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 SCAPA DRYER FABRICS, INC.

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I. The Thrust of the Petition Stands Unchallenged

Scapa's opposition leaves the petition's central contention unchallenged. A district court's mere *Daubert* gatekeeping error — its "failing to answer a threshold question of admissibility," Pet. App. 17a — yields an automatic new trial in the Ninth and Tenth Circuits even if no substantive error occurred in what the jury heard. This is contrary to 28 U.S.C. § 2111, which permits new trials *only* for errors that have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Reply to Asten-Johnson 3-6.

This rule triggers automatic new trials provided two conditions are met (ones almost always met when *Daubert* gatekeeping error occurs). First, the expert testimony involved must be "important," Pet. i, 5, 10, 13, 18. As the six en banc majority judges put it below, the rule is triggered when the evidence "is critical to the proponent's case." Pet. App. 15a. "[I]t would be the rare case indeed where expert testimony was not 'critical to the proponent's case,'" as the five en banc dissenting judges noted. Pet. App. 24a n.2. (Its importance is the very reason an opponent challenges its admission.) AstenJohnson and Scapa cite only three cases in which a new trial following a *Daubert* gatekeeping error has ever been avoided because the expert testimony at issue was *not* important.[1]

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[1] AstenJohnson cited none. Scapa cites five cases. Scapa Opp. 12-13. Only three qualify. *United States v. Roach*, 582 F.3d 1192,

Second, a new trial can also be avoided if "the record is sufficient to determine," Pet. App. 19a, that only one result can properly be reached on the admissibility question — that it would be an abuse of discretion to rule otherwise. This will rarely occur, given the wide discretion of district courts on evidentiary matters. Almost always the record will be "too sparse," *id.*, for definitive decision without a remand, as in *Barabin*; in the two Ninth Circuit cases decided after *Barabin*; and in *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). Reply to Asten-Johnson 10. AstenJohnson and Scapa have identified only one case in which a new trial following a *Daubert* gatekeeping error was perhaps sidestepped by an appellate court's definitive ruling on the existing record.[2]

1208 (10th Cir. 2009) (gatekeeping error involving expert testimony "that Roach was a member of the Crips" disregarded given "other evidence of Roach's gang membership"); *United States v. Smith*, 27 Fed. Appx. 577, 582 (6th Cir. 2001) (gatekeeping error involving police lab technician's testimony that defendant's hair matched hair on ski mask found near bank robbery disregarded given "overwhelming and diverse evidence" linking defendant to the crime); *United States v. Williams*, 29 Fed. Appx. 486, 487 (9th Cir. 2002) (gatekeeping error involving expert testimony that defendant's fingerprints were on gun disregarded given other evidence of possession).

United States v. Jawara, 474 F.3d 565 (9th Cir. 2006), apparently held that there was no gatekeeping error given the district court's "implicit finding of reliability" and the expert's "extensive academic qualifications and experience and the relevance and value of her testimony to the jury . . . ." *Id.* at 583. *United States v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004), did not involve whether a new trial should be granted; it merely affirmed a summary judgment ruling. *Id.* at 916.

[2] "Perhaps," because only an alternative holding was involved. *Storage Craft Technology Corp. v. Kirby*, 744 F.3d 1183, 1191-92

While avoiding the central thrust of the petition, Scapa's opposition does reveal, even more than the petition, confusion about the harmless-error rule — a rule which is applicable in a variety of contexts and is important to the proper and consistent administration of the appellate jurisdiction of the various circuits. Some circuits administer the rule emphasizing a particular, restrictive statute, 28 U.S.C. § 2111. Pet. 20-21; Reply to AstenJohnson 3-6. Others administer the rule emphasizing a general, flexible statute, 28 U.S.C. § 2106. Scapa Opp. 4-9. This division is mirrored in the sharp en banc split in *Barabin* between the six-judge majority (flexible approach to granting new trials) and the five-judge minority (restrictive approach). The lower courts need guidance on the relation between these two statutes, and on what constitutes "harmless error" generally in the evidentiary context. This Court is the only court that can eliminate the present confusion.

