No. 22-210

In the Supreme Court of the United States

NEIL DUPREE, PETITIONER

v.

KEVIN YOUNGER

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

BRIEF FOR LAW PROFESSORS JOAN STEINMAN, RICHARD FREER, NANCY MARDER, MARK ROSEN, MICHAEL SOLIMINE, AND ADAM ZIMMERMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici* and their counsel made a financial contribution to the preparation or submission of this brief.

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Amici take no position on the merits of the underlying dispute or the tragedy that resulted in this litigation and provide their institutional affiliations only

for purposes of identification. As scholars and teachers of federal courts and procedure, however, *amici* have an abiding interest in the principles governing federal civil procedure, and in the Court's resolution of a longstanding circuit split over what it takes to preserve summary judgment issues for appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), this Court left open the question whether "purely legal issues" decided on summary judgment—*e.g.*, issues that could be decided "with reference only to undisputed facts"—were preserved for appeal without being re-raised in a Rule 50 motion. *Id.* at 190 (citations omitted). The court below held that such purely legal issues—even if "carefully considered" by the district court at summary judgment—are not preserved for appeal if the losing party does not renew his argument at the Rule 50 stage. Pet.App.5a. The Court should reverse.

Rule 50 provides no textual basis to require litigants to re-raise purely legal issues decided on summary judgment in a Rule 50 motion—let alone for courts of appeals to deem such issues unreviewable if the losing party failed to do so. The Rule addresses only motions regarding the sufficiency of the evidence *at trial*, and that is exactly how this Court has consistently characterized Rule 50 motions. Moreover, unless the record as it relates to the legal issue being raised somehow changed between summary judgment and the conclusion of trial—which ordinarily will not happen when an issue was decided based on "undisputed facts" (*Ortiz*, 562 U.S. at 190)—the evidence at trial will have no bearing on the correctness of the district court's pre-trial legal ruling.

Beyond the text of Rule 50, sound judicial policy confirms that raising purely legal issues at summary judgment should be sufficient to preserve them for appeal. That policy is reflected, for example, in the settled rule that Rule 12(b)(6) rulings take claims off the table until appeal. There is no basis for a different rule when it comes to summary judgment rulings that take issues out of the case.

Such a rule does not create unfair surprise. The legal issues were fully briefed and argued at summary judgment—a lengthy and expensive process to which parties dedicate significant time and effort. Thus, neither the parties—nor any court below—can be caught unawares by such an issue. In addition, the courts of appeals serve law-clarifying functions and should be empowered to correct legal errors made by district courts. Unlike factual determinations, there is no reason to believe that district courts have greater competency to address purely legal issues. Allowing appellate courts to reach purely legal issues and decide them de novo both comports with the structure of our Nation's judiciary and avoids immunizing a district court's legal errors from review.

As trial approaches, moreover, the legal issues in a case should narrow, not expand. Multiple procedural devices—including Rules 12 and 56—encourage this result. So too would a rule allowing parties to pursue purely legal issues on appeal without making a repetitive Rule 50 motion. Were it otherwise, legal issues would snowball as trial neared with parties perfecting technical preservation of issues for appeal.

Fears that "wasted trials" would result from appellate review of purely legal issues lost at summary judgment are exaggerated. The final judgment rule

itself accepts the risk that some trials will need to be repeated. District courts routinely decide purely legal issues on summary judgment—sometimes incorrectly. Unless the record has somehow changed, Rule 50 neither immunizes such mistakes from appellate review nor imposes additional hurdles to raising them on appeal.

The Court should reverse.

ARGUMENT

In a sense, every summary judgment decision is a "legal" decision—the question, after all, is whether a party is entitled to "judgment as a matter of law." Fed. R. Civ. P. 56(a). But in *Ortiz*, this Court recognized a salient difference between summary judgment decisions resolved against the movant due to the presence of material factual disputes and those that turn on "purely legal issues"—i.e., those that "can be resolved 'with reference only to undisputed facts.'" 562 U.S. at 190 (citations omitted); see also Pet. Br. 14. The Court there concluded that a Rule 50 motion was required to preserve issues where the denial of summary judgment was based on material factual disputes and led to further development of the record at trial. 562 U.S. at 191-192. The Court, however, left open whether a Rule 50 motion was required to preserve for appeal "purely legal issues" (*id.* at 190) that were taken off the table by the district court's decision of a summary judgment motion.

