No. 22-210

In the Supreme Court of the United States

NEIL DUPREE, PETITIONER,

v.

KEVIN YOUNGER,
RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment.

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INTRODUCTION

Petitioner asks this Court to address a question on which it has repeatedly denied certiorari without any noted dissent. There is no good reason for changing course in this case.

The court of appeals correctly refused to excuse petitioner's error in failing to renew in his post-trial briefing the exhaustion argument he made at summary judgment. Petitioner's argument for a contrary rule finds no support in the text of the relevant provisions, all of which make clear that orders denying a summary judgment motion "do not qualify as 'final decisions' subject to appeal." *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011). Petitioner's position

also depends on an artificial distinction between factual and legal issues. As the lower courts have repeatedly acknowledged, that distinction is exceedingly difficult to apply in practice.

Petitioner also overstates the importance of the issue he seeks to raise. It arises infrequently and rarely makes a difference when it does arise. And while petitioner complains of the unfairness of the Fourth Circuit's approach, he could easily have avoided any issue by following that court's long-established precedents—precedents his counsel was concededly aware of and simply ignored.

This petition would be an especially unsuitable vehicle for addressing the question presented in any event. Petitioner contends that the court of appeals erred in refusing to review an issue the district court resolved against him. But a closer inspection of the record below suggests that the district court never resolved the precise legal argument petitioner tried to make on appeal. The resolution of the question presented is thus irrelevant to the disposition of his appeal.

The Court should deny the petition.

STATEMENT

A. Factual Background

On September 30, 2013, petitioner Dupree directed three prison guards to attack respondent Younger, a pretrial detainee at the Maryland Reception, Diagnostic & Classification Center. Pet.App.3a. The guards entered Younger's cell while he was sleeping and threw him from the top bunk onto the concrete floor. Pet.App.3a, 55a. They bludgeoned him using a mace can, radios, and handcuffs, and then proceeded to slam Younger's head against the concrete floor and the toilet. Pet.App.12a, 55a. The guards left, and Younger lay unconscious in a pool of his

blood for an hour before a medical unit arrived. Pet.App.12a. The guards ordered Younger to report that he had sustained his injuries by falling off his bed. Pet.App.12a.

Although Younger was bedridden for weeks after the attack, he was not taken to a hospital for his head and leg injuries for "[s]everal months." Pet.App.3a, 12a. Younger suffered from headaches and anxiety for months after the attack. Pet.App.12a. He also sustained permanent injuries to his face, wrists, ribs, and right hand. Pet.App.12a. Even after spending months in the hospital, Younger had to undergo surgery years later to repair his leg muscle. Pet.App.12a.

The three guards who attacked Younger were ultimately convicted for their crimes. Pet.App.12a-13a.

B. Proceedings Below

1. On September 28, 2016, Younger filed the present suit against the guards as well as three correction officials, including petitioner. Pet.App.3a, 13a. Younger alleged constitutional violations under 42 U.S.C. § 1983. Pet.App.3a. He also brought claims against the State of Maryland, which he ultimately pursued and won in state court. Pet.App.13a.

Petitioner filed two motions to dismiss, both of which the district court rejected. Pet.App.57a, 86a. Petitioner also filed a motion for summary judgment, raising, among other issues, an argument that Younger had failed to exhaust his administrative remedies under the Prisoner Litigation Reform Act (PLRA), 42 U.S.C. § 1997e. Pet.App.36a. Petitioner contended that Younger "did not complete the necessary steps within the administrative process" and that such process was available to him. Memorandum in Support of Defendant Dupree's Motion for Summary Judgment at 10, 11-16, *Younger v. Green*,

No. 16-cv-3269 (D. Md. Nov. 18, 2019), ECF No. 186-1 (hereinafter Dupree MSJ).

