No. _____

In the Supreme Court of the United States

United States of America ex rel.
Howard W. Beck, M.D., Petitioner,
v.
St. Joseph Health System, et al.,
Respondents.

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

Petition for a Writ of Certiorari

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Question Presented

This case presents a circuit split regarding the effect of a second timely filed post-judgment motion under Rule 59 on the appellate court's jurisdiction.

The question presented is —

> Whether a court-created exception barring successive post-judgment motions can deprive a court of appeals of jurisdiction over an appeal that is timely filed—under the plain language of Rule 4 of the Federal Rules of Appellate Procedure—within 30 days of the entry of the order disposing of the last timely filed post-judgment motion, which in this case was a second Rule 59(e) motion to reconsider, timely filed—under Rule 59 of the Federal Rules of Civil Procedure—within 28 days after entry of the judgment.

Parties to the Proceedings

Petitioner is United States of America ex rel. Howard W. Beck, M.D.

Respondents are St. Joseph Health System, Covenant Health System, Covenant Medical Center, and Covenant Medical Group.

Providence St. Joseph Health is the parent corporation of St. Joseph Health System.

St. Joseph Health System is the parent corporation of Covenant Health System.

Covenant Health System is the parent corporation of Covenant Medical Center and Covenant Medical Group.

Related Proceedings

United States District Court (N.D. Tex.):

United States of America ex rel. Howard W. Beck, M.D., v. St. Joseph Health System, et al., No. 5:17-CV-052-C (November 30, 2021).

United States Court of Appeals (5th Cir.):

United States of America ex rel. Howard W. Beck, M.D., v. St. Joseph Health System, et al., No. 22-10137 (February 1, 2023).

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In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
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v.

ST. JOSEPH HEALTH SYSTEM, ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, United States of America ex rel. Howard W. Beck, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in Cause No. 22-10137.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–3a) is not published in the Federal Reporter but is available at 2023 WL 1433614.

The decisions of the district court are not published in the Federal Supplement but:

- the order granting summary judgment (App. G, *infra*, 13a–49a) is available at 2021 WL 7084164;
- the order denying motion to reconsider is reproduced in the appendix (App. F, *infra*, 11a); and

- the order denying second motion to reconsider is reproduced in the appendix (App. E, *infra*, 9a).

Jurisdiction

The judgment of the court of appeals was entered in Cause No. 22-10137 on Feb. 1, 2023. App. B, *infra*, 4a. The petition for rehearing was denied on May 4, 2023. App. C, *infra*, 6a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

28 U.S.C. § 2107(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.

28 U.S.C. § 2107(a).

28 U.S.C. § 2072:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure … for cases in the United States district courts … and courts of appeals.
>
> (b) …. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 U.S.C. § 2072(a), (b), (c).

Rule 59(e) of Federal Rules of Civil Procedure:

> A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

FED. R. CIV. P. 59(e).

Rule 4(a)(1)(A) of Federal Rules of Appellate Procedure:

> In a civil case except as provided in Rules … 4(a)(4) … the notice of appeal … must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

FED. R. APP. P. 4(a)(1)(A).

Rule 4(a)(4)(A) of Federal Rules of Appellate Procedure:

> If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> …
>
> (iv) to alter or amend the judgment under Rule 59;

FED. R. APP. P. 4(a)(4)(A), (iv).

Statement of the Case

A. Factual Background

Petitioner, Howard W. Beck, M.D., is a licensed Texas physician who has practiced urology in Lubbock since September 1991. C.A. ROA.11285 (Beck Aff.). He has active medical staff privileges at Covenant Medical Center, where he makes hospital rounds and performs surgery. C.A. ROA.11288. Many of the same Medicare patients he sees are also regularly seen by physicians in the Covenant Medical Group. C.A. ROA.11288.

Petitioner brought this claim under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729–3730, alleging that respondents filed false claims for Medicare reimbursement by submitting such claims for services rendered by physicians with whom it had financial relationships that violated the Stark Law, 42 U.S.C. § 1395nn, and while paying remuneration to physicians to induce referrals in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b. *See* C.A. ROA.147 (First Am. Compl.).

B. Proceedings Below

1. On September 30, 2016, petitioner filed the original complaint under seal. C.A. ROA.29. On September 23, 2019, the Government filed an election not to intervene. C.A. ROA.60. On September 24, 2019, the district court ordered the complaint unsealed, C.A. ROA.64, and summons were issued for the respondents, St. Joseph Health System, Covenant Health System, Covenant Medical Center, and Covenant Medical Group. C.A. ROA.74–81.