Absent this Court's guidance, some circuits persist in holding that decisions on such "purely legal" issues cannot be reviewed on appeal unless the appealing party renewed, in a Rule 50 motion, the same points it pressed at summary judgment. Pet.App.5a. Correctly interpreted, however, Rule 50 addresses only

the sufficiency of the evidence placed before the jury. Consequently, failing to file a Rule 50 motion should have no impact on the preservation—or forfeiture—of "purely legal issues" for appeal. This reading of Rule 50 is consistent with sound judicial policy: it results in no unfair surprise, enables appellate courts to better serve their law-clarifying functions, serves judicial economy, and does not result in "wasted" trials. Thus, this Court should reverse and make clear that a party may raise on appeal purely legal issues resolved against the party on summary judgment, without a follow-on Rule 50 motion.

I. *Ortiz* does not decide this case.

This Court has never addressed the question presented here. The closest it has come is *Ortiz*, but it left the issue open.

In opposing certiorari, however, respondent suggested that *Ortiz* is dispositive here. See Opp. 1, 9-11. According to him, *Ortiz* indicated that "orders denying a summary judgment motion 'do not qualify as 'final decisions' subject to appeal'" and are "not normally appealable after trial" outside of a limited category of decisions not at issue here—decisions denying immunity from suit. Opp. 1, 9, 10 (citing and quoting *Ortiz*, 562 U.S. at 188, 183-184). But this misunderstands this Court's more limited holding.

The Court in *Ortiz* set out to consider whether a party may "appeal an order denying summary judgment after a full trial on the merits." 562 U.S. at 183-184. The district court had rejected the respondents' qualified immunity defense on summary judgment, "[f]inding that the * * * defense turned on material facts genuinely in dispute." *Id.* at 183. After losing at

trial, the respondents did not raise qualified immunity in a post-trial motion, but nonetheless prevailed on appeal. The respondents argued, as does petitioner here, that "an issue of a 'purely legal nature,' * * * is preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)." *Id.* at 190.

Yet this Court did "not address" that issue because the record there "hardly present[ed] 'purely legal' issues." *Ortiz*, 562 U.S. at 190. While "the pre-existing law was not in controversy"—"[w]hat was controverted * * * were the facts" regarding liability. *Id.* at 190-191. Because the petitioners' claim in *Ortiz* turned on disputed facts, they were "obliged to raise that sufficiency-of-the-evidence issue by postverdict motion for judgment as a matter of law under Rule 50(b)." *Id.* at 191-192. They had not done so—and therefore could not prevail.

Ortiz simply applied the rule from *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006)—that a party's "failure to comply with Rule 50(b) forecloses [a] challenge to the sufficiency of the evidence" on appeal. That straightforward application of prior precedent has no bearing here, where the record regarding the legal question raised did not—indeed could not—change between summary judgment and the end of trial. Any statements in *Ortiz* arguably addressing the question presented here—regarding purely legal issues—are merely dicta.

Additionally, insofar as the Court takes this opportunity to address *Ortiz*, it should clarify its suggestion that the time to seek review of the summary judgment denial on purely legal issues "expired well in advance of trial." 562 U.S. at 189 (citing Fed. R. App. P.

4(a)(1)(A)). In making that statement, the Court was addressing a special case: an appeal from a denial of qualified immunity at summary judgment. Interlocutory appeals of such decisions are available only with respect to questions of law, not with respect to district court determinations that genuine issues of material fact preclude summary judgment. *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) (holding that denial of a claim to qualified immunity "is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291," to the degree that the qualified immunity claim turns on an issue of law). As discussed above, however, *Ortiz* involved disputed facts. Hence, no interlocutory appeal was available from that denial of summary judgment.

Here, by contrast, the district court's rejection of Dupree's affirmative defense of exhaustion did raise an issue of law, but that issue did not arise in the context of claimed immunity from suit and Dupree's rights could be fully vindicated after final judgment. Thus, the summary judgment ruling at issue is not one of the "'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final'"—a class that "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 42 (1995)); see also, *e.g.*, *De Csepel* v. *Republic of Hungary*, 859 F.3d 1094, 1109 (D.C. Cir. 2017) (rejecting an affirmative defense grounded in exhaustion of administrative remedies as not an immediately appealable collateral order);

Stewart v. *Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002) (same). Accordingly, Dupree properly appealed the denial of his summary judgment motion *after* final judgment and could not properly have appealed it sooner. This case provides the Court with an opportunity to clarify that *Ortiz* does not preclude such appeals.