The district court denied Younger's motion. The court began by explaining the two avenues for relief then available to aggrieved Maryland inmates: (1) the administrative remedy procedure (ARP), in which an inmate takes his complaint up through three levels of review, ending with the Inmate Grievance Office; and (2) the Internal Investigative Unit (IIU), which investigates allegations of employee misconduct. Pet.App.38a-40a.[1] When an IIU inquiry begins, the court noted, Maryland regulations "direct the warden to dismiss [an ARP] grievance if it shares the 'same basis' as a pending IIU investigation," and to state in the dismissal that no further action would be taken in the ARP case because of the existence of an IIU investigation. Pet.App.40a (citation omitted).

In analyzing petitioner's PLRA claim, the court recounted the rule from *Ross v. Blake*, 578 U.S. 632 (2016), that a prisoner must exhaust only "available' remedies"—that is, remedies "capable of use to obtain some relief for the action complained of." Pet.App.38a (quoting *Ross*, 578 U.S. at 642). The parties' dispute here, the district court explained, was whether the "administrative remedy procedure ('ARP') is 'available' upon the initiation of a parallel investigation by the Internal Investigative Unit." Pet.App.38a. The district court held that it was not: "the IIU investigation satisfied [Younger's] obligation to subject his claims to administrative exhaustion." Pet.App.42a.

In reaching that conclusion, the district court noted that *Ross* had commented on the confusing relationship

[1] The relevant regulations have since been amended, but those changes are not relevant to this appeal.

between the ARP and IIU, and had remanded for consideration of, among other things, whether the ARP process was "available" to a prisoner once an IIU inquiry had been initiated. Pet.App.40a. Indeed, *Ross* instructed the lower court to consider whether "the IIU investigation into [an] assault foreclose[d]" the "standard grievance procedures" (i.e., the ARP). 578 U.S. at 648. Since *Ross*, the district court observed, courts in the District of Maryland had "repeatedly held that the availability of the IIU process 'closes the door' to the ARP process" and thus that the ARP process "is rendered unavailable upon the commencement of an [IIU] investigation." Pet.App.40a-41a (quoting *Brightwell v. Hershberger*, No. 10-cv-3278, 2016 WL 4537766, at *5 (D. Md. Aug. 31, 2016)).

Consistent with this authority, the district court rejected petitioner's argument that the possibility an inmate could persist in the ARP process during an IIU inquiry made the ARP process available. Pet.App.41a. Given this conclusion, the court reasoned that there was no need to "resolve disputes concerning Younger's adherence to the ARP process because the IIU investigation satisfied his obligation to subject his claims to administrative exhaustion." Pet.App.42a.

2. Younger's case proceeded to a jury trial on January 21, 2020. Pet.App.10a. At the close of evidence, one of petitioner's co-defendants moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), but petitioner did not. *See* Pet.App.10a-11a. On February 3, 2020, the jury returned a verdict in favor of Younger in the amount of $700,000. Pet.App.11a.

One of petitioner's co-defendants moved for judgment notwithstanding the verdict under Rule 50(b), reasserting a legal argument he had made at summary judgment and again at trial. Pet.App.11a, 23a. Petitioner, by contrast, neither reasserted the exhaustion argument

he had made at summary judgment nor raised any objections to the district court's reasoning in rejecting that argument. Petitioner did move for remittitur, which the district court denied, finding the $700,000 award compatible with the trial evidence of the "brutal attack" on Younger, the severe injuries he sustained, and Younger's testimony that he "lives in persistent fear of being attacked" such that he "pushes a heavy dresser in front of his bedroom door" every night. Pet.App.25a-26a. The court further found that the jury award was consistent with other compensatory damages awards in excessive force cases in the District of Maryland. Pet.App.26a-27a.

3. Petitioner appealed the case to the Fourth Circuit. He did not raise any evidentiary arguments or challenge the district court's determination that the $700,000 award was appropriate. *See* Pet.App.2a. Instead, he raised a seemingly new PLRA exhaustion argument from the one he had made at summary judgment. Petitioner now conceded that "the district court correctly determined that an IIU investigation 'closes the door to the ARP'" but argued that the third step of the ARP—review by the Inmate Grievance Office, Pet.App.38a-39a—constituted a separate, independently required stage of the exhaustion process that inmates must fulfill even if the incident is the subject of an IIU inquiry. Brief of Appellant at 14-15, *Younger v. Dupree*, No. 21-6423 (4th Cir. Aug. 25, 2021). Petitioner also renewed a factual argument that the ARP was "available" to Younger because another inmate had been able to use it to obtain some relief. *Id.* at 17.