On November 30, 2021, the district court granted respondents' motion for summary judgment and entered a judgment dismissing the case. App. G, *infra*, 13a–49a; App. H, *infra*, 50a. Petitioner initially filed a Rule 59(e) motion to alter or amend the judgment on December 10, 2021. C.A. ROA.2849. That motion was summarily denied without a merits review[1] on the second business day after it was filed, on December 14, 2021, "as the same fails to include a certificate of conference."[2] App. F, *infra*, 11a. On the same day—December 14, 2021—petitioner filed a second, or corrected, Rule 59(e) motion to alter or amend the judgment, which included the certificate of conference required by the district court. C.A. ROA.2855.

On January 12, 2022, the district court denied petitioner's second, timely filed Rule 59(e) motion. App. E, *infra*, 9a. On February 9, 2022, petitioner timely filed his notice of appeal, within 30 days of the order disposing of the last timely filed motion under Rule 59(e) of the Federal Rules of Civil Procedure. C.A. ROA.3242.

2. On appeal to the Fifth Circuit, respondents filed a motion to dismiss petitioner's appeal, arguing that petitioner filed an impermissible successive motion to alter or amend the judgment, making the notice of appeal untimely. On April 5, 2022, a panel of the court of appeals

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[1] There was clearly no merits review of the Rule 59(e) motion. The merits review was completed on January 12, 2022, when the district court denied petitioner's second motion to reconsider. App. E, *infra*, 9a.

[2] Local Civil Rule 7.1.a of the Northern District of Texas expressly excludes motions for new trial from the certificate of conference requirement, but the district court apparently did not consider that exception broad enough to include other motions under Rule 59.

ordered the motion to be carried with the case. App. D, *infra*, 8a.

On February 1, 2023, the oral argument panel issued an unpublished per curium opinion granting respondents' motion to dismiss. App. A, *infra*, 1a.

The Fifth Circuit says that it was bound—under the Fifth Circuit's "rule of orderliness"—by a longstanding rule of the circuit that "aims to prevent gamesmanship." App. A, *infra*, 3a. The court below expressly acknowledges that "the situation here does not implicate gamesmanship." *Ibid.* But the court did not consider the purpose of its court-created "exception" to the plain language of Rule 4 of the Federal Rules of Appellate Procedure; nor was it concerned with the readily distinguishable procedural context in which the exception was first articulated. Instead, the court simply read its precedent broadly as barring a "successive post-judgment motion that seeks the same or similar relief as an earlier filed post-judgment motion" from further tolling the time to appeal and applied that precedent—for the first time—to a *timely* second motion to reconsider under Rule 59. App. A, *infra*, 2a–3a.

On May 4, 2023, the court of appeals denied petitioner's petition for rehearing. App. C, *infra*, 6a.

Reasons for Granting the Petition

A. The Decision Below Is Wrong

Review is warranted because the decision below is wrong. The question presented by this petition is whether a court-created prohibition on successive post-judgment motions can deprive a court of appeals of jurisdiction over

an appeal that is timely filed under the plain language of Rule 4 of the Federal Rules of Appellate Procedure and Rule 59 of the Federal Rules of Civil Procedure. The court of appeals concluded that it was bound by its rule of orderliness to apply its precedent against successive post-judgment motions to petitioner's second motion to reconsider—even though the second motion was timely filed when measured from the date of the judgment and reviewed on the merits by the district court before being denied on January 12, 2022. Accordingly, the court below held that petitioner's notice of appeal was jurisdictionally out of time. The Fifth Circuit was wrong on both its application of the court-created bar against successive motions and the jurisdictional question. Neither the court below nor the respondents contend that petitioner's notice of appeal was not timely filed in compliance with the plain language of Rule 4(a)(4)(A). Instead, they seek to impose a court-created exception to the rules and call it jurisdictional.