II. The plain terms of Rule 50 address only whether a "legally sufficient evidentiary basis" supports a party.

The text of Rule 50(a)(1) unambiguously provides that a court may grant judgment as a matter of law on the basis that "a reasonable jury would not have a legally sufficient evidentiary basis" to find for a party. Fed. R. Civ. P. 50(a)(1). There is no genuine debate over the meaning of that phrase. Since this language was introduced in 1991 (see 28 U.S.C. App'x Suppl. 3 Vol 3733 at p. 750 (1991)), this Court has consistently characterized Rule 50 as addressing evidentiary sufficiency.

In *Weisgram* v. *Marley Co.*, 528 U.S. 440 (2000), for example, the Court quoted the Rule, noting "that in ruling on a motion for judgment as a matter of law, the court is to inquire whether there is any '*legally sufficient evidentiary basis* for a reasonable jury to find [for the opponent of the motion]." *Id*. at 453-454 (emphasis added, alterations in original). Likewise, the Court in *Unitherm* summarized Rule 50(a) as "set[ting] forth the procedural requirements for *challenging the sufficiency of the evidence* in a civil jury trial"—as well as, under Rule 50(b), "the procedural requirements for renewing a *sufficiency of the evidence* challenge after the jury verdict and entry of judgment." 546 U.S. at 399-400 (emphasis added).

And in *Ortiz*, this Court reiterated that Rule 50 "permits the entry, postverdict, of judgment for the verdict loser if the court finds that the *evidence was legally insufficient* to sustain the verdict." 562 U.S. at 189 (emphasis added). In short, Rule 50 addresses only the sufficiency of the evidence. Yet sufficiency of the evidence is distinct from what the Court in *Ortiz* called "'purely legal' issues capable of resolution 'with reference to only undisputed facts.'" 562 U.S. at 190 (citations omitted).

At issue here is whether such "purely legal issues" are forfeited unless re-raised in a Rule 50 motion. And a straightforward textual analysis suggests that a Rule 50 motion is not necessary to preserve legal issues decided against a party at summary judgment, when the sufficiency of evidence at trial has no impact on that legal decision. The plain text of Rule 50(a) provides for entry of judgment based on a party "not hav[ing] a sufficient evidentiary basis" to prevail. Fed. R. Civ. P. 50(a)(1). And such a motion—that is, one based on the *insufficiency of evidence*—may be "renewed" after trial. Rule 50(b). The Rule never mentions procedures for raising anything else—including purely legal issues decided against a party at an earlier stage of the case.

"The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012). But some circuits erroneously require a litigant to re-raise—in Rule 50 motions—purely legal issues that entail no further factual development between summary judgment and trial, notwithstanding the absence of any such requirement in Rule 50. See Pet.App.5a. This Court should bring that practice to an end. Rule 50 motions

are inappropriate for questions other than the sufficiency of evidence—and cannot replace summary judgment motions for addressing purely legal issues. See Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When are Such Denials Reviewable?* 2014 Mich. St. L. Rev. 895, 956 (2015).

The reason this reading makes sense is that, unlike summary judgment decisions that deny relief and require that factual disputes be resolved at trial, holding trial will not add anything to the analysis of legal issues that can be decided with reference only to undisputed facts. Where disputes of fact preclude summary judgment, the record may well look different at the end of trial—which warrants assessing the sufficiency of evidence again, at *that* time, rather than on the record appealed on summary judgment. Cf. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). That is why many circuit courts have rightly held that summary judgment *denials* based on questions of fact must be re-raised in a Rule 50 motion. See *Lama* v. *Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994) (collecting cases).

Purely legal issues resolved at summary judgment, however, are different because a jury trial will not change the relevant record. If a court erroneously grants summary judgment and removes an issue from the case, that issue comes off the table for purposes of the trial. The party has no reason (and presumably no opportunity) to put forward evidence on it. Similarly, if the court erroneously decides a legal issue at summary judgment, the subsequent factual submissions to the jury do not alter whether the initial *legal* determination was correct. And in neither case will the argument being pressed on appeal turn on the sufficiency of the evidence placed before the jury. So the

question at the core of a Rule 50 motion—whether, after a jury trial, there is not "a legally sufficient evidentiary basis to find for the party" (Fed. R. Civ. P. 50(a)(1))—does not bear on whether the district court's earlier purely legal decision was correct. Rule 50 does not speak to that question—or its preservation for appeal.

