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

REPLY BRIEF FOR THE PETITIONER

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This case presents a significant conflict over a recurrent question of federal law. Respondent concedes the split, does not persuasively dispute its importance, and does not claim further percolation would aid the Court's review. The Court should resolve this substantial, entrenched, decades-long circuit conflict. A vehicle issue prevented the Court from reviewing this question in *Ericsson v. TCL*, No. 20-1130 (U.S.). No similar obstacle prevents review in this case. Pet. 19-22. The petition for certiorari should be granted.

The petition established there is a "significant circuit split" over whether a party must make a post-trial motion to preserve for appellate review a purely legal issue that was already fully resolved against the party pre-trial. *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 785 n.10 (6th Cir. 2020). This is the unusual case where that deep split is conceded; indeed, there is no dispute that the circuits have fractured three ways. Respondent *agrees* that there is a long-standing, firmly

entrenched circuit split on the question presented that involves twelve of thirteen circuits. *See* Opp. 13.

And respondent does not meaningfully dispute that this issue is critically important and this Court's review is long overdue. To the contrary, respondent argues that eight federal circuits have flouted the Federal Rules and federal law "for decades," "consistently apply[ing]" an "atextual, policy-driven exception" to the appellate preservation rules that usurps the authority of the legislative branches. Opp. 8, 13.

There is also no dispute that the issue is ripe for review. Respondent does not dispute that the issue arises routinely in high-stakes appeals often involving multi-million dollar verdicts. Pet. 20. Nor does he dispute that the minority rule wastes judicial and party time and resources on useless motions practice. Pet. 3. And respondent never argues that further percolation would sharpen the issues or produce any practical or theoretical benefit. Even a quick glance at the comprehensive analysis on every side of the split shows that the issue comes fully examined from every conceivable perspective.

In short, respondent has no good argument against certiorari. So he takes a different tack: he devotes nearly a third of his opposition to previewing his merits argument. *See* Opp. 8-12. That only proves the Court should grant certiorari: If respondent truly believes that *eight* circuits "consistently apply" a rule that is simultaneously wrong and raises grave separation of powers concerns, respondent should welcome the Court's review. Opp. 13.

Respondent is wrong about the merits. Under the merger rule, interlocutory rulings, even pretrial ones, are typically appealable after a jury trial because they otherwise would not be appealable at all. The rule respondent supports contravenes that ordinary

presumption, treating denials of summary judgment as specially carved out of the ordinary rule. As the courts on the majority side of the split have explained, that may make sense where summary judgment was denied on the basis of the sufficiency of evidence, because once a trial has been had, that decision has been superseded by the jury's own conclusions about sufficiency. But there is no reason to extend that narrow exception to preclude review of purely legal rulings that have nothing to do with evidentiary sufficiency and are not affected in any way by the jury's determinations about the evidence. In those kinds of cases—i.e. cases like this one—the Rule 50(b) requirement operates as nothing more than a pointless gotcha rule.

Respondent's two vehicle arguments also fail. *See* Opp. 17-20. Respondent's first argument, that petitioner "arguably" pressed a different argument on appeal than he did on summary judgment, Opp. 17, is belied by the decision below. The court below refused to hear petitioner's appeal because he "did not … reassert [in a post-trial motion] his PLRA exhaustion contention that had been rejected" at summary judgment. Pet. App. 5a. If, as respondent now argues, petitioner had pressed a *new* argument on appeal, Opp. 17-19, the court below would not have spent several pages explaining why petitioner's appeal was foreclosed by the Fourth Circuit's "*Chesapeake-Varghese* precedent." Pet. App. 5a-8a. It could have simply resolved the appeal on the basis of waiver. Respondent's other argument, that petitioner is unlikely to win his appeal on the merits on remand, Opp. 19-20, is beside the point and wrong. Whether petitioner's exhaustion argument is meritorious is the issue petitioner wants resolved in this case. Whether he is destined to win or lose that argument, the error in the decision below means he never had the opportunity to test it.

I. The Decision Below Is Wrong

Respondent's merits arguments, Opp. 8-12, only underscore this case's certworthiness. If eight circuits "consistently apply" an incorrect rule, as respondent contends, Opp. 13, the Court should grant review.

In any event, respondent is wrong on the merits. The ordinary presumption under the final judgment rule is that all issues resolved by interlocutory orders are appealable following a final judgment. 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3905.1 (3d ed. Sept. 2022 update) (hereinafter Wright & Miller). That includes "[p]roperly preserved questions of law," decided at summary judgment, which should be "open to review on appeal after trial." *Id.*

1. After trial, a party may appeal a "final decision" of the district court. 28 U.S.C. § 1291. "The general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)). An appeal from a final judgment thus "opens the record and permits review of all rulings that led up to the judgment." 15A Wright & Miller § 3905.1.

Thus, under the final judgment rule, "[t]he variety of orders open to review on subsequent appeal from a final judgment is enormous." 15A Wright & Miller § 3905.1 (listing examples). These orders include orders granting motions to dismiss, orders granting summary judgment, orders on discovery disputes, orders issued in the course of trial, *see id.*, and even orders that jeopardize the attorney-client privilege or disqualify counsel, *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-09 (2009).

