

No. 26-87

IN THE
Supreme Court of the United States

DIANA STEVENS-REYNOLDS,
Petitioner,

v.

WILSHIRE INSURANCE COMPANY AND
I A T INSURANCE GROUP,
Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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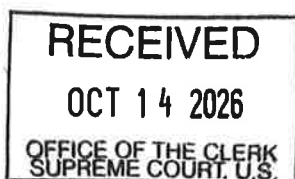


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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Respondents’ Brief in Opposition (“BIO”) recasts this case as a routine scheduling dispute. It is not. The Fifth Circuit affirmed the total exclusion of Petitioner’s damage expert after addressing only two of its own four *Geiserman* factors. It affirmed dismissal of the entire Motel claim on the stated ground that Petitioner identified “no summary judgment evidence” of non-roof damage—although Respondents’ own summary-judgment exhibit itemized more than \$288,000 in repairs outside its roof section. And it affirmed rejection of the Hurricane Delta penalty claim because the underlying Delta claim “was not proven”—after the exclusion had removed the expert proof needed to prove it. App. C, slip op. 2–4.¹

¹The Fifth Circuit’s unpublished per curiam opinion, *Steven-Reynolds v. Wilshire Ins. Co.*, No. 24-30642 (5th Cir. Mar. 31, 2025), *reh’g denied* (June 11, 2025), is reproduced in the Petition’s Appendix C; “slip op.” refers to its pagination. “Dkt.” refers to the district-court docket, No. 2:22-cv-1238 (W.D. La.); pin cites are to ECF page numbers. The Trial Opinion, Dkt. 163 (Sept. 19, 2024), is Appendix E.

The BIO does not dispute that the exclusion determined the outcome of claims. It argues instead that exclusion is automatic, that no circuit conflict exists, and that the questions were not preserved. Each argument fails. This Reply answers each point the BIO raises; where the BIO leaves a showing in the Petition unanswered, Petitioner identifies it as unrebutted.²

I. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

The BIO contends the Questions Presented were not raised below. BIO 22–24. But the Fifth Circuit expressly decided each underlying ruling: loss valuation, the Motel roof exclusion, the exclusion of Petitioner’s experts, and bad faith. App. C, slip op. 2–4. It identified the four *Geiserman* factors governing expert exclusion and affirmed. *Id.* at 3. An issue is reviewable when it was “pressed or passed upon below.” *United*

²Rule 15.2 obliges a respondent to identify “in the brief in opposition, and not later, any perceived misstatement made in the petition.” Petitioner does not contend that silence is a formal admission, and she does not concede Respondents’ characterizations of the record, preservation, prejudice, or the scope of the rulings below.

States v. Williams, 504 U.S. 36, 41 (1992). And “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Petitioner’s due-process, proportionality, factfinding, and lesser-sanction arguments are reasons the preserved exclusion ruling was error, not new claims.

Respondents note that the August 2023 summary judgments, Dkt. 45; Dkt. 48, 49, preceded the February 28, 2024 exclusion order, Dkt. 80. BIO 20–24, 28–30. That chronology does not defeat Question Two. The exclusion’s dispositive effect materialized at trial: the Delta claims were dismissed because Petitioner had no expert to separate Delta damage from Laura damage, Dkt. 163 at 2, and the Fifth Circuit affirmed because the Delta claim “was not proven.” App. C, slip op. 4. Respondents themselves argue that the Delta claim failed for lack of proof of damages attributable solely to Delta. BIO 34–35. That is precisely the technical allocation the excluded expert evidence addressed.

Question Three likewise concerns the preserved exclusion ruling, as Part III explains.

II. THE CIRCUITS ARE DIVIDED ON WHAT RULE 37(c)(1) REQUIRES WHEN EXCLUSION IS CLAIM-DISPOSITIVE

Respondents argue that the Petition's authorities involved other Rule 37 provisions and therefore show no conflict. BIO 25–27.³ The conflict does not depend on those citations. It concerns whether a court must consider fault and lesser measures before imposing a Rule 37(c)(1) exclusion that, in practical effect, ends a claim. The courts of appeals answer that question differently.

The Ninth Circuit holds that when an exclusion “amounted to dismissal of a claim,” the district court “was required to consider whether the claimed noncompliance involved willfulness, fault, or bad faith, ... and also to consider the availability of lesser sanctions.” *R & R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1247 (9th Cir. 2012). The Ninth Circuit later confined the lesser-sanction requirement to cases in which the

³The Petition's citation to “Heartland Bank v. Country Club Bank” should read *Heartland Bank v. Heartland Home Fin., Inc.*, 335 F.3d 810 (8th Cir. 2003). Petitioner rests the conflict on the authorities discussed in this Reply.

sanctioned party requests one. *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 741–42 (9th Cir. 2021).