1. Petitioner's Second Rule 59(e) Motion and Notice of Appeal Were Timely

Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides that, in a civil case, the notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from." FED. R. APP. P. 4(a)(1)(A); *see also* 28 U.S.C. § 2107(a). An exception to this rule applies when the party timely files a motion to alter or amend the judgment under Rule 59 of the Federal Rules of Civil Procedure. FED. R. APP. P. 4(a)(4)(A)(iv). The plain language of the Rule 4(a)(4)(A) exception is dispositive of the jurisdictional question before the Court:

> If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so *within the time allowed by those rules*—the time to file an appeal runs for all parties from the entry of the order disposing of the *last such remaining motion*:
>
> …
>
> (iv) to alter or amend the judgment under Rule 59.

FED. R. APP. P. 4(a)(4)(A) (emphasis added); *see also* 28 U.S.C. § 2072 (authorizing adoption of rules that supersede conflicting laws and defining when a district court ruling is final for purposes of appeal).

The phrase "such remaining motion" plainly refers to one of the enumerated motions, including a motion to alter or amend the judgment under Rule 59, that is filed "within the time allowed by those rules." FED. R. APP. P. 4(a)(4)(A). As provided by Rule 59(e): "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." FED. R. CIV. P. 59(e).

Petitioner's first and second Rule 59(e) motions were *both* filed within 28 days after entry of the judgment. Petitioner initially filed a Rule 59(e) motion on December 10, 2021. C.A. ROA.2849. That motion was summarily denied—without a merits review—on December 14, 2021, "as the same fails to include a certificate of conference." App. F, *infra*, 11a. On the same day—December 14, 2021—petitioner filed a second, or compliant, Rule 59(e) motion, which included the certificate of conference required by the district court. C.A. ROA.2855. Both the respondents, who filed a substantive response, C.A.

ROA.3004, and the district court, which denied petitioner's second motion on the merits, App. E, *infra*, 9a, treated petitioner's second timely filed motion as a viable Rule 59(e) motion, without raising any objection that it was an impermissible successive motion or any concern about the court's jurisdiction to consider the motion.

Nevertheless, respondents now argue that timing of the deadline to perfect appeal from the denial of petitioner's second *timely* Rule 59(e) motion runs afoul of circuit authority condemning impermissible "successive" motions for reconsideration.

What then is an impermissible successive motion?

2. A Timely filed Second Rule 59(e) Motion Is Not an Impermissible Successive Motion

In *Charles L.M. v. N.E. Independent Sch. Dist.*, 884 F.2d 869 (5th Cir. 1989), the Fifth Circuit considered whether a motion to reconsider an order denying a prior motion for reconsideration gave rise to a successive extension of the appellate deadline. The following procedural history of the case is important:

- August 17, 1988: court granted defendants' motion to dismiss;
- August 23, 1988: plaintiff served motion for reconsideration within 10 days[3] of the order complained of;

[3] Rule 59(e) was amended, effective December 1, 2009, to extend the deadline for filing a motion to alter or amend a judgment from 10 days (excluding intermediate Saturdays, Sundays, and legal holidays) to 28 days after entry of judgment. *See* Amendments, 556 U.S. 1343, 1354 (Mar. 26, 2009).

- September 6, 1988: court denied motion for reconsideration;
- September 15, 1988: plaintiff filed motion to reconsider order denying first motion for reconsideration (second motion not filed within 10 days after entry of August 23, 1988, order of dismissal).

Id. at 869–70.

The second motion for reconsideration in *Charles L.M.* was not a timely Rule 59(e) motion—and thus did not toll running of the thirty-day period for filing the notice of appeal—because the second motion was not filed within ten days of the judgment, as provided by Rule 59 at that time.

The *Charles L.M.* decision is distinguished from this appeal because petitioner's second Rule 59(e) motion in this case was timely filed—within 28 days of the entry of the judgment. The procedural facts in this case are as follows:

- November 30, 2021: Order granting Defendants' Motion for Summary Judgment. App. G, *infra*, 13a.
- November 30, 2021: Judgment entered. App. H, *infra*, 50a.
- December 10, 2021: Relator's Rule 59(e) Motion to Reconsider. C.A. ROA.2849.
- December 14, 2021: Order denying Relator's Rule 59(e) Motion to Reconsider for lack of a certificate of conference. App. F, *infra*, 11a.
- December 14, 2021: Relator's (Second) Rule 59(e) Motion to Reconsider. C.A. ROA.2855

(filed within 28 days of November 30, 2021, Judgment).

- January 12, 2022: Order denying, on the merits, Relator's (Second) Rule 59(e) Motion to Reconsider. App. E, *infra*, 9a.
- February 9, 2022: Relator's Notice of Appeal. C.A. ROA.3242 (filed within 30 days of January 12, 2022, Order).

