff[s] * * * argue[ ] that Defendants did not cross-appeal the district court's decision on FQHC services being a separate mandatory benefit. Nevertheless, our de novo review may address that issue due to the inherent interrelatedness of the issues on appeal * * * and our holding that the requirement of a notice of cross-appeal is a rule of practice." (quotation marks omitted)).

cross-appeal were "substantively related to the claims already before" the panel; and plaintiff-appellee "may well have believed he could not raise additional claims through a cross-appeal mechanism" while pro se. *Id.* at 473.

Finally, the D.C. Circuit takes an approach that is just as malleable, but has provided litigants with fewer guideposts. It has declared that it "will excuse compliance with the cross-appeal rule only in exceptional circumstances," but has declined to explain what those circumstances are. *See Shatsky* v. *Palestine Liberation Org.*, 955 F.3d 1016, 1030 (D.C. Cir. 2020) (quotation marks omitted). Apparently leaving the issue to be resolved on a case-by-case basis, the D.C. Circuit in *Shatsky* concluded that such "exceptional circumstances" existed where plaintiffs-appellants did not raise the cross-appeal rule in response to defendants-appellees' attempt to argue an unappealed issue, choosing instead to address that unappealed issue on the merits. *See id.*

* * *

As this survey shows, and as Wright & Miller put it, "[t]he cases are in disarray." Wright & Miller, Federal Practice and Procedure § 3904. Had Bader Farms sued BASF in the First, Second, Fourth, Fifth, Sixth, Tenth, Eleventh, or Federal Circuits, BASF would not be facing a retrial.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

1. The cross-appeal rule protects two fundamental tenets of our legal system: "fair notice and finality." *Greenlaw*, 554 U.S. at 252.

With respect to fair notice, the cross-appeal rule "put[s] opposing parties and appellate courts on notice of the issues to be litigated." *El Paso Nat. Gas*, 526 U.S. at 481-482. "Thus a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge" the scope of the judgment against him. *Greenlaw*, 554 U.S. at 252. And, "if the [plaintiff] files a cross-appeal, the defendant will have fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of" an enlarged judgment against him. *Id.* at 252-253.

With respect to finality, the cross-appeal rule "encourage[es] repose" by funneling the parties' disputes into one appeal. *El Paso Nat. Gas*, 526 U.S. at 481-482. Thus, "when a complainant has a decree in his favor, but not to the extent prayed for in his bill, and the respondent appeals; if the complainant desires a more favorable decree, he must enter a cross appeal, that, when the decree comes before the appellate court, he may be heard." *Corning* v. *Troy Iron & Nail Factory*, 56 U.S. 451, 466 (1853). "To allow a second appeal * * * on the same questions which were open to dispute on the first, would lead to endless litigation." *Id.* "There must be an end of litigation some time." *Id*.

The decision below illustrates how both fair notice and finality are undermined when the cross-appeal rule is treated as a flexible rule of practice rather than a jurisdictional, or at least mandatory, principle. Because Bader Farms did not cross-appeal or even brief the issue of individual liability, BASF had no warning that the Eighth Circuit might strip BASF of the District Court's ruling on individual liability and thus had no meaningful opportunity (or reason) to brief or

argue the issue. And the Eighth Circuit's decision to send the parties to a retrial on damages despite Bader Farms' failure to cross-appeal has the effect of prolonging litigation that has already spanned eight years. One trial and one appeal should have been enough.

2. Because the interests the cross-appeal rule serves are core to our legal system, it should come as no surprise that the rule dates back to the earliest days of the federal judiciary.

As early as 1796, this Court recognized as unexceptional the rule that an appellate court cannot grant relief to an appellee absent a cross-appeal. In *McDonough* v. *Dannery*, 3 U.S. (3 Dall.) 188 (1796), the Court entertained competing claims to a British ship captured, but then abandoned, by the French navy. Over the French captors' objection, the district court awarded one-third of the ship's value to its American salvagers, with the remainder to its British owners. *The Mary Ford*, 16 F. Cas. 981, 984 (D. Mass. 1796). The French appealed to an intermediate court, which reversed and awarded the remainder to the French. *Id.* at 985. When the British owners sought review in this Court, neither the Americans nor the French cross-appealed. As a result, although this Court questioned whether "the whole property ought not to have been decreed to the American Libellants, or, at least, a greater portion of it," *McDonough*, 3 U.S. at 198, it concluded that it lacked the power to alter the judgment in the Americans' favor. Because the Americans had "not appealed from the decision of the inferior court," the Court explained, "we cannot now take notice of their interest in the cause." *Id.*

This Court and lower courts repeatedly applied the rule, making it a "settled" rule of law by the Civil War. *See Chittenden* v. *Brewster*, 69 U.S. (2 Wall.) 191, 196 (1864) (stating that "the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself"). "Indeed, in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *El Paso Nat. Gas*, 526 U.S. at 480.