The Eighth Circuit holds that the district court’s discretion “narrows as the severity of the sanction or remedy it elects increases,” and that “[w]here the exclusion of evidence is tantamount to dismissal, a district court may need to first consider the possibility of lesser sanctions”—but it has declined to require a finding of willfulness or bad faith. *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 704–05 (8th Cir. 2018) (citations omitted); see *Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008); *Heartland Bank v. Heartland Home Fin., Inc.*, 335 F.3d 810, 817 (8th Cir. 2003).

The Sixth Circuit, following the Fourth, applies a five-factor test led by “the surprise to the party against whom the evidence would be offered” and “the ability of that party to cure the surprise,” and explains that harmlessness “involves an honest mistake on the part of a party coupled with sufficient knowledge on the part of the other party.” *Howe v. City of Akron*, 801 F.3d 718, 747–48 (6th Cir. 2015) (citations omitted); see *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003).

The Fifth Circuit's own framework requires consideration of four factors, including "the importance of the testimony" and "the availability of a continuance to cure such prejudice." *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir. 1990). In *Betzel v. State Farm Lloyds*, 480 F.3d 704 (5th Cir. 2007), an insurance case, the Fifth Circuit reversed an exclusion although the insured offered no explanation at all, because the sanction was dispositive and "[a]ny number of less-dispositive sanctions, in conjunction with a continuance, were at hand." *Id.* at 707–09. The decision below recited the same four factors but affirmed solely on explanation and prejudice: "[n]ot only did Reynolds fail to explain why she did not provide expert reports, but the district court also concluded Wilshire would be prejudiced by that failure to disclose." App. C, slip op. 3. It did not address importance or the availability of a continuance.

The result is that the same disclosure deficiency may produce claim-ending exclusion in one circuit and a required inquiry into fault, curability, and lesser sanctions in another. Petitioner does not contend that every circuit uses the formula "willfulness or bad faith." The question is whether total exclusion may operate as a presumptive, claim-ending sanction without meaningful consideration of importance, actual

prejudice, curability, and the lesser measures Rule 37(c)(1) itself authorizes “[i]n addition to or instead of” exclusion.

III. THE EXCLUSION RESTED ON AN UNRESOLVED DISCLOSURE RECORD

The BIO contends Petitioner simply failed to use available process. BIO 27–28. That argument assumes the disputed premise—that Respondents lacked Copeland’s work and were surprised by it. The record shows otherwise.

On January 10, 2024, Petitioner’s counsel transmitted discovery responses by Dropbox under the subject line “Reynolds v. Wilshire Discovery Responses via Dropbox,” and defense counsel replied the same day: “Got it, thanks.” Dkt. 75-1, at 3.⁴ Respondents acknowledge receipt but contend the production was deficient. BIO 19–20. More fundamentally, Wilshire had already filed the Copeland Estimate itself, as an exhibit to its June 26, 2023 motion for partial summary judgment

⁴The Petition described this production at Pet. 11–12. Respondents’ later filing asserted that no report or other documents from Copeland had been provided. Dkt. 77. The district court did not resolve that conflict.

on the Roof Exclusion—four months before the October 31, 2023 expert deadline. Dkt. 18 (Exhibit 9, filed as Dkt. 18-11). Respondents knew Copeland’s role, requested his deposition in November 2023, and moved to compel it on January 2, 2024. Dkt. 63.

Petitioner does not contend that Respondents’ possession of the Estimate satisfied every formal element of Rule 26(a)(2)(B). But Rule 37(c)(1) poses a separate question: whether the failure was “substantially justified or is harmless,” and, if not, what sanction fits. Surprise, knowledge, and curability are the heart of that inquiry. *Howe*, 801 F.3d at 747–48. A party that attached an expert’s estimate to its own dispositive motion cannot credibly claim surprise at its contents.

The schedule confirms the deficiency was curable. Trial had been continued to September 2024; the district court permitted supplementation through March 15 and directed that Copeland’s deposition be completed by April 12. Dkt. 79; BIO 7. The BIO never explains why any missing report components—qualifications, prior testimony, compensation, elaboration of opinions—could not have been supplied and tested within that schedule, with fees or costs imposed if

appropriate. *Cf. Betzel*, 480 F.3d at 707–09. Nor does it identify any finding that lesser measures were inadequate.

