

NO. 25-805

**IN THE
SUPREME COURT OF THE UNITED STATES**

KERRY KRUSKAL,
Petitioner,

v.

**ALAN MAESTAS, MAESTAS LAW FIRM, P.C.,
f/k/a MAESTAS & BOOTHBY, P.C.; KIMBERLY
ALDERMAN; DWIGHT THOMPSON; JONATHAN
HULL; PAULA GANZ; and SANTIAGO CHAVEZ,**
Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of New Mexico**

**SUPPLEMENT TO
PETITION FOR REHEARING**

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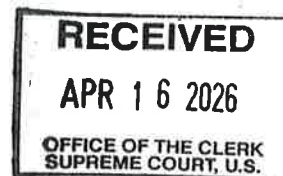


TABLE OF CONTENTS

Table of Authorities	ii
Supplement to Petition for Rehearing.	1
I. The Court’s instruction to present “new arguments” reasonably signaled that preserved issues required no repetition	1
II. Petitioner sought clarification before briefing, and the Court’s silence reasonably reinforced that repetition was unnecessary	2
III. The waiver ruling rested on a procedural requirement that was neither codified nor reasonably communicated	7
IV. The waiver ruling was not reasonably foreseeable under New Mexico law	9
V. The procedural basis for the waiver ruling became clear only after disposition, satisfying Rule 44.2	11
Conclusion	12

TABLE OF AUTHORITIES

<i>Barr v. City of Columbia</i> , 378 U.S. 146, 149 (1964)	12
<i>Chicago, Burlington & Quincy R.R. Co.</i> <i>v. Chicago</i> , 166 U.S. 226 (1897)	11
<i>Ford v. Georgia</i> , 498 U.S. 411 (1991)	11
<i>Hathorn v. Lovorn</i> , 457 U.S. 255 (1982)	12
<i>James v. Kentucky</i> , 466 U.S. 341 (1984)	12
<i>Lee v. Kemna</i> , 534 U.S. 362 (2002)	11
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958)	11
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	12

SUPPLEMENT TO PETITION FOR REHEARING UNDER RULE 44.2

(Background information is contained in the Docketing Statement, which the Court accepted without deficiency.)

Petitioner respectfully submits this Supplement under Rule 44.2 to address a procedural ambiguity that prevented meaningful merits review in the Court of Appeals and to preserve the issue for federal review. The ambiguity was not reasonably knowable at the time of briefing and became apparent only after the State's response and the Court of Appeals' subsequent disposition. This Supplement does not relitigate the merits; it explains why the waiver ruling rested on an unforeseeable and insufficiently communicated procedural requirement, and why rehearing is necessary to ensure fairness and preserve the issue for federal review.

I. The Court's instruction to present "new arguments" reasonably signaled that preserved issues required no repetition

When the Court of Appeals assigned this case to the General Calendar, it expressly invited Petitioner to present "new arguments." Petitioner reasonably understood that instruction to distinguish between arguments already preserved in the docketing statement and arguments not previously presented. The docketing statement had been accepted without deficiency, and nothing in the Court's communications suggested that issues already identified and developed

therein required restatement.

New Mexico appellate practice identifies the docketing statement as the vehicle for issue identification and preservation. The rules require that issues be identified, but they do not clearly specify how much argument is required to preserve an issue or whether argument developed in the docketing statement must later be repeated verbatim in the Brief in Chief to avoid forfeiture. Nothing in the rules, the official forms, or the Court's orders provided notice that non-repetition would carry dispositive consequences.

Petitioner initially copied the docketing statement verbatim into the Brief in Chief. Petitioner then deliberately removed the previously developed argument sections so the Court could easily identify the new arguments he had just added, further underscoring that he believed the preserved issues did not require repetition once the Court authorized new arguments. This was not an inadvertent omission; it was a deliberate effort to comply with the Court's instruction and to avoid burdening the Court with unnecessary repetition.

II. Petitioner sought clarification before briefing, and the Court's silence reasonably reinforced that repetition was unnecessary

On February 20, 2024, Petitioner filed a Motion for Leave to Amend the Docketing Statement seeking permission to present new arguments. This motion was filed precisely because Petitioner did not fully understand how the Court's earlier instruction should

be applied and sought clarification before briefing. In that motion, Petitioner identified the specific new arguments he wished to raise, demonstrating that he was attempting to comply with the Court's directives and avoid violating any procedural rule.

Although I understood that the Brief in Chief is ordinarily where arguments are presented, I did not know whether the Court's earlier instruction that "I may add new arguments" was a case specific allowance limited to the prior appeal or a general rule that continued to apply here. Because that instruction was tied to a different proceeding and nothing in the rules or subsequent orders clarified whether it carried forward, I asked whether it governed this case.

Respondents objected, confirming that the parties held competing understandings of how preserved docketing-statement issues would be treated on the General Calendar. The Court denied the motion as "unnecessary," stating that Petitioner already had permission to present new arguments. Critically, however, the Court did not state—either in that order or elsewhere—that issues preserved in the docketing statement would be deemed waived unless repeated in the Brief in Chief. Nor did the Court indicate that its invitation to present "new arguments" was limited or conditional.