II. Scapa's Opposition on Balance Bolsters the Case for Certiorari

Much of Scapa's reply bolsters the case for certiorari. In particular, Scapa identifies additional circuits which order new trials for mere *Daubert* gatekeeping error, and suggests that the Third and Fourth Circuits' approach denying new trials for gatekeeping error conflicts with this Court's decisions under 28 U.S.C. § 2106.

(10th Cir. 2014) (cited in Scapa Opp. 2) (even assuming "district court's exegesis wasn't detailed enough to discharge its gatekeeping duties," no new trial needed because "[t]he expert's assumption . . . *was* grounded in record evidence," and defendant's "own testimony belies his methodological complaint").

A. Scapa's Argument That There is "No Need" For the Rule Petitioners Defend is Wrong

Scapa argues that there is "no need" for a rule generally mandating a remand when a *Daubert* gatekeeping error has occurred because this is a "rare situation . . . ." Scapa Opp. 3. And it objects that the rule defended by petitioners might be administratively burdensome, *id*. at 4, while ignoring the real-world costs entailed by automatically granting new trials based on technicalities (the delay in finality, and the drain on the resources of the trial court, second jury, and litigants). Although perhaps relevant at the merits stage (not this stage), it is doubtful that such policy arguments can carry much force in this jurisdictional context. Pet. 15; Reply to AstenJohnson 3.

Scapa also contends that "it is incorrect to suggest that the Ninth Circuit is construing *Barabin* as imposing an automatic-new-trial rule." *Id*. at 3. But the rule *does* operate automatically, provided that the expert testimony at issue is important and the record is too sparse for the appellate court to conclude that only one result is possible on the admissibility question (almost always true). See pp. 1-2, *supra*. The recent Tenth Circuit decision cited by Scapa confirms that these two conditions suffice to trigger a new trial.[3]

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[3] Consistent with *Barabin*, the Tenth Circuit held that a new trial for a gatekeeping error can be avoided only if it is clear "the existing one reached the right result," either because other competent evidence easily proved the point at issue (so the expert testimony was not important) or because "it is readily apparent from the record" that the district court's decision was the only result that could properly have been reached (so the record was not too sparse for resolving the question). *Storage Technology Corp.*, *supra* note 2, 744 F.3d at 1190-91.

B. Scapa's Argument That Granting New Trials for Mere *Daubert* Gatekeeping Error is Permitted by 28 U.S.C. § 2106 is Wrong

Scapa next contends that federal appellate courts possess authority to order new trials for mere *Daubert* gatekeeping error pursuant to their supervisory power, in 28 U.S.C. § 2106, to order "such further proceedings to be had as may be just under the circumstances" upon reversing a judgment. Scapa Opp. 4-9. Setting aside for the moment whether the generally worded § 2106 plausibly governs when new trials may be ordered (and not the later-enacted § 2111, which specifically focuses on limiting the power of appellate courts to grant new trials), Scapa's analysis significantly bolsters the case for certiorari because it reveals that the circuit conflict is more complex than previously understood.

To date petitioners have pointed to a two-way circuit conflict: two circuits (the Third and Fourth) hold that they *must not* order new trials for *Daubert* gatekeeping error, and two circuits (the Ninth and Tenth) hold that they *must* (assuming the expert testimony is important and the record too sparse to conclude that admissibility can be resolved only one way, as is typical). Reply to AstenJohnson 7-9. Scapa identifies a third duo of circuits in conflict with the first two groups. The Sixth and Seventh Circuits hold that they *may* order new trials for a gatekeeping error, Scapa Opp. 7-8, in deciding "on a case-by-case basis, and in the exercise of broad discretion, the proper disposition of a case on appeal." *Id.* at 9.

We concur with Scapa's analysis that the Sixth and Seventh Circuits have authorized new trials (rather than simply limited remands) for mere *Daubert*

gatekeeping error.[4] The Sixth Circuit's decision in *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000), stands in stark contrast to Judge Becker's decision for the Third Circuit in *Downing* (*see* Reply to Asten-Johnson 4-5). In both a district court committed a gatekeeping error in excluding a criminal defendants' expert testimony questioning the reliability of eyewitness testimony. In both the record proved too sparse to resolve the admissibility issue on appeal. In *Downing* the Third Circuit refused to mandate a new trial, noting that the procedural error "will become harmless if on remand" the evidence were again held inadmissible. 753 F.2d at 1243-44. By contrast, in *Smithers* the Sixth Circuit ordered "a new trial based on the district court's failure to conduct a *Daubert* test before excluding the eyewitness expert's testimony . . . ." 212 F.3d at 318 n.6.