Respondents emphasize that the expert deadline was never extended and that Petitioner’s explanation was inadequate. BIO 16–18. But explanation is one *Geiserman* factor; it does not dispense with the others, as *Betzel* held where no explanation was offered at all. Nor do missed depositions establish surprise about Copeland, whose deposition Respondents themselves were pursuing. BIO 5–7, 16.

The constitutional dimension follows. Rule 37 sanctions must be “just” and “specifically related to the particular ‘claim’” at issue. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). This Court has long distinguished noncompliance attributable to “willfulness, bad faith, or any fault” from other failures before permitting sanctions that foreclose a merits determination. *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958); see *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350–51 (1909). Respondents answer that courts have no duty to investigate compliance. BIO 30–31. Petitioner seeks no roving duty. She asks whether a court may impose a claim-ending sanction

without resolving contradictory record evidence material to the sanction factors. The BIO does not answer that question.

IV. RESPONDENTS' OWN SUMMARY-JUDGMENT EXHIBIT SHOWED NON-ROOF MOTEL DAMAGE

The district court dismissed every Motel claim on Wilshire's Roof Exclusion motion. Dkt. 48, 49. The Fifth Circuit acknowledged Petitioner's argument that "the motel suffered damage unrelated to the roof," but held that she "points to no summary judgment evidence establishing a fact dispute over whether the motel suffered non-roof-related damage." App. C, slip op. 2. Respondents repeat that position. BIO 23–24, 29.

The summary-judgment record contradicts that premise. The 35-page Copeland Estimate that Wilshire attached as Exhibit 9 to its own motion itemizes \$392,257.34 in damages. Dkt. 18-11 at 27 (PageID 507).⁵ Only \$103,420.25 falls in the section labeled "Roof." *Id.* at 2 (PageID 482). The remaining \$288,837.09 falls in separately labeled sections: Framing

⁵Because Wilshire filed the Estimate in the district court, it is part of the record on review. Petitioner will provide the pertinent pages should the Court so request.

(\$50,939.35), *id.* at 2; Electrical (\$20,440.38), *id.* at 2–3; Motel Units (\$182,830.40), *id.* at 3–27; Fencing (\$21,405.46) and General Items (\$13,221.50), *id.* at 27. The Motel Units section itemizes drywall, insulation, rewiring, light fixtures, painting, and cleaning for each of 32 rooms. *Id.* at 3–27 (PageID 483–507). The Estimate reports that “[t]he framing of the entry way of the motel was severely damaged” and “[t]he main electrical panel was damaged,” *id.* at 1 (PageID 481), and assigns the fencing to “Other Structures” coverage, *id.* at 28 (PageID 508).

Under Louisiana law, “the insurer bears the burden of proving the applicability of an exclusionary clause within a policy.” *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 124 (La. 2000). A summary-judgment movant bearing the burden on an issue must establish “beyond peradventure all of the essential elements of the claim or defense.” *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). “Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.” *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160–61 (1970) (quoting advisory committee’s note to 1963 amendment of Fed. R. Civ. P. 56(e)). And a court “may consider other materials in the record,”

Fed. R. Civ. P. 56(c)(3), but may not resolve genuine factual disputes in the movant's favor. *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (per curiam).

The decision below placed on Petitioner a burden Louisiana law assigns to the insurer, and disregarded evidence the insurer itself put before the court. A roof exclusion reaches items within its terms. It does not, merely by existing, convert a \$392,257.34 repair scope—nearly three-quarters of which lies outside the roof section—into excluded roof damage.

The Trial Opinion confirms the breadth of the ruling: it describes the Motel damages as “dismissed due to a roof exclusion in the policy,” while recounting a February 2, 2022 demand that separately identified \$518,123.21 in Laura damages and \$374,034.09 in Delta decking and reroofing. Dkt. 163 at 4.

Respondents answer that no expert evidence opposed the Roof Exclusion motion. BIO 18, 23–24. But the expert deadline had not yet passed, and Wilshire's own exhibit already documented the non-roof

scope. The Motel issue therefore stands independently of the later exclusion order.