If the Court had believed that Petitioner's docketing-statement issues were not already preserved, its response would necessarily have been different. When Petitioner asked whether he was allowed to make new arguments in the Brief in Chief,

the Court would have been obligated to inform him that he must do so because, under that view, no issues had yet been preserved. The Court said nothing of the sort. Its silence is incompatible with the later conclusion that the docketing-statement issues were unpreserved.

Under these circumstances, the Court's silence reasonably reinforced Petitioner's understanding that issues preserved in the docketing statement remained preserved and that the Brief in Chief was the appropriate vehicle only for arguments falling outside that preserved set. A court cannot invite a litigant to proceed in a particular manner and then penalize that litigant for reasonably relying on the court's instruction and silence.

The appellees never argued waiver, nor could they reasonably have done so, because nothing in the rules, the Calendar Notice, or the Court's orders suggested that preserved issues would be deemed forfeited if not repeated verbatim in the Brief in Chief. Because no party asserted waiver, Petitioner had no notice that waiver was at issue and no opportunity to respond before the Court adopted that theory.

Procedural Failures of Defendants Thompson, Maestas, and Chavez (With Bad-Ruling References Integrated)

The following examples, all documented in the docketing statement and accepted without deficiency, illustrate why Petitioner reasonably believed the issues were preserved and did not require repetition.

The docketing statement documented fifteen late filings and five filings missed entirely. ONLY the relevant missed filings are documented here.

1. **Complete failure to answer the Summary Judgment motion on Unauthorized Practice of Law (both defendants).** This dispositive motion was never answered at all. (*Documented in Bad Rulings #2, #4, #9, #16.*)
2. **Thompson's failure to answer the Meltzer Summary Judgment motion.** The deadline was December 9, 2019. Thompson's December 10, 2019 Notice of Joinder was late even under the 3-day rule and could not cure Maestas's complete failure to answer the motion. (*Documented in Bad Rulings #2, #4, #9.*)
3. **Thompson's failure to respond to Plaintiff's default motions.** Deadlines: November 12, 2019; December 9, 2019; and February 6, 2020. Thompson did not respond to any default motion. No extensions were requested or granted. (*Documented in Bad Rulings #2, #5, #9, #17.*)
4. **Maestas's failure to answer the Summary Judgment motion on Unauthorized Practice of Law.** Maestas filed no answer at all. Thompson's attempted joinder had no underlying pleading to attach to. (*Documented in Bad Rulings #2, #9, #16.*)
5. **Chavez's failure to respond to Requests for Admissions and discovery.** Chavez did not

respond before the May 2023 deadline. The transcript he was ordered to produce was delivered late and in incomplete form, and Plaintiff was never served with the two-part filing submitted three weeks later. These failures constitute missed filings under Rules 1-026 and 1-036. (*Documented in Bad Rulings #11, #12, #13, #15, #17.*)

Deposition and Discovery Irregularities Documented in the Docketing Statement

The docketing statement also included a detailed chronology of Chavez's missed depositions. Chavez failed to appear on two deposition dates and then missed his deadline to produce the written deposition after the third. On each occasion, the district court granted him a new deposition date or extension of time sua sponte, despite no request from the defense and despite the fact that the deadline for motions had already passed. (*Documented in Bad Rulings #11 and #12.*)

The docketing statement further documented that Chavez's counsel answered written discovery on his behalf because Chavez could not be located for approximately two years. (*Documented in Bad Rulings #12 and #17.*) This was included to show the procedural posture of the case and the extent to which Petitioner relied on the docketing statement to identify and develop issues as New Mexico appellate practice requires.

The docketing statement also detailed that the district court later overruled a prior judge's ruling after the

deadline for doing so had passed, and did so without issuing findings of fact or conclusions of law, despite the requirement for such findings when modifying or reversing an earlier order. (*Documented in Bad Rulings #1, #2, and #10.*)

Nothing in the Court's instructions, rules, or orders suggested that any of this material—already accepted without deficiency—required verbatim repetition in the Brief in Chief to avoid forfeiture. The docketing statement served its intended function under New Mexico appellate practice: it identified the issues, provided the factual chronology, and preserved the procedural irregularities for review.

III. The waiver ruling rested on a procedural requirement that was neither codified nor reasonably communicated

The waiver ruling presupposed a procedural requirement that was not clearly articulated or reasonably communicated to Petitioner: that issues preserved in the docketing statement are forfeited unless repeated in the Brief in Chief. The appellate rules do not state this requirement. The official forms do not state this requirement. No order, instruction, or guidance from the Court stated this requirement. Petitioner could not have been on notice of a procedural requirement that appears nowhere in the rules, forms, instructions, or any communication from the Court, and that no party ever argued.”

This problem is illustrated by the treatment of the unauthorized-practice-of-law issue. The docketing

statement expressly identified and supported the fact that Thompson was not an attorney, including Maestas' sworn testimony that Thompson performed attorney work and charged attorney rates despite lacking a license. Under New Mexico appellate practice, an issue identified and supported in the docketing statement is preserved. Nothing in the rules or the Court's instructions suggested that this preserved issue would be deemed waived unless repeated verbatim in the Brief in Chief.

