No. 13-1252

IN THE

Supreme Court of the United States

ESTATE OF HENRY BARABIN;
GERALDINE BARABIN, personal representative,
Petitioners,

v.

ASTENJOHNSON, INC. AND
SCAPA DRYER FABRICS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT ASTENJOHNSON, INC.

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REPLY TO BRIEF IN OPPOSITION OF RESPONDENT ASTENJOHNSON, INC.

In its brief in opposition, respondent AstenJohnson, Inc., asserts that cases like this one, in which a new trial is ordered merely because of a district court's procedural *Daubert* gatekeeping error, "are unusual" and "unlikely to recur," so that the question presented "has little practical significance." Opp. 3; *see also* Opp. 10 ("the Ninth Circuit's ruling is narrow and reflects a circumstance that will rarely arise").

If that were true, the busy Ninth Circuit would not have bothered with en banc review of the *Barabin* panel decision. Although the court reached the wrong result (by a narrow 6-to-5 margin[1]), in granting en banc review it correctly understood that the proper remedy for a district court's failure to make required findings regarding the admission or exclusion of important evidence at trial involves "a question of exceptional importance," Fed. R. App. P. 35(a)(2). The fundamental issue at the center of this case — what authority is allocated to appellate courts and district courts, respectively, under 28 U.S.C. § 2111 and Fed. R. Civ. P. 59(a)(1)(A), regarding the proper remedy for district court evidentiary errors at trial — is an important one that merits clarification by this Court.

AstenJohnson's prediction that the en banc decision below will only "rarely" force wasteful new trials in cases involving expert testimony has already been proven wrong. AstenJohnson overlooks two decisions issued by the Ninth Circuit just in the month between the filing of our petition and the filing of its opposition, *United States v. Christian*, 2014 WL

[1] The vote to reaffirm the *Mukhtar* rule was 6-to-5, Pet. App. 2a, 20a, not 8-to-5 as stated at Pet. 9, 22.

1491887 (9th Cir. Apr. 17, 2014), and *United States v. Young*, 2014 WL 1624311 (9th Cir. Apr. 24, 2014). *Christian* and *Young* relied on *Barabin* to grant criminal defendants new trials due to mere procedural *Daubert* gatekeeping error, with no requirement that they prove *any* substantive error in the evidence actually heard by the jury, much less *harmful* error.

Most of the points made in the petition stand unrebutted. In particular, AstenJohnson completely fails to acknowledge the importance of clearly defining the proper scope of appellate review on evidentiary matters and the range of discretion that should be left to district courts on these matters, as well as the particular need to construe Section 2111 and Rule 59(a)(1)(A) to avoid unnecessary retrials on remand. Review by this Court is needed to ensure that the circuit courts comply with limits on their authority to displace jury verdicts, to eliminate an intractable conflict among the circuits, to give greater content and guidance to the harmless-error rule, and to bring greater order to appellate review of evidentiary matters generally.

A. The En Banc Decision Below Improperly Claims Power for Appellate Courts That Congress Has Allocated to District Courts

AstenJohnson has virtually no rebuttal to the portions of the petition demonstrating that the Ninth Circuit's 6-to-5 en banc decision, by displacing the discretion of district courts to correct merely procedural evidentiary errors on remand without a wasteful new trial, ignores controlling statutory and rule provisions and is irreconcilable with this Court's precedent. Pet. 3-4, 10-18.

The *Mukhtar* rule, which mandates new trials in cases involving important expert testimony merely because *Daubert* gatekeeping error has occurred:

(1) exceeds the authority Congress first vested in federal appellate courts to grant new trials in the Judiciary Act of 1789, which remains in force for civil cases via Fed. R. Civ. P. 59(a)(1)(A), Pet. 3; and

(2) violates the express limitation on the authority of appellate courts to grant new trials for technical reasons, enacted by Congress a century ago, now codified in 28 U.S.C. § 2111. Pet. 3-4, 10-11.

AstenJohnson's response? This Court should not review *Barabin* for compliance with Section 2111 because the Ninth Circuit gave so little heed to the statute that it did not even cite it (although petitioners did). Opp. 4. Understandably, AstenJohnson prefers that this Court focus less on the governing statute and more on policy considerations. *E.g.*, Opp. 8-10. By granting review and focusing on Section 2111 and related rules, this Court can reinforce the principle that in jurisdictional matters, analysis should start — and often end — with the text of the relevant statutes and rules, not with policy. Pet. 15.