A unanimous panel of the Fourth Circuit dismissed petitioner's appeal. Pet.App.2a-3a. Petitioner could not, the panel explained, raise on appeal an issue he had not raised in a Rule 50 motion before the district court. Pet.App.5a (citing *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1237 (4th Cir.

1995)). The case fell squarely within Fourth Circuit precedent precluding review in such circumstances. Pet.App.5a. Petitioner's contrary arguments "simply track[ed] the views expressed" in a dissenting opinion to *Varghese v. Honeywell International*, 424 F.3d 411, 423 (4th Cir. 2005). Pet.App.7a-8a. The panel thus concluded that the exhaustion issue was not properly before it, and dismissed petitioner's appeal. Pet.App.8a-9a.

4. Petitioner petitioned for rehearing en banc, which the Fourth Circuit denied without noted dissent on April 8, 2022. Pet.App.111a. Petitioner then filed the present petition for certiorari on September 6, 2022.

REASONS FOR DENYING THE PETITION

The Fourth Circuit correctly held that petitioner failed to preserve his argument regarding exhaustion for appeal. The Federal Rules of Civil Procedure and the U.S. Code provide a sensical scheme for parties to preserve issues lost at summary judgment for appeal. Put simply, the federal rules allow parties to raise arguments lost at summary judgment on appeal via motions under Rule 50(a) and 50(b). All litigants have to do in their Rule 50 motions to preserve arguments for appeal is include a sentence or two incorporating arguments lost at summary judgment.

Some courts have created an atextual exception to this straightforward practice, providing for appellate jurisdiction over arguments denied at summary judgment (and not raised in Rule 50 motions) if they concern a "pure question of law." *E.g.*, *FDIC v. AmTrust Fin. Corp.*, 694 F.3d 741, 751 (6th Cir. 2012). These courts do not find solace in the relevant rules' text. Instead, they support their position in the name of policy. However, policy concerns do not greenlight Article III courts' efforts to rewrite Article I's clear textual guidance.

In the face of the Fourth Circuit's clear rule, petitioner argues that "the question presented raises legal and practical issues of surpassing importance." Pet. 3. He grossly overstates the importance of the question presented. Indeed, this Court has denied certiorari at least ten times to address it. And because competent lawyering easily avoids putting litigants within the reach of the question presented, it rarely affects the outcomes of cases.

The potential resolution of this case presents that reality: The Court's decision on the question presented would not impact this case because the argument petitioner raised before the Fourth Circuit appears not to be the "issue rejected at summary judgment." Pet. i. And even if the Fourth Circuit reached the new argument petitioner raises, it would have no trouble recognizing it as meritless. As such, this is a poor vehicle for the Court to address the question presented.

At bottom, petitioner asks this Court to save him from a mistake of his own creation—failing to follow precedent of which he was aware. The Court should deny that invitation.

I. The Decision Below is Correct

The U.S. Code and Federal Rules of Civil Procedure set forth a logical sequence by which litigants can preserve issues for appeal. There is no basis for creating an atextual, policy-driven exception to that system.

1. The United States Code and Federal Rules of Civil Procedure set out a carefully calibrated scheme for judicial consideration of parties' arguments before, during, and after trial.

Before trial, a party "may move for summary judgment, identifying each claim or defense . . . on which summary judgment is sought." Fed. R. Civ. P. 56(a). Rule

56 imposes just one requirement on a district court considering a summary judgment motion: the court must *grant* summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*

During trial, parties may move for judgment at any time before the case is submitted to the jury: Rule 50(a) permits the court to grant motions for judgment as a matter of law when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [moving] party on that issue." *Id.* R. 50(a).