III. Sound judicial policy supports giving effect to the plain meaning of Rule 50.

Beyond the text of Rule 50, principles of sound judicial administration further support reversal. The "paramount command" of the Federal Rules of Civil Procedure is to secure "the just, speedy, and inexpensive" resolution of litigation. *Dietz* v. *Bouldin*, 579 U.S. 40, 45 (2016) (citing Fed. R. Civ. P. 1). From the Rules' earliest days, this Court has sought to administer them based on sound judicial policy—"to promote the ends of justice, not to defeat them." *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941). In short, "[o]rderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Ibid.* And here, sound judicial policy counsels against reading Rule 50 in a manner that adds extra-textual requirements to the rule.

A. No unfair surprise results from allowing parties—without filing Rule 50 motions—to preserve for appeal purely legal positions rejected on summary judgment.

As to *factual* issues, the "failure to comply with Rule 50(b) forecloses [a party's] challenge to the sufficiency of evidence" on appeal. See *Unitherm*, 546 U.S. at 404. This doctrine is rooted in fundamental fairness. The system should avoid unfair surprise to the litigants and to the district court—and seek to ensure

that the merits of an issue are fully aired prior to decision. As Justice Scalia once explained, "[t]he very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." *Freytag* v. *C.I.R.*, 501 U.S. 868, 895 (1991) (Scalia, J. concurring). As the trial is litigation's "main event," preservation doctrines ensure that parties respect it as such. See *Granberry* v. *Greer*, 481 U.S. 129, 132 (1987). Otherwise, meritorious claims and defenses would be held back while parties take the first—of many—bites at the apple.

By contrast, there is no reason to think that courts should treat a failure to renew a purely legal argument in the trial court as a forfeiture of that issue. Indeed, there is no unfair surprise—or surprise at all—when a party raises on appeal a legal issue that it fully litigated in connection with summary judgment motions below. The issue was briefed. The opposing party had an opportunity to respond in writing. The court may well have held oral argument. The judge considered and then actually decided the issue. Summary judgment motions and the decisions resolving them are not clandestine bombs strategically buried early in a proceeding only to explode after trial, with the effect of unexpectedly derailing the proceedings. They are lengthy, onerous, and expensive processes to which the parties on both sides dedicated significant time, effort, and resources.

In other words, summary judgment motions do not fly under the radar. Indeed, the legal issues on summary judgment may be more hotly contested—with a better record preserved for appeal—than many other issues that have the potential to result in reversal. An appellate court may reverse based on legal errors made in dismissing a count in a complaint, or in discovery orders depriving parties of critical discovery, or in orders rejecting proposed jury instructions, or even in key evidentiary rulings. See Steinman, *Puzzling Appeal*, 2014 Mich. St. L. Rev. at 960-961 (collecting examples). Summary judgment rulings are frequently the subject of far more extensive advocacy and judicial analysis than are these sorts of decisions.

In addition, many other issues—even those raised early in the proceedings—can be raised on appeal, regardless of whether the appealing party renewed or re-argued the bases for its motion at a later stage. Take motions to dismiss under Rule 12. In *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 496 (1989), this Court ruled on whether a denied motion to dismiss based on a forum selection clause constituted a collateral order. Critical to that decision was whether the motion to dismiss would be effectively reviewable on appeal from a final judgment. Upon concluding that it was, the Court held that "Petitioner's claim that it may be sued only in Naples, while not perfectly secured by appeal after final judgment, is adequately vindicable at that stage—surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant." *Id.* at 501.

Likewise, lower federal courts addressing legal issues decided on motions to dismiss for failure to state a claim have concluded that such claims *can* be re-

viewed on appeal following final judgment. See Steinman, *Puzzling Appeal*, 2014 Mich. St. L. Rev at 963 n.229 (collecting cases). Leading commentators agree: "[D]ismissal of part of a complaint or dismissal of an entire action for failure to state a claim is often reviewed on final judgment. * * * [I]f the legal theory is rejected by a definitive ruling denying a motion to dismiss at the pleading stage, renewal should not be required, not even if the defendant fails to request instructions embodying the theory rejected in denying the motion to dismiss and to object to denial of the request." 15A C. Wright & A. Miller, Fed. Prac. & Proc. Juris. § 3905.1 (3d ed. 2022) (citations omitted).