The petition also demonstrates that mere procedural *Daubert* gatekeeping error cannot, in itself, affect the verdict in any way, so that it is impossible for such errors (standing alone) to justify a new trial under this Court's standard harmless-error jurisprudence. Pet. 11-13 & note 3.

AstenJohnson's response? Nothing. The opposition addresses none of the harmless-error precedents cited in the petition. It ignores the analysis of fourteen different Ninth Circuit judges explaining why the *Mukhtar* rule violates this Court's harmless-error jurisprudence: the eleven judges who dissented from the denial of rehearing en banc in *Mukhtar* (listed at

Pet. 12 n.3), plus three judges who dissented from the en banc decision in *Barabin* but who were not yet on the court when *Mukhtar* was decided (listed at Pet. App. 20a) (two judges dissented in both cases).

Finally, the petition demonstrates that the only remaining way of justifying the *Mukhtar* rule under this Court's jurisprudence is to justify it as a structural-error rule. Plainly it *operates* in that fashion, requiring no showing that the procedural gatekeeping error actually altered the evidence the jury would have heard absent the procedural error. The concept of creating a structural-error rule that does not involve constitutional error, and that operates in civil cases, is wholly foreign to this Court's jurisprudence. Pet. 13-18.

AstenJohnson's response? No dispute that the *Mukhtar* rule operates as a structural-error rule, and no serious rebuttal to our demonstration that the creation of this new structural-error rule for civil cases violates multiple strands of this Court's jurisprudence — only some nibbling away at the edges of a minor aspect of our analysis. Opp. 8-9 n.3.

Nor does AstenJohnson even mention the Third Circuit's decision in *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985) (discussed in Pet. 21). *Downing* articulated the division of authority between appellate and district courts, when there has been procedural error involving trial evidence, in a manner diametrically opposed to *Barabin*. It supplies a model of how this Court, consistent with its past decisions, can and should clarify the relation between federal appellate and trial courts regarding the proper remedy for trial evidentiary errors, and in so doing should emphasize the need to avoid unnecessary new trials.

Downing, authored by Judge Becker — and one of the landmark pre-*Daubert* decisions on expert testimony (its Rule 702 "fit" analysis was adopted by

this Court in *Daubert*[2]) — was a criminal case in which the district court had used an improper legal test to bar the defendant from calling a psychologist on the reliability of eyewitness identifications. *Id.* at 1228, 1241. The court found the record too sparse to resolve the admissibility issue on appeal, *id.* at 1242, and directed the district court to reopen the record, by holding "an evidentiary hearing concerning the admissibility of [defendant's] proffered expert testimony." *Id.* at 1244. Whether a new trial could be granted depended on the result of that hearing: "The district court's error will become harmless if on remand the district court . . . decides that the proffered testimony is not admissible. . . . [A] new trial is required only if the district court determines that the proffered testimony is admissible." *Id.* at 1243. *See also id.* at 1244 ("judgment of conviction should be reinstated" if testimony again found inadmissible).

Judge Becker's analysis, and his order that the criminal defendant could not receive a new trial unless he ultimately established that the expert testimony was admissible, hardly broke new ground. It was an application of the general rule — supported by a leading treatise, and illustrated by this Court's decision in *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008) — that when discretion has been exercised improperly on evidentiary matters by a district court, the remedy is a remand to permit its proper exercise. Pet. 19-20.

It is no answer that, due to its particular facts, *Mendelsohn* did not involve "a *Daubert* issue at all." Opp. 11. *Mendelsohn* articulated a general rule govern-

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[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993).

ing appellate review of a district court's failure to exercise discretion properly on evidentiary matters, one not tied to the facts of the particular case, and one which suggests no basis for some special exception applicable to expert testimony. *E.g.*, 552 U.S. at 381 (remand for "relevant inquiry under the appropriate standard"); *id*. at 384 ("the Court of Appeals should have remanded the case to the District Court for clarification").

AstenJohnson is no more persuasive in its effort to distinguish *Mendelsohn* as somehow limited to a district court's application of "the wrong evidentiary standard in excluding certain evidence," Opp. 11, and thus supposedly inapplicable to a case in which the district court "failed to conduct the necessary" analysis at all. Opp. 12. Both scenarios involve a district court's failure to exercise its discretion properly and thus (to borrow Judge Posner's analysis, Pet. 18-19, ignored by AstenJohnson) are equally an abuse of discretion. Logically they should be governed by the same rule on the scope of a remand articulated by this Court in *Mendelsohn* and illustrated by Judge Becker's *Downing* decision. But if different rules are to be applied, they should be articulated by this Court rather than made up by the circuit courts without reference to Section 2111 and Rule 59.