After trial, a party may renew its motion for judgment as a matter of law, and may also move for a new trial. *Id.* R. 50(b). If the district court denies the party's Rule 50 motions, the denial creates a final judgment subject to immediate appellate review. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006). An appellate court thus may review that decision and "order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment." Fed. R. Civ. P. 50(e).

Not every decision that a district court makes during the life of a case is immediately appealable. Congress has reserved appellate jurisdiction for review of "final decisions of the district courts of the United States," 28 U.S.C. § 1291, and of interlocutory decisions under limited circumstances, *id.* § 1292. Orders denying summary judgment are quintessential interlocutory orders, not normally appealable after trial. *Ortiz*, 562 U.S. at 183-84. This is because a decision denying summary judgment is "simply a step along the route to final judgment." *Id.* at 184. Issues rejected at summary judgment can become appealable, however, if raised in a Rule 50 motion. *See* Fed. R. Civ. P. 50(e).

Under this orderly scheme, parties can easily raise arguments lost at summary judgment on appeal via motions under Rule 50(a) and 50(b). "If such motions are properly made, the denied motion for summary judgment need not be reviewed, because the . . . issues determined by the district court are freely reviewable, and the case may be reversed and rendered on that basis." *Black v. J.I. Case Co.*, 22 F.3d 568, 571 n.5 (5th Cir. 1994). Rule 50 motions are the expected and simple way for parties to preserve issues for appeal. *See also infra* pp. 13-14.

2. In the face of this sensical scheme, some courts have grafted an atextual exception into the Rules, providing for appellate jurisdiction over arguments denied at summary judgment (and not raised in Rule 50 motions) if they concern a "pure question of law." *E.g.*, *AmTrust Fin. Corp.*, 694 F.3d at 751. This position finds no support in the text of the relevant statute or rules, and it undermines the careful system Congress has established for appellate review.

Start with the text of the relevant provisions: Appellate courts have jurisdiction over only "final decisions of the district courts." 28 U.S.C. § 1291. Section 1292, in turn, sharply limits the non-final, interlocutory decisions that can be raised on appeal—and those decisions are appealed *immediately after they are made*, not at the close of the district court proceedings. *Id.* § 1292(b) (directing district courts to certify interlocutory orders for appellate review within ten days of their entry). Summary judgment denials "do not qualify as 'final decisions' subject to appeal." *Ortiz*, 562 U.S. at 188. Only one limited category of summary judgment denials—those denying some form of immunity—may be appealed *immediately*—that is, before trial. *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985); *Ortiz*, 562 U.S. at 188. All other summary judgment denials are non-final, and the legal issues they raise only

become subject to appeal after they are re-raised in a timely Rule 50 motion.

Those circuits that create such an exception ground their decision not in text but in policy, reasoning only that "[t]he rationale for requiring a Rule 50 motion does not apply to purely legal questions." *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012); *accord, e.g.*, *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719 (7th Cir. 2003); *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995). But this divide between legal and factual issues finds no support in the text or structure of section 1292 or Rule 50. Petitioner's dissatisfaction with the scheme Congress has adopted is not a reason to rewrite the rules.

Even if policy were relevant, it cuts against petitioner's position. There is no dispute that petitioner's rule adds work to an appellate court's already heavy caseload: "It is no doubt true that determining whether an issue is based in law or fact or some combination of the two is sometimes 'vexing' . . . ." *Feld*, 688 F.3d at 783 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)). This vexing task is unnecessary in cases where counsel act "prudent[ly]" and "renew their arguments in a Rule 50 motion." *Id.* It is surely far easier for a litigant to add one sentence incorporating by reference an argument made at summary judgment than it is for a court to undertake the question of whether an issue is purely legal. *See infra* pp. 13-14.

Courts' response to this point—that "it is equally true that there are cases in which it is clear that appellant has raise a pure issue of law, divorced from any dispute over the facts"—is a nonstarter. *Feld*, 688 F.3d at 783. The existence of the occasional purely legal issue—which is far less common than petitioner would admit, *infra* pp. 14-15—does not justify the expenditure of court resources to

find that needle in a haystack, especially when the problem could be avoided by prudent and low-cost lawyering. *See Black*, 22 F.3d at 571 n.5 (noting that such a rule "would benefit only those summary judgment movants who failed to properly move for judgment as a matter of law at the trial on the merits").