The Seventh Circuit similarly held that a *Daubert* gatekeeping error warranted a new trial in *United*

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[4] None of the other decisions cited in Scapa Opp. 4-9 involve a *Daubert* gatekeeping error. Several merely explicate Third Circuit law, focusing on its doctrine authorizing *de novo* review on appeal of certain evidentiary issues (not involving expert testimony) when the district court has failed to conduct required balancing. *See* Pet. 19 n.5 (Third Circuit cases); Scapa Opp. 7 (same). As to the others, with only two exceptions they do not even involve expert testimony (seven of the ten do not even involve evidence issues). They simply illustrate the operation of § 2106.

Neither of the decisions actually involving expert testimony is pertinent. *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77 (1st Cir. 1998), reversed a *Daubert* ruling and ordered a new trial, but on the merits, not for inadequate gatekeeping. *Id.* at 85 (expert's opinion rested on a reliable methodology, so its exclusion "constituted an abuse of discretion"). *LeBlanc v. Chevron USA Inc.*, 275 Fed. Appx. 319 (5th Cir. 2008), reversed a *Daubert* ruling on the merits but did not grant a new trial; it merely reversed the dismissal of the lawsuit. *Id.* at 321.

States v. Hall, 93 F.3d 1337 (7th Cir. 1996). Hall was convicted based on an allegedly false, coerced confession. The district court had excluded expert testimony supporting his defense. *Id.* at 1341. The Seventh Circuit found a gatekeeping error. *Id.* at 1342 ("we cannot be confident that the district court applied the *Daubert* framework"); *id.* at 1345 (emphasizing this "failure to conduct a full *Daubert* inquiry"). The record was too sparse to resolve the admissibility issue on appeal; all the court could hold was that the gatekeeping error "*may* have led to the exclusion of critical testimony for Hall." *Id.* at 1346 (emphasis added). In contrast to *Downing*, the court did not order a remand to permit a proper *Daubert* inquiry (with the conviction standing if the result did not change). Instead it ordered Hall's conviction vacated. *Id.*

Returning to Scapa's merits argument: Is its view that § 2106 authorizes new trials for mere *Daubert* gatekeeping error, on a case-by-case basis, plausible? No. Statutory interpretation resolves the matter. Section 2106 is a general statute codifying the supervisory power of appellate courts. It does not even mention new trials. Section 2111, by contrast, is a particular statute focused on limiting the power of appellate courts to grant new trials. Section 2106 was enacted in 1948 (62 Stat. 963). Section 2111 was enacted in 1949 (63 Stat. 105). Plainly the specific limit on the power to grant new trials contained in the later statute controls. *E.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) ("a specific policy embodied in a later federal statute should control our construction of the [earlier] statute"); *Lockhart v. United States*, 546 U.S. 142, 149 (2005) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs").

Nor can Scapa find comfort in § 2106 precedents. True, this Court has recognized that under their supervisory power appellate courts may require district courts "to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). But "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148 (1985). This Court has already held (albeit in a case not involving § 2111 specifically) that the § 2106 supervisory power cannot be used to circumvent the harmless-error inquiry required by § 2111 and the companion rules governing civil and criminal litigation in the district courts (*see* Pet. 4). *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) ("We now hold that a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a).").

The defense of the merits of the en banc decision below mustered by AstenJohnson and Scapa seems implausible enough to suggest this case may be a suitable candidate for summary reversal.

C. Scapa's Argument That Appellate Courts Have "Flexibility" to Grant New Trials For *Daubert* Gatekeeping Error is Wrong

Scapa next attacks, as unduly "rigid," Scapa Opp. 10, the rule we defend based on Third and Fourth Circuit precedent: that appellate courts cannot grant new trials for mere *Daubert* gatekeeping error. *Id.* at 10-14. Arguing for a more "elastic harmful-error analysis," *id.* at 11, Scapa points to this Court's decisions emphasizing that in determining whether a

particular error is harmful, appellate courts should not apply rigid rules but should take account of the specific factual circumstances. *Id.* at 10-11.