Contrary to respondent's claim, Opp. 10, section 1291 does not require parties to reraise legal issues denied at summary judgment. Section 1291 restricts which *orders* may be appealed, but not the *issues* that may be raised on appeal from an appealable order. *Cf. Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 293 (2016) (Alito, J., concurring in part and dissenting in part). The *order* denying summary judgment on a purely legal issue is not itself appealable post-trial, *see Ortiz v. Jordan*, 562 U.S. 180, 188 (2011), but when it is "quintessential[ly] interlocutory," Opp. 9, as it concededly was here, it "merge[s]" into the final judgment when the case ends, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The denial of summary judgment operates as a "step[] toward[] [the] final judgment in which [it] will merge." *Id.*; *see also Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). And the final order disposing of the case *is* appealable.

To be sure, there may be good reason to prohibit appeals of denials of summary judgment where the argument at summary judgment went to the sufficiency of the evidence. *See Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004). In those circumstances, the jury verdict supersedes the summary judgment decision by replacing the judge's *predictions* about the sufficiency of the evidence with the *findings* of a jury that remove all doubt about sufficiency. *See Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-19 (7th Cir. 2003). Once a jury trial is lost, the question whether the court correctly denied summary judgment on sufficiency grounds is *moot*. *See id.* But the jury verdict has no similar effect on a litigant's argument when the issue involved is purely legal. *See id.* at 719. In that case, it is irrelevant what the jury holds with respect to the evidence, because the validity of a

purely legal issue is unaffected by the jury's findings. *See id.*

Appellate review of purely legal claims denied at summary judgment and not reasserted in a post-trial motion thus fits comfortably within the "carefully calibrated scheme for judicial consideration of parties' arguments before, during, and after trial." Opp. 8. When a party appeals a final decision under Section 1291, purely legal issues decided at summary judgment are preserved, just as numerous other issues raised and resolved during the course of the case are preserved. Respondent offers no authority to support his argument that courts applying the majority rule have "rewrit[ten] Article I's clear textual guidance." Opp. 7. They are just applying the *general* rule that antecedent legal issues raised in interlocutory orders are appealable.

2. Respondent's contrary arguments are unpersuasive. Respondent claims it is "sometimes 'vexing'" to determine which claims are purely legal and which turn on the sufficiency of the evidence. Opp. 11. But as several courts on the majority side of the split have explained, even if the distinction can sometimes be vexing, often it is not, and when it is not, there is no reason to deny review. *See Feld*, 688 F.3d at 783; *Chemetall GMBH*, 320 F.3d at 719-20. This case is a perfect example. Even *respondent* does not contend that this case involves a disguised factual issue. The district court's denial of petitioner's PLRA exhaustion defense was indisputably purely legal.

Respondent claims that it would be enough to preserve a purely legal argument rejected at summary judgment to "add one sentence [to a Rule 50(b) motion] incorporating by reference an argument made at summary judgment." Opp. 11. But if "add[ing] one sentence," *id.*, is all it would take to preserve an issue for

appeal, it is impossible to conceive what the possible justification could be for requiring it. At that point it truly is just a "pointless gotcha rule" that does nothing but deprive litigants of the opportunity to take potentially meritorious appeals. Transcript of Oral Argument at 46, *Ortiz v. Jordan*, 562 U.S. 180 (2011) (No. 09-737) (Alito, J.). Courts "might as well [suggest] that the lawyer has to stand on his head when the motion is made or jump up and down three times" to preserve an issue for appeal. *Id.*

II. The Question Presented Warrants this Court's Review

1. As the petition established, the circuit conflict is square, obvious, and entrenched. Pet. 6-19. Indeed, the multi-decade conflict is *conceded* in this case. Respondent acknowledges that this conflict "has existed for decades" and implicates "[t]welve of thirteen circuits." Opp. 13.

Nonetheless, according to respondent, there is no need for this Court to resolve the open conflict because it is so entrenched. Opp. 13. On respondent's view, the twelve circuits that comprise the circuit split "consistently apply their precedent to the cases in front of them" and "[p]arties in these circuits thus have a clear understanding of how to preserve arguments for appeal." Opp. 13.

That argument could be made about any circuit-level variation in the application of the Federal Rules. But the entire purpose of the Rules is to provide litigants with uniform, nationwide rules of procedure in federal court. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts."). This conflict eviscerates that uniformity. Moreover, respondent's position is internally contradictory. Respondent claims the circuit split should be allowed to stand because litigants can research the rule applicable in their own circuit and follow it, Opp. 13-14, but also argues that eight

circuits have crafted an erroneous rule that circumvents Rule 50(b)'s requirements, Opp. 7-12.

2. The question presented is also of great legal and practical importance. Pet. 19-20. The existing conflict leaves parties in an untenable position. The law requires clarity regarding preservation rules, but the continuing uncertainty over whether Rule 50(b) motions are required for purely legal issues forces every judicious litigant in the country—even in majority-rule circuits—to make unnecessary post-trial motions for fear this Court may one day hold that such a motion is in fact required to preserve an issue for review.