B. The Decision Below Deepens an Intractable Division Among the Courts of Appeals

The Ninth Circuit's recent decisions in *Christian* and *Young*, extending *Barabin*, eliminate any doubt about the intractable circuit division over whether new trials *must* (Ninth and Tenth Circuits) or *must not* (Third and Fourth Circuits) be granted for mere procedural *Daubert* gatekeeping errors. AstenJohnson

has not disputed the petition's showing that the Third and Fourth Circuits are in conflict with *Barabin* and with settled law in the Tenth Circuit. Pet. 5, 21. Asten-Johnson merely disputes whether the Seventh Circuit is involved in the circuit division. Opp. 11 n.5.

When a case "has been decided differently from a very similar case coming from another lower court," there is an undeniable conflict. WILLIAM H. REHNQUIST, THE SUPREME COURT 234 (2001). The conflict here is most readily appreciated by comparing the Third Circuit's *Downing* decision, *against* the criminal defendant, with the recent Ninth Circuit holdings (applying *Barabin*) on very similar facts in *Christian* and *Young*, *in favor of* the criminal defendants.

In *Downing*, the criminal defendant's argument for a mandatory new trial was denied because under Third Circuit precedent, following general practice, a new trial *must not* be granted for mere procedural error in a district judge's gatekeeping of expert testimony. 753 F.2d at 1243.

By contrast, the criminal defendants in *Christian* and *Young* won their appeals seeking a mandatory new trial based on *Barabin*'s holding that a new trial *must* be granted for mere procedural *Daubert* gatekeeping error involving important expert testimony (assuming that the substantive evidentiary issue cannot be resolved on appeal, which is typical, see p. 10, *infra*).

Christian involved a Nevada man whose car had been repossessed and who, after various public officials failed to help recover it, sent e-mails threatening to kill a police chief, a prosecutor, and a judge. 2014 WL 1491887, at *2. He was prosecuted for transmitting death threats through interstate commerce. Claiming he had a diminished capacity to understand the threatening nature of his e-mails (negating specific intent), Christian sought to call a psychologist to so

testify. *Id*. at *3-*4. As in *Downing*, the district court excluded the defendant's testimony. The Ninth Circuit reversed his conviction solely on the basis of a procedural *Daubert* gatekeeping error — the district court had "applied an erroneous legal standard" in analyzing admissibility. *Id*. at *5-*6.

The court made clear it was *not* holding that the expert testimony "must be admitted," only that the district court on remand must conduct a proper legal analysis. *Id*. at *7. Rather than order a limited remand for that purpose, with a new trial to be held only if the evidence was actually found admissible (all *Downing* permits), the Ninth Circuit panel ordered an outright new trial, applying *Barabin*: "Although *Barabin* involved the *admission* of expert testimony in a *civil* trial and this case involves the *exclusion* of expert testimony from a *criminal* trial, we hold that *Barabin*'s analysis applies with equal force to these circumstances." *Id*. at *8.

Young is the reverse of *Christian*: the *Daubert* gatekeeping error related not to the exclusion of a defense expert witness, but to the admission of a prosecution expert witness. Young was an admitted drug dealer who was brought in for questioning during a murder investigation.[3] Although Young was searched at the start of the interview and no contraband was found, immediately afterward the police noticed a plastic bag on the floor that had not been there earlier. It contained nearly a pound of crack cocaine. Young was prosecuted for possession with intent to distribute. After a seven-day trial, Young was convicted, based partially on a DNA expert's testimony that DNA

[3] The factual context, not set out in the Ninth Circuit's memorandum opinion, is taken from the parties' briefs, available on PACER.

matching Young's was on the bag (with the odds that someone other than Young left the DNA being at least 10,000 to 1).

As in *Barabin* and *Christian*, the Ninth Circuit reversed solely on the basis of a procedural *Daubert* gatekeeping error: the district court's failure to make specific findings regarding the government expert's DNA methodology. *Young*, 2014 WL 1624311, at *1. On a limited remand (permitted by *Downing*), the district court could have made these findings, rendering another seven-day trial unnecessary (assuming the DNA testimony was found relevant and reliable). But instead of permitting that commonsense option, being bound by the automatic-reversal rule of *Mukhtar*, *Barabin*, and *Christian*, the panel ordered a complete new trial. *Id*. at *2.