Ultimately, "[t]he only error here was counsel's failure to file a postverdict motion pursuant to Rule 50(b)." *Unitherm*, 546 U.S. at 406. Indeed, when asked whether he could have filed a Rule 50 motion to preserve their arguments, petitioner's counsel forthrightly responded, "Yes, we could have." Fourth Circuit Oral Argument 01:44. There is no reason to "craft a new jurisprudence based on a series of dubious distinctions between law and fact" in order to rescue petitioner from an error that concededly could have been easily avoided. *Black*, 22 F.3d at 571 n.5.

II. The Question Presented Does Not Warrant This Court's Review

Since 1995, this Court has denied certiorari at least ten times to address the same question petitioner urges here.[2] The Court should follow the same course here. To

[2] *See Ericsson Inc. v. TCL Commc'n Tech. Holdings Ltd.*, 955 F.3d 1317 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2624 (2021); *Eon Corp. IP Holdings LLC v. Silver Spring Networks, Inc.*, 815 F.3d 1314 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 640 (2017); *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754 (7th Cir. 2015), *cert. denied*, 577 U.S. 1092 (2016); *Caluori v. One World Techs., Inc.*, 555 F. App'x 995 (Fed. Cir. 2014), *cert. denied*, 574 U.S. 870 (2014); *U.S. Fid. & Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126 (9th Cir. 2011), *cert. denied*, 565 U.S. 1035 (2011); *F.B.T. Prods., LLC v. Aftermath Recs.*, 621 F.3d 958 (9th Cir. 2010), *cert. denied*, 562 U.S. 1286 (2011); *TVT Recs. v. Island Def Jam Music Grp.*, 412 F.3d 82 (2d Cir. 2005), *cert. denied*, 548 U.S. 904 (2006); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897 (9th Cir. 2004), *cert. denied*, 545 U.S. 1127 (2005); *Michael*

the extent there is disagreement between the courts of appeals on the question presented, petitioner overstates its significance.

A. Any Differences in Approach Across the Circuits Poses No Obstacle for Parties Litigating in the Federal Courts

Petitioner's assertion (at 3) of an "intolerable" division between the courts of appeals is belied by the fact that the disagreement he points to has existed for decades. *Compare Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573-74 (Fed. Cir. 1986) (declining to consider issue not raised in post-trial motion), *cert. dismissed*, 479 U.S. 1072 (1987), *with Creative Cookware, Inc. v. Northland Aluminum Prods., Inc.*, 678 F.2d 746, 748 (8th Cir. 1982) (reviewing legal issue raised only at summary judgment).

Twelve of thirteen circuits have established precedent on the issue, and those courts consistently apply their precedent to the cases in front of them. Parties in these circuits thus have a clear understanding of how to preserve arguments for appeal that the district court rejected: "[C]ounsel should always research and consider the position of the circuit in which he or she is practicing." Pet. 2 n.1 (quoting Kelli Benham Bills, *Rule 50 and Purely Legal Arguments: A Circuit Split*, ABA (June 27, 2013), https://tinyurl.com/bdfjxdp8).

Here, for example, Fourth Circuit precedent going back to 1995 put petitioner on notice of his responsibility to raise arguments he lost during summary judgment in

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Found., Inc. v. Urantia Found., 61 F. App'x 538 (10th Cir. 2003), *cert. denied*, 540 U.S. 876 (2003); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837 (10th Cir. 1994), *cert. denied*, 516 U.S. 906 (1995), *reh'g denied*, 516 U.S. 1004 (1995).

Rule 50(a) and 50(b) motions, as he acknowledges. *Chesapeake*, 51 F.3d at 1235-37; Reply Brief of Appellant at 2-3, *Younger v. Dupree*, No. 21-6423 (4th Cir. Nov. 23, 2021). Indeed, "prudent counsel" in any circuit would submit Rule 50 motions so as not to take a chance that the appellate court disagrees as to whether their issue is purely legal. *Feld*, 688 F.3d at 783; *Chemetall*, 320 F.3d at 719.