But even if the Court were correct that issues not repeated in the Brief in Chief were waived (which Petitioner contests), the unauthorized-practice-of-law issue was in fact included in the Brief in Chief. Paragraph 12½ of the Brief in Chief expressly cited Maestas' sworn testimony that Thompson was not an attorney. Thus, even under the Court's own waiver framework, this issue was preserved and cannot be deemed waived.

Petitioner did not waive any issue merely because it was not restated in the Brief in Chief; the Court's own instruction and silence reasonably suggested that repetition was unnecessary.

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This asymmetry is underscored by the fact that opposing counsel committed multiple procedural violations expressly identified in the docketing statement, yet the Court treated those errors as non dispositive while applying to Petitioner a novel procedural requirement that appears nowhere in the rules. A procedural rule cannot be applied more strictly to a pro se litigant than to represented parties, particularly when the rule was neither stated nor reasonably knowable at the time.

IV. The waiver ruling was not reasonably foreseeable under New Mexico law

Nothing in New Mexico law made the waiver ruling reasonably foreseeable. *State v. Aragon* involved issues that were listed in a docketing statement but never developed there and never developed again in the brief in chief. The Court in *Aragon* treated those issues as

abandoned because they were never meaningfully argued at any stage. Here, by contrast, Petitioner's issues were developed in the docketing statement, accepted by the Court, and later treated as forfeited based solely on a non-repetition requirement that was never articulated in advance. Nothing in Aragon suggests that a litigant abandons an issue the Court has already accepted as preserved and then signaled need not be repeated. The waiver ruling in this case therefore represents an unforeseeable application of an unstated procedural rule.

In the previous appeal, the Court of Appeals stated that federal law did not apply because the case was in state court. Petitioner did not initially contest that point because he did not imagine the Court could be mistaken on such a fundamental principle. In the present appeal, however, Petitioner demonstrated that this earlier statement was incorrect by citing a century-old, never-overturned decision establishing that federal constitutional protections apply in every state court. Even apart from that federal authority, Petitioner also understood that New Mexico law independently required the Court to apply the same principles, so he reasonably believed that either source of law—federal or state—would govern the issue.

This Court's decision in Crutchfield reinforces the principle that procedural rules must be applied in a manner that affords fair notice and a reasonable opportunity to comply. A procedural requirement that is neither stated nor reasonably inferable cannot serve as the basis for dispositive waiver. Crutchfield confirms that a litigant cannot be penalized for failing

to anticipate an unstated procedural requirement, particularly where the court's own instructions and silence reasonably suggested that the litigant's approach was permissible.

Petitioner does not rely on pro se leniency. The argument rests on notice, foreseeability, and the adequacy of the procedural rule. Pro se principles are preserved only in the alternative.

V. The procedural basis for the waiver ruling became clear only after disposition, satisfying Rule 44.2

A procedural forfeiture cannot rest on a requirement that was not firmly established, regularly followed, or reasonably knowable at the time compliance was required. *See Ford v. Georgia*, 498 U.S. 411, 423–24 (1991); *NAACP v. Alabama*, 357 U.S. 449, 457–58 (1958); *Lee v. Kemna*, 534 U.S. 362, 376 (2002). This Court has long held that federal constitutional protections apply in state courts. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 234–35 (1897). Here, the repetition requirement applied by the Court of Appeals appears nowhere in the appellate rules, official forms, calendar notices, or briefing instructions; it was not asserted by any party. A waiver ruling resting on such a novel and unforeseeable requirement lacks the notice and predictability necessary for meaningful appellate review and cannot serve as a sound procedural basis for a dispositive forfeiture.

This Court has repeatedly held that a procedural bar

is inadequate where the litigant lacked fair notice or a meaningful opportunity to comply. *See Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) (procedural requirements cannot be enforced where compliance was not reasonably possible). A procedural rule is inadequate when it is novel, inconsistently applied, or not clearly announced. *See James v. Kentucky*, 466 U.S. 341, 348–49 (1984). A state procedural rule is inadequate where it is not strictly or regularly followed. *See Hathorn v. Lovorn*, 457 U.S. 255, 262–63 (1982). And a procedural bar cannot apply where the rule was unclear at the time of the litigant's action. *See Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). These decisions reinforce that a procedural requirement cannot bar review when it was neither articulated nor reasonably knowable at the time Petitioner filed his Brief in Chief.

Because the operative procedural requirement was neither articulated nor reasonably inferable until after the Court's disposition, the basis for the waiver ruling constitutes an intervening circumstance and a substantial ground not previously available within the meaning of Rule 44.2. Petitioner raised this issue at the first practicable opportunity after the basis for the waiver became known. Rehearing is therefore warranted.

CONCLUSION

Because the waiver ruling rests on an unforeseeable and insufficiently communicated procedural requirement that operated as a dispositive forfeiture, rehearing is warranted. Vacatur and remand are

appropriate so the Court of Appeals may consider the preserved issues on the merits under a clearly articulated and predictable procedural framework.

Respectfully submitted,

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