Moreover, unlike the second motion in *Charles L.M.*, petitioner's second motion in this case did not seek reconsideration of the order denying the prior motion. *See Charles L.M.*, 884 F.2d at 870 (citing *Brown v. United Ins. Co.*, 807 F.2d 1239, 1242 (5th Cir. 1987) (holding that the tolling provision of Rule 4 does not apply to motions to reconsider orders that *deny* timely post-judgment motions under Rules 50(b) or 59)).

In holding that a motion to reconsider an order denying a prior motion for reconsidering, on substantially the same grounds, does not interrupt the running of the time for appeal, the court in *Charles L.M.* quoted the Fifth Circuit's earlier opinion in *Ellis v. Richardson*, 471 F.2d 720, 721 (5th Cir. 1973). The brief *per curiam* opinion in *Ellis* does not provide any procedural history to suggest a broader application than was before the court in *Charles L.M.* But the Fifth Circuit's subsequent opinion in *Harrell v. Dixon Bay Transportation Co.*, 718 F.2d 123, 127 (5th Cir. 1983), characterized the second Rule 59 motion in *Ellis* as "asking the trial court to reconsider the denial of his first Rule 59 motion." *See also* Charles A. Wright et al., Federal Practice and Procedure § 3950.4 (4th ed.) (collecting cases discussing ineffectiveness—to further

extend the time for appeal—of a motion to reconsider the *denial of a prior motion for reconsideration*). Moreover, as discussed further below, when *Charles L.M.* and *Ellis* were decided, Rule 4(a)(4) did not expressly extend the appeal window until the entry of the order disposing of the *last* timely filed Rule 59 motion. *See* 1993 Amendment to Rule 4(a)(4). 20 Moore's Federal Practice - Civil § 304 App. 04 (2022).

Petitioner does not rely upon the order denying his first motion as a basis for starting a successive time period for filing a new motion. Because petitioner's second Rule 59(e) motion was timely filed—when measured from the November 30, 2021, judgment—it triggered the tolling period expressly provided by Rule 4(a)(4)(A).

Until its decision in this case, no published Fifth Circuit opinion had ever applied the successive motion rule articulated in *Charles L.M.* to a timely filed second Rule 59(e) motion. And until 2020, no Fifth Circuit panel had issued a published opinion applying the holding of *Charles L.M.* to a timely filed second post-judgment motion of any kind. *See Edwards v. 4JLJ, L.L.C.*, 976 F.3d 463, 465 (5th Cir. 2020) (applying the general proposition—that after a motion is denied, a second one based on the same grounds will not *further* delay the appeal deadline—to a timely filed renewed motion for judgment as a matter of law under Rule 50(b)). But, like the court of appeals' decision in this case, *Edwards* does not offer any discussion of the rationale typically supporting application of the general proposition as a guard against impermissible successive motions. Nor does it give any consideration to the plain language of Rule 4(a)(4)(A) as amended following the court's prior opinion in *Charles L.M.*

3. Rule of Orderliness or "Tricky Little Puzzle"

The court of appeals' opinion acknowledged that "the situation here does not implicate gamesmanship" as in *Charles L.M. See* App. A, *infra*, 3a. Nevertheless, the court concluded that "it falls within our precedent that a successive identical post-judgment motion does not serve to toll the deadline" without any regard for the purpose of the *Charles L.M.* rule or the plain language of Rule 4. *Ibid.* Indeed, at oral argument before the Fifth Circuit, Judge Higginson acknowledged that petitioner's second motion to reconsider "seems to qualify under Rule 4"—but called it a "tricky little puzzle" in light of the court's prior panel opinion in *Edwards*.[4] Of course, it is patently unfair to treat a Rule 59(e) motion filed without a certificate of conference as nullifying a second, corrected motion filed with such a certificate when instructed by the district court that the local rule exempting motions for new trial does not apply to a motion to alter or amend (despite the near certainty that all Rule 59 motions—of either variety—will be opposed with equal regularity).

Respondents' counsel conceded during oral argument in the court below that there was no decision on the merits when the district court denied the first motion.[5] And when Judge Wilson asked if the result would have been different if the district court had merely instructed petitioner to correct what the court viewed as a filing deficiency—

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[4] Oral Argument at 3:18–3:40, *United States ex rel. Howard Beck v. St. Joseph Health Sys.*, No. 22-10137, 2023 WL 1433614 (5th Cir. Feb. 1, 2023), https://www.ca5.uscourts.gov/OralArgRecordings/22/22-10137_12-5-2022.mp3.