Petitioner thus asks the Court to resolve a question that can be avoided by including a sentence or two in Rule 50(a) and 50(b) motions incorporating a previously made argument. Indeed, petitioner did just that in his summary judgment motion with respect to an issue he had raised in his motion to dismiss. *See* Dupree MSJ, *supra*, at 3. An issue with such a simple solution is unworthy of this Court's review.

B. The Question Presented Is Rarely Outcome Determinative

Even in those cases where parties fail to include a sentence incorporating their lost summary judgment arguments, a circuit's exception for purely legal issues is often inconsequential.

1. The circuit courts that follow petitioner's suggested rule do not commonly face purely legal questions falling within the exception. For example, the Sixth Circuit recently found that an issue was a mixed question of fact and law and thus not eligible for the circuit's exception to the normal preservation rule. *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 788-89 (6th Cir. 2020). The court emphasized that "our exception to Rule 50's requirements, which would allow for review of summary-judgment motions on 'pure questions of law' after a jury verdict, [is] exceptionally narrow, covering only truly abstract questions that 'can be asked and

answered *without reference to the facts of the case*.'" *Id.* at 789 (citation omitted).

Similarly, in *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), the Ninth Circuit refused to excuse a party's failure to comply with Rule 50 because its "arguments 'hardly present "purely legal" issues capable of resolution "with reference only to undisputed facts."'" *Id.* at 1122 (citation omitted). And, in rejecting a party's attempt to frame its issues as legal ones, the Tenth Circuit noted that it had "previously cautioned that 'prudent counsel will not rely on their own interpretations of whether an issue is purely a question of law or fact.'" *Copar Pumice Co. v. Morris*, 639 F.3d 1025, 1031 (10th Cir. 2011) (citation omitted); *see also, e.g.*, *Murray v. Amalgamated Transit Union*, 719 F. App'x 5, 7 (D.C. Cir. 2018) (acknowledging the Circuit's "rare" exception for purely legal issues but finding that the claim under consideration depended on resolution of disputed facts and thus was not purely legal); *Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding, LLC*, 784 F.3d 177, 187-89 (3d Cir. 2015) (same); *Ayers v. City of Cleveland*, 773 F.3d 161, 167 (6th Cir. 2014) (same).

2. Petitioner (at 19 & n.7) cites to 14 cases the circuit courts have decided in 2020 that addressed the issue this petition presents. But a closer look at those cases reveals that the circuits' approach to preserving issues on appeal is rarely outcome determinative. For example, in *Hisert on Behalf of H2H Associates, LLC v. Haschen*, 980 F.3d 6 (1st Cir. 2020), although the appellant's arguments "were not properly presented on appeal," the First Circuit concluded that "they lack[ed] merit in any event." *Id.* at 8; *see also Jones ex rel. United States v. Mass. Gen. Hosp.*, 780 F.3d 479, 490 (1st Cir. 2015) (same).

In *Gulf Engineering Co., L.L.C. v. Dow Chemical Co.*, 961 F.3d 763 (5th Cir. 2020), the Fifth Circuit actually reached appellant's issue "[b]ecause Dow preserved this

issue by restating its objection in a Rule 50 motion." *Id.* at 766. And in *Universal Truckload, Inc. v. Dalton Logistics, Inc.*, 946 F.3d 689 (5th Cir. 2020), the court did not reach the appellant's issue because appellant had forfeited the forfeiture issue in its appeal brief. *Id.* at 699 n.5.[3]

3. Finally, the "profound real-world stakes" petitioner highlights in recounting damages verdicts are not creatures of any disagreement among the circuits. Pet. 20. Juries imposed the damages awards in each case, and able lawyering preserves the opportunity to challenge such awards.