We agree that under the decisions Scapa cites, when substantive evidentiary error has occurred — meaning that the jury heard evidence that should have been excluded, or failed to hear evidence that should have been admitted — judges must be flexible in deciding whether, under § 2111, the substantive evidentiary error had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). But no such error has been found in this case. Neither Scapa nor AstenJohnson dispute that, "[b]y definition, the procedural gatekeeping error by the district judge . . . had *zero* likelihood of affecting the result . . . if, as the en banc dissenters assume might be the case (and the en banc majority likewise assumes, App. 19a), it turns out on remand that all the expert testimony heard by the jury was properly admitted." Pet. 12 & n. 3. "If the expert testimony was admissible, then the jury simply reached a verdict based on evidence it was properly permitted to consider," Pet. App. 25a — "no harm, no foul." *Id.* at 23a. Absent any finding of substantive error, flexible § 2111 balancing cannot be conducted.

Scapa's discussion of lower court cases illustrating the flexible application of § 2111 only serves to support petitioners' main argument. The Sixth and Seventh Circuit cases, Scapa Opp. 12, further buttress the circuit conflict. See pp. 5-7, *supra.* The other cases either are irrelevant or illustrate how rarely the automatic-new-trial rule will fail to be triggered based

on the expert testimony not being important. See pp. 1-2 & note 1, *supra*.[5]

D. Scapa's Argument That There is No Conflict is Wrong

Scapa next contends "that there is no true circuit conflict." Scapa Opp. 14. Plainly the Ninth and Tenth Circuits mandate a new trial for mere *Daubert* gatekeeping error when the expert testimony is important and the record is too sparse for the appellate court to conclude that only one result is possible regarding admissibility (almost always true). See pp. 1-2, *supra*. In addition, Scapa has demonstrated that the Sixth and Seventh Circuits sometimes order new trials for mere *Daubert* gatekeeping error. See pp. 5-7, *supra*.

These circuits apply a rule in conflict with the well-settled general rule that an improper exercise of discretion is cured by a remand to permit the proper exercise of discretion. Pet. 19-20. Neither Scapa nor AstenJohnson has cited any case in the other nine circuits granting a new trial for mere *Daubert* gatekeeping error. The Third and Fourth Circuits have affirmatively rejected requests for new trials in such circumstances. Pet. 21.

Using a confusing double negative, Scapa contends that in *Downing*, Judge Becker "did not hold" that "harmful error cannot be found" based on a gatekeeping error. In fact, he held a new trial proper

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[5] The only decision not already discussed is *Smith v. Jenkins*, 732 F.3d 51 (1st Cir. 2013), which Scapa suggests held that mere *Daubert* gatekeeping error can constitute "harmful error." Scapa Opp. 12. But in *Smith* the court found substantive evidentiary error, *id*. at 65, which it relied on, in an alternative holding, to order a new trial. *Id*. at 68-69.

only if on remand, after fulfilling its gatekeeping responsibilities, the district court reversed its substantive evidentiary ruling and ruled "that the proffered testimony is admissible." 753 F.2d at 1243. He held that the "judgment of conviction should be reinstated" if the district court on remand reached the same substantive result. *Id*. at 1244.

The conflict between the Third and Fourth Circuits, and the Sixth, Seventh, Ninth, and Tenth Circuits, in applying § 2111 to *Daubert* gatekeeping errors, is clear.

E. Scapa's Argument That Appellate Judges Would Be Burdened By Limits on Their Power to Grant New Trials is Immaterial

Finally, Scapa warns that adhering too rigidly to § 2111's prohibition on new trials absent a substantial and injurious effect on the jury's verdict could burden appellate judges. Scapa Opp. 14-15. Scapa's practical observation may be well founded: a policy of limiting new trials can sometimes entail multiple appeals. But weighing those policy concerns is for Congress. And Congress has duly weighed them. Acting on policy concerns that have persisted for over a century, Congress chose to prioritize preventing appellate courts from ordering new trials based on technical errors. Pet. 3-4, 11. If new trials can *ever* be granted for mere *Daubert* gatekeeping error, only district courts may grant them, because § 2111 plainly bars appellate courts from doing so. Whatever burden § 2111 may impose on appellate judges, it is not their place to claim power that Congress has allocated to district judges. Reply to AstenJohnson 3-4.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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