[5] *Id.* at 16:45–52.

much like the Fifth Circuit practice of requiring counsel to correct a briefing deficiency, respondents' counsel acknowledged that perhaps it would be different—merely insisting that is not what happened here.[6] That rationale, as the court in *Autry v. Ahern Rentals, Inc.*, EP-19-CV-00154-DCG, 2023 WL 1769208, at *4 (W.D. Tex. Feb. 3, 2023), recently explained, "elevates form over substance."

In *Autry*, Judge Guaderrama overruled an objection to the court's consideration of a second post-judgment motion that included citations to the trial record not previously provided in the first motion, which had been denied without prejudice for that reason. *Id.* at *1–2. The court in *Autry* concluded, "when a litigant amends a posttrial motion that the court *has not yet resolved on the merits*, that amendment relates back to the original motion's filing date for timeliness purposes." *Id.* at *3 (emphasis added). It made no difference to Judge Guaderrama that the first motion had been denied rather than amended at the court's direction because such a distinction would elevate form over substance. *See id.* at *4. The same "form over substance" tension at issue in *Autry* is at play in this case—as illustrated by Judge Wilson's exchange with opposing counsel at oral argument in the court of appeals. It should make no difference that the district judge in this case denied the first motion and subsequently considered a second motion (filed with a certificate of conference) on the merits rather than simply declining to rule on the merits of the first motion until a certificate of conference had been filed.

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[6] *Id.* at 16:56–17:23.

As Judge Guaderrama explained in *Autry*: "In either scenario, the Court's intention—and the ultimate result—is exactly the same: the court declines to rule on the motion's merits until it can cross-check the movant's characterization of the trial record against the official transcript. It would make no sense to honor that obvious intention when the court says it's 'reserving a ruling' on the motion, but not when it says it's 'denying the motion without prejudice to refiling.'" *Id.* Nevertheless, despite Judge Guaderrama's best efforts to apply logic and reason to the applicable rules, his decision to consider the second post-judgment motion will surely meet with the same fate on appeal to the Fifth Circuit—at least at the panel stage—unless this Court takes up this case, overrules *Edwards*, and reverses the decision of the court below. Even if Judge Guaderrama *grants* the second post-judgment motion, which remains pending, and the case proceeds to trial, on subsequent appeal the Fifth Circuit will consider itself bound by precedent to rule that the whole thing was a nullity—concluding that neither it nor the district court had any jurisdiction to proceed beyond expiration of the appellate deadline following denial of the first post-judgment motion. The injustice of the Fifth Circuit's erroneous ruling in this case is on track to repeat itself in due course unless this petition is granted.

The Fifth Circuit's opinion in *Edwards* describes Rule 4(a)(1) as jurisdictional, as it has a statutory anchor in 28 U.S.C. § 2107(a), 976 F.3d at 465, n.2. *Edwards*, however, fails to address the question of whether the Fifth Circuit's prohibition against impermissible successive motions for reconsideration is a claim-processing rule rather than jurisdictional in nature. *See Bowles v. Russell*, 551

U.S. 205, 210 (2007) (discussing distinction between claim-processing rules and jurisdictional rules; recognizing significance of fact that a time limitation is set forth in a statute).

Moreover, application of the general proposition by the *Edwards* panel to timely motions conflicts with the authority relied upon by a prior panel of the court in *Brown v. United Ins. Co.*, 807 F.2d 1239 (5th Cir. 1987), which held that a subsequent Rule 59(e) motion filed on July 2 was not timely with respect to a judgment entered on April 28:

> A motion to alter or amend a judgment under Rule 59(e) that is served not later than 10 days after entry of judgment destroys the finality of the judgment for purposes of appeal. If the motion is denied the finality of judgment is reestablished; and the policy underlying finality precludes the court from entertaining a motion to reconsider that denial, *where the reconsideration motion is served later than 10 days after entry of [the original] judgment.*

Id. at 1242 (quoting 6A Moore's Federal Practice para. 59.13[4]) (emphasis added).