Thus, petitioner (at 20) wrongly claims that he "faces a $700,000 judgment solely because he was unable to reassert his exhaustion defense on appeal." He faces

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[3] *See also Kidis v. Reid*, 976 F.3d 708, 720 (6th Cir. 2020) ("Assuming the issue [of a "purely legal" exception] is live, [defendant's] argument nonetheless fails."); *Gerics v. Trevino*, 974 F.3d 798, 807 (6th Cir. 2020) (declining to review unpreserved issue because not purely legal); *Hanover*, 974 F.3d at 788-89 (same); *Hurt v. Com. Energy, Inc.*, 973 F.3d 509, 516 (6th Cir. 2020) (same); *In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067, 1075 (9th Cir. 2020) (entertaining and rejecting unpreserved "purely legal" issue); *Watley v. Felsman*, 839 F. App'x 728, 729 n.1 (3d Cir. 2020) (applying *Ortiz* to find qualified immunity order not timely appealed); *Hernandez v. Fitzgerald*, 840 F. App'x 333, 337 n.4 (10th Cir. 2020) (entertaining unpreserved argument because it arose from a grant of summary judgment and was in any case purely legal); *Sooroojballie v. Port Auth. of N.Y. & N.J.*, 816 F. App'x 536, 540 (2d Cir. 2020) (entertaining unpreserved argument because it was a question of law); *Haas v. Fancher*, 802 F. App'x 538, 544 (11th Cir. 2020) (refusing to review summary judgment denial without discussion of whether issues were legal); *Buie v. Dhillon*, No. 19-5105, 2020 WL 873502, at *1 (D.C. Cir. Feb. 14, 2020) (affirming district court because sufficiency challenge was not preserved via Rule 50); *Ferguson v. Waid*, 798 F. App'x 986, 989 (9th Cir. 2020) (declining review because unpreserved issue was not purely legal).

$700,000 in damages because of his egregious conduct. There is no guarantee the verdict would have been vacated had his appeal been heard on the merits, and in any case, he lost the chance to do so because his counsel failed to follow circuit precedent despite being aware of it. Reply Brief of Appellant, *supra*, at 2-3.

III. This Case Is a Poor Vehicle for Addressing the Question Presented

Even if the question presented were worthy of this Court's review, this case is a poor vehicle for addressing that question. Petitioner claims that he was barred from arguing on appeal an issue he lost at summary judgment. But the issue he sought to raise before the Fourth Circuit was arguably not the one the district court rejected at summary judgment. The resolution of the question presented may thus be irrelevant to petitioner's case. At any rate, the new issue petitioner has raised is easily resolved in Younger's favor, and the Fourth Circuit is poised to resolve that issue in a related case, which could moot any remand of petitioner's case.

A. The Question Presented Is Not Outcome Determinative in This Case

The Court's resolution of the question presented would not impact this case because the argument petitioner raised before the Fourth Circuit was seemingly not the "issue rejected at summary judgment." Pet. i.

The question presented asks whether rejection of an argument at summary judgment preserves that argument for appeal, even in the absence of Rule 50 motions after the presentation of evidence. *See, e.g.*, Pet. 6 (describing circuit split "over whether a party must go through the motions of making a post-trial motion to preserve for appellate review a legal defense *that was*

already fully resolved against the party pre-trial" (emphasis added)); Pet. 21 (framing the question as "whether the rejection of a legal defense at summary judgment is enough to preserve it for appeal").

But the issue petitioner raised on appeal was arguably not the one resolved against him at summary judgment. The issue the district court resolved at summary judgment was whether the "administrative remedy procedure ('ARP') is 'available' upon the initiation of a parallel investigation by the Internal Investigative Unit." Pet.App.38a. The district court answered that question in the affirmative: "[T]he IIU process 'closes the door' to the ARP process," making it unavailable. Pet.App.40a. And the district court (properly) characterized the Inmate Grievance Office as part of the ARP process. Pet.App.38a-39a.

On appeal, petitioner conceded that "the district court correctly determined that an IIU investigation 'closes the door to the ARP.'" Brief of Appellant, *supra*, at 15 (quoting Pet.App.40a). In other words, petitioner did not challenge the issue "that was already fully resolved against" him—the one that could be resurrected by this Court's deciding the question presented. Pet. 21.

