No. 24-318

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

JOHN P. MANDLER
BRUCE JONES
FAEGRE, DRINKER, BIDDLE & REATH LLP
90 South Seventh Street
Minneapolis, MN 44502
(612) 766-7221

JO-ANN TAMILA SAGAR
Counsel of Record
NEAL KUMAR KATYAL
KRISTINA ALEKSEYEVA*
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
jo-ann.sagar@hoganlovells.com

** Admitted only in New York. Supervised by principals of the firm admitted in D.C.*

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 24-318

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

This case presents an opportunity to resolve a longstanding division of authority on the jurisdictional status of the cross-appeal rule. This Court's precedents have "[n]ever recognized an exception to the rule," *Greenlaw* v. *United States*, 554 U.S. 237, 245 (2008), suggesting that the cross-appeal rule is jurisdictional, or at a minimum, a mandatory claim-processing rule. But since *Greenlaw*, which addressed the cross-appeal rule in the criminal context, the courts of appeals have struggled to determine the force of the rule in the civil context. Every court of appeals has weighed in, and yet no consensus has been built around the right answer.

The Eighth Circuit, for its part, has held that "the cross-appeal requirement is a non-jurisdictional rule of practice that can be avoided in the discretion of the

court." *Gross* v. *FBL Fin. Servs., Inc.*, 588 F.3d 614, 621 (8th Cir. 2009). And, in the decision below, the Eighth Circuit applied that rule to BASF's detriment. If Bader Farms had sued BASF in one of the circuits that holds the cross-appeal rule is jurisdictional or mandatory, BASF would not be facing a retrial. This case is therefore an excellent vehicle to resolve an acknowledged split on an important and frequently recurring issue. Bader Farms attempts to evade review by misreading the briefing and opinion below, but the record is easy to correct.

ARGUMENT

I. THIS IS AN EXCELLENT VEHICLE.

A. The Court Of Appeals Did Not Affirm On Alternate Grounds.

Bader Farms repeatedly asserts that the cross-appeal rule does not apply to individual district court rulings, but rather applies only to the final judgment that results from those earlier rulings. *See* BIO 2, 9. BASF agrees; a court of appeals can affirm the district court's judgment for any reason appearing in the record, with or without a cross appeal. However, the parties' agreement on that point is irrelevant here.

Contrary to Bader Farms' assertions (at 9-12), the Eighth Circuit plainly altered the District Court's judgment based on its assessment of an issue that was not appealed. 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 51a. 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 21a. The remand for a new trial was not required by the issues raised and won by BASF in its appeal. Instead, the Eighth Circuit made these changes based on its re-assessment of BASF's individual liability for punitive damages. *Id.* at 50a; *see also id.* at 10a (decision below explaining that the court "altered the judgment" based on its "chang[ed]" view of the "theory of liability for punitive damages," where the new theory required a "new trial"). In other words, the Eighth Circuit's decision to swap theories of liability (from joint and several liability based on a joint venture theory to individual liability based on a conspiracy theory) necessitated a corresponding swap in the judgment (from joint and several liability as determined in the last trial to a new trial in which individual liability could be considered). BASF obviously did not advance an alternate theory for its liability for punitive damages; the Eighth Circuit took that step without the help of any appealing party.

The Eighth Circuit's decision therefore did *not* result in an opinion affirming the District Court's judgment on alternate grounds. It resulted in a wholly new "heads you win, tails I lose" judgment that would force BASF to defend itself in a second trial. The Eighth Circuit was able to write such a decision only because it believed the cross-appeal rule is discretionary and does not bar the court's consideration of unappealed issues.

B. The Question Presented Is Outcome Determinative.

1. Because the Eighth Circuit did not affirm on alternative grounds, the cases on which Bader Farms relies do not advance its argument. *See* BIO 2 (citing *United States* v. *American Ry. Express*, 265 U.S. 425 (1924); *Jennings* v. *Stephens*, 574 U.S. 271 (2015)); *see also id.* at 9-12. This case is nothing like *Jennings* or *American Railway*.