In addition, *Edwards* makes no attempt to address the reasons that a second motion "based upon substantially the same grounds" is sometimes dispositive in determining whether a motion is an impermissible successive motion. The filing of a motion seeking relief that is identical to the relief sought in a prior motion is troubling in only two particular situations. *One*, where the timeliness of the second motion is tied to the denial of the first (i.e., an

untimely motion to reconsider an order denying a prior motion for reconsideration as in *Charles L.M.*); and *two*, when a second motion for reconsideration of an interlocutory order (which may be requested at any time while the case remains pending in the district court[7]) is filed in an attempt to restart the appellate timetable for perfecting an interlocutory appeal. *See, e.g., Nobby Lobby, Inc. v. Dallas*, 970 F.2d 82 (5th Cir. 1992) (holding City's interlocutory appeal was timely only because second motion for reconsideration, filed forty-one days after the trial court's interlocutory order, asserted at least one completely different ground for relief from that order). Unless intervening case law or other circumstances change in the interim, such a successive motion would clearly raise concerns about gamesmanship. By contrast, when the timeliness of a second motion under Rule 59(e) forestalls any concern about an attempt to manipulate the appellate timetable, the content of the motion adds nothing meaningful for the court's consideration in determining whether the second motion is an impermissible successive motion for reconsideration. In this case there is simply no scenario in which one could read the procedural facts as suggesting that petitioner was attempting to restart the appellate timetable, as the second motion to reconsider was timely filed when measured from entry of the original judgment.

And of some import, the *Edwards* panel decided the jurisdictional question in response to appellee's motion for rehearing raising the jurisdictional issue, which appellee "flagged at oral argument (though, unfortunately, not in

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[7] *See* FED. R. CIV. P. 54(b) (interlocutory order "may be revised at any time before the entry of a judgment").

its original briefing)." 976 F.3d at 465, n.2. Because the panel treated the petition as one seeking panel rehearing, and granted it—*without adversarial briefing* by the opposing party[8]—it should have been given no more weight than a decision of a motions panel, to which the Fifth Circuit's rule of orderliness does not apply. *See Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 597 (5th Cir. 2021) (motion's panel ruling not binding).

4. Edwards Should Be Overruled

The Fifth Circuit's opinion in *Edwards* did not (1) apply the distinction between jurisdictional rules and claims-processing rules to the Fifth Circuit's prohibition against impermissible successive motions; (2) analyze the untimeliness of the second motions in *Charles L.M.* and its progeny; or (3) recognize that the purpose of the general rule against successive motions is to guard against "manipulative" litigation tactics that are "nothing more than an attempt to circumvent the … time restriction applicable to the appeal." *See Vine v. PLS Fin. Servs.*, 807 Fed. Appx. 320, 326 (5th Cir. 2020) (unpublished) (discussing interlocutory appeals under the Federal Arbitration Act).

The court in *Edwards* simply cites *Charles L.M.* as mandating application of the following rule: "After a motion is denied, though, a second one based on the same

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[8] The panel in *Edwards* issued its prior opinion on September 2, 2020. 976 F.3d at 464. The appellees in *Edwards* filed their petition for rehearing *en banc* on September 14, 2020. Exactly one week later, without requesting a response, the panel withdrew its prior opinion and substituted the published opinion issued on September 21, 2020. *Id.* at 463–64. Although the court is obligated to assess its own jurisdiction, as Judge Jerry Smith observed in *Ruiz-Perez v. Garland*, 49 F.4th 972, 976 (5th Cir. 2022), "adversarial briefing helps."

grounds will not further delay the appeal deadline." 976 F.3d at 465. For the reasons articulated above, this Court should overrule *Edwards*.

Moreover, to the extent prior cases like the Fifth Circuit's *Charles L.M.* decision in 1989 are not viewed as limiting the successive motion prohibition to untimely motions, the 1993 amendment to Rule 4 does that work. Accordingly, at the very least, the general proposition recited in *Charles L.M.* and its progeny should be limited to successive post-judgment motions that are not timely filed under the rule governing the applicable post-judgment motion.

5. Legislative History

Rule 4(a)(4) was amended in 1993. Prior to the amendment, Rule 4(a)(4) provided in pertinent part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: … (iii) under Rule 59 to alter or amend the judgment; … the time for appeal for all parties shall run *from the entry of the order denying a new trial or granting or denying any other such motion*.