Petitioner's brief in the Fourth Circuit instead raised the seemingly new argument that an IIU inquiry obviated the need to exhaust only the first two steps of the ARP process, but not the third step—appellate review by the Inmate Grievance Office. Brief of Appellant, *supra*, at 15. Petitioner thus argued, citing no authority, that "dismissal due to the IIU's involvement does not affect the

inmate's need to pursue the claim and seek relief with the [Inmate Grievance Office]." *Id.*[4]

The district court did not "fully and finally resolve[]" this argument, Pet. 5—it addressed only whether an IIU inquiry makes unavailable the ARP process *as a whole*, including the Inmate Grievance Office. Thus, even if the Court were to answer the question presented—whether parties must file Rule 50 motions to preserve "a purely legal issue rejected at summary judgment," Pet. i—the Court's decision would have no impact on this case, because the issue raised on appeal seems not to be the one rejected at summary judgment. This case thus does not present a vehicle for the question presented.

B. The New Underlying Issue Is Easily Resolved for Respondent

Even if the Fourth Circuit reached the new argument petitioner raises, it would have no trouble recognizing it as meritless.

As noted, petitioner now agrees "that an IIU investigation 'closes the door to the ARP.'" Brief of Appellant, *supra*, at 15 (quoting Pet.App40a). Instead, he contends that inmates must obtain review from the Inmate Grievance Office even when the IIU has initiated an inquiry.

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[4] As noted above, *see supra* p. 6, petitioner also renewed on appeal his factual argument from summary judgment that the Inmate Grievance Office was available to Younger because he purportedly "understood the administrative process" and another inmate attacked on the same day was able to "negotiat[e] the administrative process to obtain relief." Brief of Appellant, *supra*, at 17; *see id.* at 15-18. Petitioner does not appear to argue, nor could he, that this argument could qualify for a "purely legal" exception, since it rests on facts that could have been further developed at trial. *Accord Brightwell v. Hershberger*, No. 11-cv-3278, 2016 WL 5815882, at *2 (D. Md. Oct. 5, 2016) ("The practical availability of remedies is not a pure question of law." (citing *Ross v. Blake*, 578 U.S. 632, 648 (2016)).

See id. (insisting that "dismissal due to the IIU's involvement does not affect the inmate's need to pursue the claim and seek relief with the IGO").

This argument makes no sense, either in this case or in the abstract. Younger *did* raise a grievance with the Inmate Grievance Office, as petitioner has often acknowledged. *See, e.g.*, Dupree MSJ, *supra*, at 8. The Inmate Grievance Office dismissed that grievance for failure to exhaust the ARP process, *id.*, which all parties now agree he was not required to do. Brief of Appellant, *supra*, at 14-15. Younger thus did everything petitioner now claims he was required to do in order to exhaust his claim—that is, he properly exhausted his available remedies.

Petitioner's conception of the Maryland system is also wrong: The Inmate Grievance Office serves as an appellate body *within the ARP process*, distinct from the IIU. Agencies within the Department of Public Safety and Correctional Services—including the Inmate Grievance Office, *see* Brief of Appellant at 13; Md. Code Ann., Corr. Servs. § 2-201— to "[r]elinquish authority for an investigation undertaken by the IIU." Md. Code. Regs. 12.11.01.08 (2013). The IIU thus exists outside the entire ARP process, including the Inmate Grievance Office, and an IIU inquiry makes that entire ARP process unavailable.

In any event, petitioner's co-defendant, Crowder, has raised the exact same exhaustion arguments in his own appeal before the Fourth Circuit. *See* Brief of Appellant at 51-52, *Younger v. Crowder*, No. 21-6422 (4th Cir. Sept. 3, 2021). The Fourth Circuit held oral argument on October 25, 2022. If the panel rejects Crowder's identical argument on the merits, then the underlying merits question in petitioner's Fourth Circuit case will be mooted. This Court's resolution of the question presented, then, would have no effect on the resolution of petitioner's case.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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NOVEMBER 23, 2022

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