V. THE DELTA, BAD-FAITH, AND LOSS-VALUATION RULINGS CONFIRM THE EXCLUSION WAS FUNCTIONALLY DISPOSITIVE

Respondents argue that after trial the district court found no bad faith and that Petitioner could not prove damages attributable solely to Delta. BIO 32–35. That is the point. The estimate of Carbon Consulting, Petitioner’s public adjuster—opened under Wilshire’s claim number on November 14, 2020, the day of the joint post-Delta reinspection, Dkt. 138-1 at 1 (PageID 1905) (listing Carbon as “Claim Rep.”); Dkt. 163 at 5—contains five sections labeled “DELTA RE-SHINGLE,” identifying \$51,295.35 in Delta sheathing and shingle work: \$9,530.55 at 2222 Woodring, *id.* at 2 (PageID 1906); \$16,067.68 at 2150 Mary, *id.* at 19 (PageID 1923); \$12,955.23 and \$4,765.28 for the lower and upper roofs at 2029 See, *id.* at 36–37 (PageID 1940–41); and \$7,976.61 at 213 Decker, *id.* at 66 (PageID 1970). Petitioner filed that estimate with her opposition to Respondents’ motion in limine. Dkt. 138. On August 28, 2024, the district court struck it from the record. Dkt. 147. The Trial Opinion then

dismissed the Delta claims because Petitioner “had no expert to provide a report or testify as to any separate damages from Delta.” Dkt. 163 at 2. The Fifth Circuit rejected the statutory-penalty claim under La. Rev. Stat. § 22:1892 because “Reynolds’ claim related to damages from Delta was not proven.” App. C, slip op. 4.

The Trial Opinion notes Copeland’s May 2021 statement that he could not separate the two storms’ damage. Dkt. 163 at 7. But Copeland became involved only in January 2021, after the estimates were prepared. *Id.* at 8. Carbon, the public adjuster that inspected the properties with Wilshire’s adjuster in November 2020, did separate the Delta work—and that proof was stricken. The exclusion operated as a claim-ending sanction even though the final disposition came at trial rather than by summary judgment. The BIO does not answer that contention.

The loss-valuation ruling is relevant in the same way. The Fifth Circuit held that Petitioner had not explained how the policies’ exceptions to actual-cash-value settlement applied. App. C, slip op. 2; see Dkt. 45. Respondents treat that ruling as ordinary contract interpretation. BIO 20–21, 29. The ruling is part of the context in which

recoverable damages were narrowed while the technical proof needed to establish them was excluded.

VI. THE FEDERAL-STATE, SUPERVISORY, AND NATIONAL-IMPORTANCE GROUNDS STAND UNREBUTTED

Respondents say the district court applied federal procedure and Louisiana substantive law. BIO 31–32. Petitioner agrees that valid Federal Rules govern procedure in diversity cases. *Hanna v. Plumer*, 380 U.S. 460, 471–74 (1965). The concern is practical: when a federal disclosure sanction removes the only means of proving Louisiana-created insurance rights and statutory penalties, see La. Rev. Stat. §§ 22:1892, 22:1973, the proportionality safeguards within Rule 37(c)(1) should be applied, not bypassed. The BIO does not answer that point.

Respondents characterize the case as ordinary error correction. BIO 24–35. But the Petition invokes this Court’s supervisory power because the decision below “so far departed from the accepted and usual course of judicial proceedings” as to warrant review. Sup. Ct. R. 10(a). It affirmed a claim-ending exclusion without addressing two of the circuit’s own four factors, on a disputed disclosure record, and affirmed the Motel dismissal

on a premise contradicted by the movant's own exhibit. Respondents' factual dispute under Rules 11 and 26(g), BIO 19–20, confirms that the sanction rested on unresolved facts.

Nor does the BIO answer the Petition's showing that the question recurs nationwide—in technical litigation generally and in natural-disaster insurance cases particularly, where separating the damage caused by successive storms ordinarily requires expert proof. Those grounds stand unrebutted.

VII. THIS CASE IS A SUITABLE VEHICLE

Respondents argue that record disputes and chronology make the case unsuitable. But the Fifth Circuit actually decided the expert-exclusion issue, the Motel non-roof argument, loss valuation, and the Delta and bad-faith claims. App. C, slip op. 2–4. It can decide the recurring federal question whether, when Rule 37(c)(1) exclusion has claim-dispositive consequences, a court must resolve material disclosure disputes and consider importance, actual prejudice, curability, and lesser measures before total exclusion.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment insofar as it affirms the expert-exclusion ruling and the claims it affected, and remand for application of the proper Rule 37(c)(1) standard.

September 26, 2026

Respectfully submitted,

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