20 Moore's Federal Practice - Civil § 304 App. 04 (2022) (emphasis added).

The 1993 amendment revised Rule 4 to make clear that the tolling period would run from the entry of the order disposing of the *last such remaining motion*, including a Rule 59(e) motion. *Id.*

The Committee Note[9] to the 1993 Amendment states, "The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4)." *Id.* (citing *e.g.*, *Finch v. City of Vernon*, 845 F.2d 256 (11th Cir. 1988) (holding that a Rule 59 motion, timely filed after the judgment, tolled the appeal period because it did not merely seek reconsideration of an order denying a prior Rule 50(b) motion but also asked for relief from the judgment)). This legislative history of the 1993 amendment to Rule 4(a)(4) confirms that any prohibition against impermissible successive motions for reconsideration is limited to motions that are not timely filed as required by Rule 4(a)(4)(A). A timely filed motion—even a second one—on the other hand, tolls the appeal window until the district court disposes of it. *See* FED. R. APP. P. 4(a)(4)(A).

When a litigant follows the plain language of the rule, there is no apparent "risk of an untimely notice of appeal …." *See* App. A, *infra*, 3a. Thus, filing a premature notice of appeal—rather than perfecting an appeal after the last timely filed Rule 59(e) motion is denied at a time that is undisputedly in compliance with the plain language of a jurisdictional rule governing timeliness and tolling—is not the answer.

A corollary to a court's duty to examine its own jurisdiction is "the virtually unflagging obligation of the

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[9] Advisory Committee Notes are instructive on the drafters' intent in promulgating the federal rules. *United States v. Navarro*, 169 F.3d 228, 237 (5th Cir. 1999).

federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Mata v. Lynch*, 576 U.S. 143, 150 (2015). The decision below is wrong because the Fifth Circuit disregarded its obligation to exercise jurisdiction over petitioner's appeal.

B. The Question Presented Warrants Review

1. The Fifth Circuit's Dismissal Cannot Be Reconciled With This Court's Decision in Hamer v. Neighborhood Housing Services of Chicago

In *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 16 (2017), this Court once again made clear that an appeal filing deadline prescribed by statute will be regarded as "jurisdictional" while a time limit prescribed only in a court-made rule is not jurisdictional. The court of appeals in this case erroneously held jurisdictional a time limit specified only in its own caselaw, rather than in a statute (or even a rule adopted pursuant to statute). *See* App. A, *infra*, 2a. As this Court did in *Hamer*, the Court should vacate the Fifth Circuit's judgment dismissing the appeal. 138 S. Ct. at 17.

As an alternative to taking up this case to consider the scope of the Fifth Circuit's rule against successive post-judgment motions more broadly, petitioner requests that this Court—at the very least—consider the Fifth Circuit's error in holding that it lacked jurisdiction of the appeal. Because the Fifth Circuit's error on the jurisdictional question highlights the need for this Court to further provide precedential guidance on a question that is likely to be repeated—if not corrected—this is an appropriate case

for summary reversal. *See, e.g., Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (intervening to correct court of appeals error "because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents."). As the Fifth Circuit's opinions in this case and in *Edwards* reflect a clear misapprehension of this Court's jurisdictional standards pertaining to the timeliness of appeal, a per curium opinion—reversing the judgment of dismissal in light of *Hamer* and remanding this appeal for reconsideration of the prudential and equitable reasons why the Fifth Circuit's rule against impermissible successive post-judgment motions should not apply to petitioner's second, timely filed motion to reconsider—is warranted.

2. There Is a Circuit Split on the Scope of Impermissible Successive Motions

The question presented warrants Supreme Court review because there is a circuit split.

In *Robbins v. Saturn*, 532 Fed. Appx. 623 (6th Cir. 2013) (unpublished), the Sixth Circuit distinguished *Charles L.M.*, and cases from other circuits, in which post-judgment motions filed beyond the time within which to seek reconsideration of the original judgment were condemned as impermissible successive motions. As the Sixth Circuit pointed out:

> The courts in those cases understandably determined that the second motion did not again toll the running of the time in which to take an appeal. As the Seventh Circuit observed, "[t]he time limit would be a joke if parties could continually file new motions,

> preventing the judgment from becoming final." *Charles* [*v. Daley*], 799 F.2d [343] at 347 [(7th Cir. 1986)].