Clearly *Downing* would have been decided differently in the Ninth Circuit, and *Christian* and *Young* would have been decided differently in the Third Circuit — the acid test for whether a real conflict exists.

C. The Decision Below Presents a Purely Legal Issue, Unencumbered by Record-Specific Concerns

Throughout AstenJohnson's opposition are various suggestions that the case is too record-specific, fact-bound, or otherwise peculiar to merit review. None need give this Court pause in concluding that the purely legal issue decided below — the validity of the *Mukhtar* rule criticized by fourteen Ninth Circuit judges, which nonetheless survived en banc review by a single vote — merits review by this Court.

According to AstenJohnson, the en banc judges "unanimously agreed that the existing record was 'too

sparse' to allow a court" — that is, on AstenJohnson's reading, *any* court, including a district court — to resolve the *Daubert* issues "on the existing record . . . ." Opp. 2 (citing Pet. App. 19a, 21a). The cited pages do not bear this out. The judges were merely explaining why "we" could not finally rule on admissibility "with certainty," the record being too sparse for that — that is, too sparse for *them* to rule on appeal that, despite the broad discretion afforded district judges on evidence issues, the record permitted only one result (so no remand would be needed). When a district court commits a procedural *Daubert* gatekeeping error, it is typical (hardly odd) that the record will be too sparse to allow *the appellate court* to rule with certainty that there is no basis for the district court to exercise discretion on remand. *E.g.*, *Christian*, *supra*, 2014 WL 1491887, at *8 (record too sparse to make final determination); *Young*, 2014 WL 1624311, at *2 (same); *Downing*, 753 F.2d at 1242 (same).

Even accepting AstenJohnson's reading of the decision below, it fails to demonstrate that anything should turn on whether the existing record is adequate for the district court to resolve the *Daubert* issues on remand, without reopening the record. Opp. 6, 9 n.4. But if anything does turn on that, the idea that the record is somehow inadequate is difficult to square with the representation of AstenJohnson's prior counsel during the en banc oral argument that "the record's fully developed" on the *Daubert* issues. Tr. 2:18.[4] Dramatically illustrating its counsel's point that "[w]e have a thoroughly developed record," Tr.

[4] Video of the en banc oral argument is posted on the Ninth Circuit's website at http://www.ca9.uscourts.gov/media. Transcript citations are to an unofficial transcript posted in PDF format at http://www.scribd.com/doc/227314021.

10:6, was the "massive" eight-inch-high stack of record materials referenced in the argument. Tr. 3:3, 11:21.

AstenJohnson also complains that we "repeatedly misstate the trial court's error" as involving merely a failure "to make particularized findings" under Fed. R. Evid. 702. Opp. 5 n.1. But a fair reading of the district judge's two written decisions and many oral statements addressing AstenJohnson's evidentiary objections — cited in Pet. 7 & note 2, but ignored by AstenJohnson — reveals he understood what was required of him by Rule 702 and *Daubert*, he impliedly made the necessary findings, but he failed to make explicit findings regarding the particular methodology used by each expert, which the en banc Ninth Circuit has now required.

D. A Vote on the Petition Should Be Postponed Until the United States' Position Is Known

Because two separate Ninth Circuit panels have recently relied on *Barabin* to mandate retrials of federal criminal cases, it appears the United States may have an interest in the question presented by this case (which encompasses procedural gatekeeping error in both civil and criminal cases, Pet. i), and in the broader issues underlying the case concerning the authority allocated to appellate courts and district courts, respectively, pursuant to 28 U.S.C. § 2111 and Fed. R. Civ. P. 59(a)(1)(A), regarding the proper remedy for evidentiary errors at trial.

Therefore this Court may wish to seek the United States' views. This Court may also find it prudent to wait to see whether the Solicitor General seeks review of *Christian* and/or *Young*, with an eye toward consolidating this case with any related case(s), or granting review in one case while holding the other(s).

The other respondent, Scapa Dryer Fabrics, Inc., filed a waiver. Assuming that prior to voting on the petition this Court would call for a response from Scapa, this Court likely would be unable in any event to grant certiorari before its summer recess. Therefore we suggest that this Court should call for that response and then postpone a vote on the petition until the United States' position is known.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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