3. The cross-appeal rule is no less important today. As illustrated by the fact that every single court of appeals has issued at least one published decision on this topic in the last seven years alone, the question presented frequently recurs. *See supra* at 12-26. The courts of appeals so frequently grapple with the question whether the cross-appeal rule permits exceptions because the cross-appeal rule potentially affects *any* district court decision that is appealed. This Court would be hard-pressed to find a rule with more widespread implications for the appellate process.

4. This Court's decision in *Greenlaw* has done nothing to resolve the civil side of the split. Indeed, the court of appeals decisions cited and discussed in this petition were all issued with the benefit of the guidance provided by the Court's 2008 decision in *Greenlaw*.

In that case, this Court reaffirmed the "cross-appeal rule," and the cross-appeal rule's "inveterate" application, while also declining to resolve its jurisdictional status. 554 U.S. at 244-245. The defendant had appealed his sentence on the ground that it was too long. *Id.* at 242. The United States did not cross-appeal, but it argued in the court of appeals that the defendant's

sentence was actually shorter than the applicable mandatory minimum. *Id.* The court of appeals vacated the sentence and directed the district court to impose a higher sentence on remand. *Id.* at 242-243. This Court held that the court of appeals had erred in altering the judgment based on an error that the government could have, but did not, challenge in a cross-appeal. *Id.* at 254. The Court emphasized that Congress had provided, by statute, that the government could appeal a sentence only with the authorization of "high-ranking officials within the Department of Justice." *Id.* at 246. Appellate courts, the Court stated, would circumvent that statute if they were to "take up errors adverse to the Government" when it has not cross-appealed with the requisite authorization. *Id.* Although the Court declined to decide whether the cross-appeal rule is jurisdictional, it reaffirmed in *Greenlaw* that the rule lacks exceptions.

Yet, perhaps because *Greenlaw* focused on the effect of a criminal statute on criminal sentencing, *see* 554 U.S. at 245-246, *Greenlaw*'s reasoning has not aided the courts of appeals in reaching consensus on whether the cross-appeal rule permits exceptions in the civil context.

5. If this Court does not grant review in this case, the confusion will only grow. Courts on each side of the split have picked sides post-*Greenlaw*, with full knowledge of the division of authority on the question presented, and having considered the arguments on each side of the debate. *See supra* at 12-26. Delaying review will only add more cases to the split. The courts of appeals cannot solve this problem on their own.

III. THE DECISION BELOW IS WRONG.

1. This Court's recent decisions "have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules," explaining that "jurisdiction" refers to the limits on a court's personal jurisdiction over parties or its subject-matter jurisdiction over "classes of cases." *Bowles*, 551 U.S. at 210-213 (quoting *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam)); *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004); *see John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 132-135 (2008). Because "Congress decides what cases the federal courts have jurisdiction to consider," *Bowles*, 551 U.S. at 212, the Court has observed that requirements that are created only by *court-promulgated rules* are not properly termed "jurisdictional." *Id.*; *Kontrick*, 540 U.S. at 452. By contrast, *statutory requirements* can have "jurisdictional significance." *Bowles*, 551 U.S. at 210.

The cross-appeal rule fits neatly in the latter category. Congress has provided in 28 U.S.C. § 2107(a) that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." A party that fails to cross-appeal has failed to meet this statutory requirement. *See Greenlaw*, 554 U.S. at 253 ("The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal.").

This Court has already held that one part of 28 U.S.C. § 2107 is jurisdictional. *See Bowles*, 551 U.S. at 212-213. That case answers the question presented.

In *Bowles*, the district court had purported to reopen the time period for filing a notice of appeal for 17 days, in conflict with 28 U.S.C. § 2107(c), which permitted a district court to reopen that period for only 14 days. 551 U.S. at 208. Because the would-be appellant filed his notice of appeal outside the 14-day period allowed by the statute, this Court held that the court of appeals lacked jurisdiction over the appeal. In so holding, the Court recognized that the notion of subject-matter jurisdiction includes congressional decisions not only about "whether federal courts can hear cases at all," but also "when, and under what conditions, federal courts can hear them." *Id.* at 212-213. That reasoning applies with equal force here: 28 U.S.C. § 2107(a) also creates a jurisdictional rule.

Because the cross-appeal rule is jurisdictional, it permits no exceptions. *See Bowles*, 551 U.S. at 214.

2. Even if the cross-appeal rule is not jurisdictional, it is close enough to make no difference. *See Georgia-Pac. Consumer Prods.*, 40 F.4th at 487 ("Th[e] distinction between jurisdictional and mandatory rules will not matter in many cases. After all, a court generally must enforce a mandatory rule (just as much as a jurisdictional one) when a party properly invokes it.").