Id. at 627. The court in *Robbins* noted that, because the second post-judgment motion was filed within the 10-day time period then allowed for post-judgment motions, the appellant had no need to rely on his initial filing to establish the timeliness of his second motion. *Id.* Accordingly, *Robbins* was "not a case where a party is seeking to extend the 30-day appeal period by filing successive post-judgment motions." *Id.* Because the appellant filed his appeal less than 30 days after denial of a post-judgment motion that was filed within 10 days of the original judgment, the court concluded that the appellant's second motion "does not have the deleterious consequences" described in the cases condemning impermissible successive motions for reconsideration. *Id.* at 628. The court in *Robbins* then turned to an analysis of the Rules:

> Rule 4(a)(4) of the Federal Rules of Appellate Procedure refers to the entry of an order "disposing of the last such remaining motion," implying that more than one Rule 59(e) motion may be filed. Even if this language was intended to account only for the possibility that multiple parties may file such motions, its broad language still supports [appellant's] position.

Id. (noting that the court could find no authority, in the Sixth Circuit or otherwise, "that stands for the proposition that the appeal period is not tolled when a party files a second or successive Rule 59(e) motion within 10 days

of the original judgment."). Because, as in *Robbins*, petitioner's second Rule 59(e) motion was timely filed, it does not have the deleterious consequences condemned by cases such as *Charles L.M.*

The First Circuit likewise distinguishes an impermissible successive motion from a timely filed second motion for reconsideration:

> While it is true that "a subsequent motion for reconsideration served within ten days of the order denying the initial motion for reconsideration but more than ten days after the entry of the original judgment does not toll the time for appealing from that judgment," here, the "subsequent" motion for reconsideration was filed within ten days of the entry of judgment.

Colon-Santiago v. Rosario, 438 F.3d 101, 108 (1st Cir. 2006) (internal citations omitted) (holding that appellate court had jurisdiction because subsequent motion for reconsideration was timely and the notice of appeal was filed within 30 days of the order disposing of that motion).

An Eleventh Circuit case cited by respondents in the court below is distinguishable because the second motion in that case, *Valentine v. BAC Home Loans Servicing, L.P.*, 635 Fed. Appx. 753 (11th Cir. 2015) (unpublished), was not timely filed when measured from the judgment being challenged:

- May 8, 2014: judgment entered;
- May 16, 2014: first Rule 59(e) motion filed;
- June 26, 2014: first Rule 59(e) motion denied;

- July 8, 2014: amended Rule 59(e) motion filed.

Id. at 755.

Thus, the amended motion was not timely because it was not filed within 28 days after entry of the judgment. Unlike the untimely second motion in *Valentine*, petitioner's timely second motion here does not presage an "endless parade of post-judgment motions." *See id.* at 756. As the court in *Valentine* noted, appellants "are not permitted to keep resetting and tolling [the appeals window] simply by filing new post-judgment motions." *Id.* Because petitioner's second motion in this case was timely—and was not dependent upon the order denying his first motion for its timeliness—petitioner's appeal window was no longer than it would have been had the motion, timely filed on December 14, 2021, been the only motion to alter or amend the judgment.

This Court should resolve the circuit split by applying the plain language of the rules in keeping with the First and Sixth Circuits, which distinguish impermissible successive motions from a second, timely filed Rule 59(e) motion.

3. *The Court Should Make Clear That the Plain Language of Rule 4 Is Controlling*

The question presented warrants review because the Fifth Circuit has ignored the plain language of Rule 4, and called its court-created exception to the rule jurisdictional. No one disagrees that petitioner's second Rule 59(e) motion to reconsider was timely filed within 28 days of entry of the judgment or that petitioner's notice of appeal was timely filed within the plain language of Rule 4(a)(4)(A)'s tolling provision, which has a statutory

anchor in 28 U.S.C. § 2072. At the very least, the Fifth Circuit erred in treating its own court-created prohibition against impermissible successive post-judgment motions as jurisdictional rather than as a claims-processing rule subject to prudential and equitable exceptions.

This question of law regarding a district court's jurisdiction to consider a timely filed, but second, motion to reconsider is important because procedural rules are not meant to lay traps for litigants who take affirmative steps to invoke—or extend—the court's jurisdiction.

This Court should take the opportunity to review this important question.

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The Court should, therefore, grant certiorari to review the Fifth Circuit's decision and hold that a second Rule 59(e) motion to reconsider filed no later than 28 days after the entry of the judgment is timely for purposes of extending the time to appeal under Rule 4.

Conclusion

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

Respectfully submitted,

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