In *Jennings*, the Court held that a habeas petitioner did not need to cross appeal to defend the judgment (a grant of habeas relief) based on a theory that the district court had rejected. 574 U.S. at 273-275. The district court there had granted habeas relief to the petitioner on two of his ineffective-assistance-of-counsel theories, but denied relief as to a third theory. *Id.* at 275. The state appealed, attacking only the two theories on which the district court had granted relief. *Id.* Without filing a cross-appeal, the petitioner defended the district court's judgment on all three theories. *Id.* The Fifth Circuit thought it lacked jurisdiction to consider the third theory because Jennings did not file a cross appeal. *Id.* This Court granted certiorari and reversed, explaining that the Fifth Circuit could consider the third theory because a victory on the third theory would not require any alteration to the judgment: "Jennings' rights under the judgment were * * * release, resentencing, or commutation within a fixed time, at the State's option; the [third] theory would give him the same. Similarly, the State's rights under the judgment were to retain Jennings in custody pending resentencing or to commute his sentence; the [third] theory would allow no less." *Id.* at 276.

American Railway is just the same. There, the Court held that a railroad did not need to cross appeal to defend the judgment (an injunction against enforcement of an order by the Interstate Commerce Commission) based on theories that appeared in its complaint but were rejected by the district court. 265 U.S at 435-436. The appellee had prevailed in the district court on an argument that it was not a "carrier by railroad" within the meaning of the Transportation Act. *Id.* at 427. On appeal, the appellee raised two additional statutory reasons why "the order exceeds the power conferred upon the Commission" and also argued that the order was an unconstitutional taking under "the Fifth Amendment." *Id.* at 434-435. The Court held that a cross appeal was unnecessary because the appellee "does not attack, in any respect, the decree entered below." *Id.* at 435-436. "It merely asserts additional grounds why the decree should be affirmed." *Id.* at 436.

Both *Jennings* and *American Railway* differ from this case because the arguments advanced by the non-appealing parties in those cases could result only in an affirmance of the district court's judgment. Here, by contrast, the Eighth Circuit's decision did *not* result in an opinion affirming the District Court's judgment. Instead, the Eighth Circuit altered the District Court's judgment based on an argument that no appealing party advanced. *See* Pet. App. 50a.

2. *Jennings* and *American Railway* are not on point, but there is a different decision of this Court that speaks directly to the Eighth Circuit's reasoning: *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937). Here, the Eighth Circuit defended its alterations to the District Court's judgment by asserting that its decision harmed Bader Farms

overall. *See* Pet. App. 9a-10a. Bader Farms reprises that argument. *See* BIO 10. In *Morley*, this Court rejected a similar attempt to tinker with the judgment. *See* 300 U.S. at 190-191.

Morley concerned a contract dispute between a contractor and a surety. *Id.* at 187-189. The contractor appealed the district court's ruling that the surety was entitled to exoneration but not specific performance, and the surety did not cross-appeal. *Id.* at 190. The court of appeals reversed the exoneration finding but preserved the overall result in favor of the surety by "conclud[ing] that there should be specific performance." *Id. From the surety's perspective, there was no difference between these remedies*; the only distinction was which bank would hold the money for the surety's liabilities. *Id.* at 192-193. This Court nevertheless reversed, explaining that those similarities were "surely not a reason why an appellate court should be at liberty to treat the two as interchangeable": "[t]he substitution of specific performance for exoneration at the instance of the surety was not an affirmance of the decree below, as if the reasons only had been changed with the decision standing firm," and so could not be awarded "[w]ithout a cross appeal." *Id.* at 190-191.

Here, as in *Morley*, it is irrelevant that Bader Farms might have been worse off overall as a result of the Eighth Circuit's rulings. What matters is that the Eighth Circuit altered the judgment based on its assessment of an unappealed issue in a way that plainly benefitted Bader Farms and harmed BASF. This Court draws a sharp distinction between *affirming* a judgment on alternative grounds and *altering* the judgment by resurrecting an unappealed

issue. The cross-appeal rule does not take a holistic approach to district court judgments.

* * *

Because the Eighth Circuit did not affirm the judgment below on alterative grounds, as was true in *Jennings* and *American Railway*, its alterations to the judgment below are permissible only if the cross-appeal rule is, as the Eighth Circuit has held, "a non-jurisdictional rule of practice that can be avoided in the discretion of the court." *Gross*, 588 F.3d at 621. That holding accords with other Eighth Circuit's opinions on this issue. *See, e.g.*, *Duit Const. Co. Inc.* v. *Bennett*, 796 F.3d 938, 941-942 (8th Cir. 2015); *Kessler* v. *National Enters., Inc.,* 203 F.3d 1058, 1059-60 (8th Cir. 2000). Indeed, the Eighth Circuit has previously applied the same "related argument exception" as it applied in this case. *See* Pet. 22-23 (discussing *Arkansas State Conf. NAACP* v. *Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023)). The decision below plainly implicates the question presented, and the Court's answer to that question will be outcome determinative.