This Court has long and repeatedly described the cross-appeal rule "in the loftiest of terms." *Id*. at 485. For example, in *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185 (1937), Justice Cardozo described the rule as affecting "[t]he *power* of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal." *Id.* at 187 (emphasis added); *see also, e.g.*, *Mail Co.* v. *Flanders*, 79 U.S. (12 Wall.) 130, 135 (1870) (stating that "inasmuch as that part of the decree was in favor of the

appellants, and the respondents did not appeal, the error, if it be one, cannot be corrected"); *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 111 (1922) (filing of a cross-appeal "enabled" the court to review that part of the order alleged to be erroneous); *Swarb* v. *Lennox*, 405 U.S. 191, 202 (1972) (White, J., concurring) ("It is true that this Court has no jurisdiction of that portion of the District Court's judgment from which no appeal or cross-appeal was taken."). "Indeed, in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *El Paso Nat. Gas*, 526 U.S. at 480.

At a minimum, then, the cross-appeal rule is a claim-processing rule that yields only to waiver or forfeiture. *See Hamer* v. *Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 (2017) ("[P]roperly invoked, mandatory claim-processing rules must be enforced.").

3. Because the cross-appeal rule is jurisdictional, or at least mandatory, the decision below is wrong. Adhering to its misguided rule that the cross-appeal rule can sometimes be set aside—even in the face of the appellant's objection—the Eighth Circuit altered the district court's judgment to benefit a non-appealing party.

The District Court's judgment held "Defendant Monsanto Company and Defendant BASF Corporation, jointly and severally" liable "for Punitive Damages in the amount of $60,000,000.00." Pet. App. 61a-62a. BASF successfully appealed the jury's joint venture finding that was the basis of that joint and several liability. *Id*. at 39a-44a. That victory required only one change to the judgment: striking BASF's name from

the portion of the judgment discussing punitive damages.

The Eighth Circuit, however, made other alterations to the judgment, "vacat[ing] the punitive damages award and remand[ing]" for "a new trial only on the issue of punitive damages." *Id*. at 55a; *see also id.* at 60a. These changes were not required by the issues raised and won by BASF or Monsanto in their appeals. Instead, the Panel made these changes based on its re-assessment of an unappealed issue. The Eighth Circuit reconsidered the District Court's assessment of the punitive damages evidence against BASF, without the benefit of briefing or argument, and concluded that BASF could—contrary to the unappealed rulings—be held individually liable for punitive damages. *Id*. at 53a-54aa. Having so concluded, a new trial would be required to assess punitive damages against both BASF and Monsanto because, in the prior trial, the jury had examined Monsanto's conduct alone. *Id.* at 55a.

The Eighth Circuit's revision of the judgment was made possible only by that court's flexible approach to the cross-appeal rule. The court of appeals decided that it could vacate the district court's unappealed individual-liability ruling because BASF had challenged its joint liability,[11] and because the alterations to the

[11] The Eighth Circuit's related-argument discussion was part of its law-of-the-case doctrine analysis. But the reasoning applies to both arguments. *See* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478.6 (3d ed. 2024 update) ("The practice of refusing to consider on appeal an issue not argued by any party may be expressed on law-of-the-case grounds, but the rationale rests on proper appeal procedure.") (footnote omitted).

judgment were also to unappealing party's detriment. If the Eighth Circuit had adhered to the cross-appeal rule and found no exception to it, the court could not have remanded the case for another damages trial. Because the cross-appeal rule is a jurisdictional rule, or at the very least mandatory, the decision below is erroneous.

IV. THIS CASE IS AN EXCELLENT VEHICLE.

This case presents the ideal vehicle to resolve the question presented.

First, BASF has fully preserved its cross-appeal objection. *See, e.g.*, BASF Pet. for Reh'g by Panel, at 2-3, 16-18, August 4, 2022, No. 20-3663; Pet. App. 6a, 9a.

Second, the question presented was passed upon by both the district court and the court of appeals, and it is outcome determinative here. *See* Pet. App. 21a; *id*. at 6a-10a.

Third, there are no factors that might complicate this court's review. This case permits the Court to consider the cross-appeal issue in a non-partisan context, *contra Ark. State Conf. NAACP*, 86 F.4th at 1204, and without the special considerations that sometimes apply to criminal defendants, *contra United States* v. *Greenlaw*, 538 F.3d 830, 831 (8th Cir. 2008). Yet the stakes are still high. The Eighth Circuit vacated BASF's joint and several liability for a $60 million punitive damages award. The District Court held that BASF therefore owed Bader no punitive damages at all. The Eighth Circuit decision reversing that ruling without the benefit of briefing would force the parties to retry the punitive damages verdict to an uncertain result.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

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