Nonetheless, according to respondents, there is no need for this Court to resolve the open conflict because the question presented "is rarely outcome determinative." Opp. 15. That is incorrect. This issue is not only common, it is frequently outcome determinative. The issue was outcome determinative in this case: had the Fourth Circuit followed the majority rule, petitioner's appeal would have been decided on the merits. *See, e.g.*, *In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067, 1072-73 (9th Cir. 2020) (considering purely legal issue). The issue is outcome determinative in the First, Fourth, and Fifth Circuits every time the court of appeals refuses to consider an issue solely because of a party's failure to re-raise it in a post-trial motion. *See* Pet. 14-17 (canvassing cases). And it is also outcome determinative in every case where a litigant wins an appeal on the merits in a majority-rule circuit without making a preservative Rule 50(b) motion. *See, e.g.*, *Ericsson Inc. v. TCL Commc'n Tech. Holdings Ltd.*, 955 F.3d 1317, 1324, 1331 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2624 (2021) (setting aside $75 million verdict); *see also* Pet. 20 (collecting cases).

III. This Case Is an Optimal Vehicle for Addressing this Deep and Persistent Circuit Split

This case is an optimal vehicle for resolving this important question. Pet. 21-22. The issue is a pure question of law; it was squarely resolved below; and it was outcome-determinative. There are no conceivable obstacles to resolving it here. Respondent argues this is an imperfect vehicle for two reasons. Each is meritless.

First, respondent claims petitioner "arguably" raised a different PLRA exhaustion argument on appeal than he did at summary judgment. Opp. 17, 18. Respondent's argument is incorrect and contradicts the decision below. Had petitioner in fact changed his argument between summary judgment and appeal, the court below would have had no reason to discuss the circuit conflict. It could simply have dismissed the case on the basis of waiver. Instead, it held that "[t]he circumstances of this appeal *fall precisely* within the scope of our *Chesapeake-Varghese* precedent." Pet. App. 5a (emphasis added).

In any event, petitioner's argument has been consistent at every stage. The district court held, as a matter of law, that the existence of an IIU investigation is enough to satisfy the PLRA's exhaustion requirements. As the district court explained when denying petitioner's motion for summary judgment, "[t]he Court need not resolve disputes concerning [respondent's] adherence to the ARP process because the IIU investigation satisfied his obligation to subject his claims to administrative exhaustion." Pet. App. 42a.

Petitioner's claim on summary judgment, and on appeal, is that the existence of an IIU investigation is *not* enough to satisfy the PLRA's exhaustion requirement, and that petitioner *failed* to exhaust as a matter of law by failing to seek relief from the IGO by appealing an ARP denial, thereby failing to complete the administrative

review process in accordance with the applicable procedural rules. Petitioner's argument is, was, and has been that the IGO can grant relief, but only on appeal from a denied ARP grievance. *See* Dupree MSJ 7-16 (D. Ct. Doc. 186-1); Pet'r C.A. Br. 10-18.

Second, as a last-ditch effort, respondent argues that review should be denied because respondent might ultimately prevail on the merits on remand. *See* Opp. 19-20. Yet this Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Cert. Reply Brief at 2, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15). Respondent cannot avoid review of the predicate legal issue by predicting how the court of appeals *might* rule on the merits later.

Respondent's prediction, anyway, is wrong. This Court's decision in *Ross v. Blake*, makes clear that a PLRA remedy is unavailable because it is incapable of use only if "*no ordinary prisoner* can make sense of what it demands." 578 U.S. 632, 644 (2016) (emphasis added). That is a high standard. *Id.* It requires the unavailability of the administrative remedy to be beyond "debate" or "reasonable mistake." *Id.* "When an administrative process is susceptible of multiple reasonable interpretations … the inmate should err on the side of exhaustion." *Id.* At least one other prisoner has received relief from the IGO by properly exhausting the grievance process—that is, by filing an ARP, having it denied, then appealing the ARP denial to the IGO and receiving relief. *See* Dupree MSJ 12 (D. Ct. Doc. 186-1). This is not an administrative remedy that "no ordinary prisoner can make sense of." *Ross*, 578 U.S. at 644.

Respondent suggests that petitioner's case could be doomed on remand by adverse Fourth Circuit precedent.

Opp. 20. Specifically, respondent claims that petitioner's co-defendant, Crowder, properly re-raised his PLRA exhaustion argument in a Rule 50(b) motion and that Crowder's appeal is likely to be decided on the merits against him. Opp. 20. As an initial matter, oral argument suggested the panel will hold that Crowder failed to preserve this argument. *See* Oral Argument at 36:03, *Younger v. Crowder*, No. 21-6422 (4th Cir. Oct. 25, 2022) (Judge Rushing stating that exhaustion had not been discussed at oral argument "for good reason," because "Crowder's post-trial Rule 50(b) motion did not mention exhaustion"). In any event, as *Ross* shows, this Court remains available to provide petitioner relief if the Fourth Circuit rules against him on the merits on remand.

This case readily checks every box for review, and respondent's effort to kick up dust falls short. This is an important conflict. It warrants resolution by this Court in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2022

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