C. The Question Presented Was Pressed And Passed Upon Below.

BASF adequately preserved its objection to the Eighth Circuit's reassessment of BASF's individual liability for punitive damages. BASF pressed the argument that the cross-appeal rule is jurisdictional or otherwise mandatory at the panel stage. *See* BASF Resp. Br. 41-48 (subsection titled "Because Bader failed to cross-appeal, the Panel lacked the power to alter the District Court's sufficiency-of-the-evidence ruling"). In the decision below, the Eighth Circuit acknowledged and addressed BASF's argument. *See*

Pet. App. 9a-10a. BASF then filed a rehearing petition that highlighted the circuit split on the jurisdictional nature of the cross-appeal rule and asked the Eighth Circuit to reconsider its view that the rule is not jurisdictional. *See* BASF Reh'g Pet. 13-15.

Bader Farms' statements to the contrary (at 2, 8-9) are frankly baffling. For example, Bader Farms asserts (at 2) that "[t]he parties did not argue, nor did the Eighth Circuit decide, the issue of the cross-appeal rule's classification as jurisdictional, mandatory, or subject to exceptions." But such a direct argument would have been improper and pointless at the panel stage. As noted above, the Eighth Circuit staked out its position on the jurisdictional status of the cross-appeal rule at least 15 years ago. *See Gross,* 588 F.3d at 621 (holding, in 2009, that "the cross-appeal requirement is a non-jurisdictional rule of practice that can be avoided in the discretion of the court"). BASF "raised the jurisdictional point for the first time in its petition for rehearing," BIO 8, because "in [the Eighth] circuit, one panel is not at liberty to overrule the decision of another," *United States* v. *Cole*, 537 F.3d 923, 928 (8th Cir. 2008).

At the panel stage, BASF crept as close to the line as it could, arguing forcefully that the Eighth Circuit "lacked the power" to alter the district court's judgment because of Bader Farms' "fail[ure] to cross-appeal," BASF Resp. Br. 41, and supporting that argument with citations to cases from courts that understand the cross-appeal rule is jurisdictional, *see id.* at 43, 45 (citing *Art Midwest, Inc.* v. *Atlantic Ltd. P'ship XII*, 742 F.3d 206, 212 (5th Cir. 2014), and *In re Chama Land & Cattle Co.*, 310 F. App'x 726, 738 (5th Cir. 2009)). BASF's arguments about the court's "power" to decide the question, of course, plainly

implicated the court's "jurisdiction." *See, e.g.*, *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010) (explaining that "[s]ubject-matter jurisdiction * * * refers to a tribunal's power to hear a case") (internal quotation marks and alterations omitted)); *see also Morley Const. Co.*, 300 U.S. at 187 (cross-appeal rule concerns "[t]he power of an appellate court to modify a decree").

Bader Farms also attempts to reach even further back into the history of the litigation, arguing (at 8) that "BASF's petition for rehearing of *Bader I* did not mention the cross-appeal rule at all." BASF's petition for rehearing in *Bader I* instead argued that the law-of-the-case doctrine prevented the Eighth Circuit from ordering a new punitive damages trial. *See Bader I*, Reh'g Pet. 11-18. But the content of BASF's petition for rehearing in *Bader I* does not matter because BASF seeks review of the Eighth Circuit's decision in *Bader II*, not *Bader I*. And, even if it did matter, BASF's earlier reliance on the law-of-the-case doctrine would not prevent the court from reaching the cross-appeal rule. The doctrines function the same way here. *See* Pet. at 34 & n.11.

Finally, Bader Farms suggests (at 9) that BASF should have "ask[ed] the Court to consider the issue whether the court below erred in holding that the cross-appeal rule does not apply on the facts of this case." But, of course, that is precisely what BASF has done. The Eighth Circuit held that "[t]he cross-appeal rule is inapplicable here," Pet. App. 10a, only because the Eighth Circuit believes that "the cross-appeal requirement is a non-jurisdictional rule of practice that can be avoided in the discretion of the court," *Gross*, 588 F.3d at 621. So BASF's question presented—which asks this Court to decide whether

the cross-appeal rule is jurisdictional or otherwise mandatory—necessarily asks whether the Eighth Circuit erred in setting aside the rule. If this Court agrees with BASF that the rule is jurisdictional or otherwise mandatory, then the Eighth Circuit plainly erred in finding the rule inapplicable here.

II. THE SPLIT IS REAL.

Bader Farms understandably does not contest that there is a deep divide among the circuits over the proper characterization of the cross-appeal rule—whether it is jurisdictional and therefore exceptionless, a mandatory claim-processing rule that yields to waiver or forfeiture, or an informal and flexible rule that permits all kinds of court-crafted exceptions. This Court has already recognized that "Courts of Appeals have disagreed" on this question. *Greenlaw*, 554 U.S. at 245; *see also El Paso Nat. Gas Co.* v. *Neztsosie*, 526 U.S. 473, 480 n.2 (1999) ("The issue has caused much disagreement among the Courts of Appeals and even inconsistency within particular Circuits for more than 50 years."). The courts of appeals have similarly noticed the disagreement. *E.g.*, *Art Midwest, Inc.*, 742 F.3d at 212 ("[T]he circuits have split on this issue."). As have the treatises. *See, e.g.*, 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3904 (3d ed. June 2024 update) ("The cases are in disarray.").

Bader Farms argues instead (at 3, 12-16) that the decision below does not implicate the split because Bader Farms, on its telling, simply asked the Eighth Circuit to affirm the District Court's judgment on alternative grounds. Bader Farms collects cases in which the appellee advanced arguments that would

not have required any change to the judgment. *E.g.*, *Cooper Indus., Ltd.* v. *National Union Fire Ins. Co. of Pittsburgh*, 876 F.3d 119, 126 (5th Cir. 2017) (cross-appeal unnecessary where "the district court even used [the appellee's] proposed order and simply crossed out "[PROPOSED]" and stamped the date"; the appellee complained only that the district court "rejected several of its arguments"); *McMunn* v. *Babcock & Wilcox Power Generation Grp., Inc.,* 869 F.3d 246, 259-260 (3d Cir. 2017) ("a party, without taking a cross-appeal, may urge in support of [a judgment] from which an appeal has been taken any matter appearing in the record" (citation omitted)).

But that is not this case. *See supra* at 2-3. Here, the Eighth Circuit conceded that it "altered the judgment" to reflect its "chang[ed]" view of the "theory of liability for punitive damages." Pet. App. 10a. BASF obviously did not argue that there were other theories on which its liability for punitive damages could be sustained. The Eighth Circuit's alteration of the judgment to match an alternative theory of liability therefore violated the cross-appeal rule, and Bader Farms' examples are irrelevant.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

Finally, Bader Farms attempts (at 16-18) to downplay the importance of the split. But the cross-appeal rule is vitally important; it "protects two fundamental tenets of our legal system: 'fair notice and finality.'" Pet. 26 (quoting *Greenlaw*, 554 U.S. at 252). A flexible approach to the rule undermines both of those tenets, as this case illustrates. The Eighth Circuit stripped BASF of the District Court's ruling on individual liability without giving BASF any

opportunity to brief the issue, and in so doing, it prolonged litigation that has already lasted eight years. *See* Pet. 27-28. The question presented is also frequently recurring. *See id.* at 29. Indeed, in just the last seven years, every court of appeals has issued at least one published decision on the question presented. *Id.* Bader Farms ignores all of that. But this Court should not. The Court should grant the petition and bring order to the "disarray." Wright, Miller & Edwards, *supra*, § 3904.

CONCLUSION

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

Respectfully submitted,

JOHN P. MANDLER
BRUCE JONES
FAEGRE, DRINKER,
BIDDLE & REATH LLP
90 South Seventh Street
Minneapolis, MN 44502
(612) 766-7221

JO-ANN TAMILA SAGAR
Counsel of Record
NEAL KUMAR KATYAL
KRISTINA ALEKSEYEVA*
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
jo-ann.sagar@hoganlovells.com

** Admitted only in New York. Supervised by principals of the firm admitted in D.C.*

Counsel for Petitioners

DECEMBER 2024