None of this should be surprising, as it is in keeping with sound policies underlying forfeiture doctrine. For example, none of these situations involves any unfair surprise: the issues were raised, each side was heard, and the district court ruled. On the other hand, the rule adopted below conflicts with other preservation doctrines (*e.g.*, forfeiture) that are predicated on concerns about unfair surprise. Rather than look for unfair surprise, the approach below would hold an issue forfeited *in spite of* its having been fully disclosed and litigated. The Fourth Circuit refused to address exhaustion of administrative remedies even though Dupree argued it on summary judgment and "the district court carefully considered" it. Pet.App.5a.

Because the Federal Rules seek to "promote the ends of justice," rigid forfeiture rules should be avoided if justice so requires. *Hormel*, 312 U.S. at 557. As this Court has explained, a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony

with this policy." *Ibid.* A fortiori, a rigid practice of holding forfeited legal questions that specifically *had* been previously pressed and ruled upon is out of harmony with the policies underlying the Federal Rules.

B. Allowing a party to appeal "purely legal" summary judgment decisions lets appellate courts perform their law-clarifying functions.

Quite apart from the foregoing analysis, allowing post-judgment appeals of summary judgment rulings even absent a Rule 50 motion asserting the same issues enables appellate courts to serve their proper functions. In our federal judicial system, trial and appellate courts serve complementary (if sometimes overlapping) functions: trial courts are generally better positioned to make factual determinations, and appellate courts better equipped to issue rulings that establish the law governing wide swaths of cases.

So, as a generalization, issues that turn on "the evidence regarding the facts" are best determined by the district court. *Pierce* v. *Underwood*, 487 U.S. 552, 560 (1988). District courts can feel the beating heart of a case. They speak to the lawyers; see the parties; hear the witnesses; read the exhibits; and judge testimony for credibility. It only makes sense, then, that Rule 50 determinations—which, by definition, follow the presentation of evidence at trial—should be directed "in the first instance" to "the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone*, 330 U.S. at 216. Our system rightly gives deference to district courts' decisions on factual matters, which appellate courts review "only to avoid severe aberrations, violations of duty, and clear errors that would result

in injustice to the parties." Joan Steinman, *Appellate Courts as First Responders: Constitutionality and Propriety of Appellate Courts Resolving Issues in the First Instance*, 87 Notre Dame Law Review 1521, 1524 (2012). As Federal Rule of Civil Procedure 52(a)(6) puts it: "Findings of fact * * * must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6); see also generally *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948).

Purely legal issues, however, are another matter. "Courts of appeals * * * are structurally suited to the collaborative juridical process that promotes decisional accuracy" on legal issues. *Salve Regina College* v. *Russell*, 499 U.S. 225, 232 (1991). Thus, "it can be expected that the parties' briefs will be refined [on appeal] to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district court judge." *Ibid.* And "[p]erhaps most important, courts of appeals employ multijudge panels that permit reflective dialogue and collective judgment." *Ibid.* (internal citations omitted).

Allowing appellate review of purely legal issues without a Rule 50 motion preserves those core competencies. Issues regarding sufficiency of the evidence are determined in the first instance by trial judges, by way of renewed Rule 50 motions. Cf. *Ortiz*, 562 U.S. at 191-192. By contrast, legal positions fully briefed under Rule 56 that call for no further factual development are reviewable de novo by the courts of appeals "even if raised only in a motion for summary judgment." See, *e.g.*, *In re Bard IVC Filters Prod. Liability*

Litig., 969 F.3d 1067, 1072-1073 (9th Cir. 2020) (finding purely legal issues remain reviewable "even after *Ortiz*"); *Frank C. Pollara Group, LLC* v. *Ocean View Inv. Holding, LLC*, 784 F.3d 177, 185-186 (3d Cir. 2015) (collecting cases). This preserves deference to trial courts on matters concerning facts and evidence while allowing appellate courts to exercise de novo authority over matters of law, where they have particular competence and are no less equipped to review the paper record that the district court reviewed under Rule 56.

Finding forfeiture of legal issues unless a party files a Rule 50 motion, on the other hand, has the potential to create a "gotcha" situation, and to immunize a district court's legal errors from review. This undermines justice. Consider a recent case in the Federal Circuit, *Ericsson Inc.* v. *TCL Communication Technology Holdings Ltd.*, 955 F.3d 1317 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 2624 (2021). The issue was patent eligibility—an "issue of law." *Id.* at 1321. The Eastern District of Texas held at summary judgment —after full briefing and argument—that the subject matter of the patent *was* patent-eligible under 35 U.S.C. § 101. *Id.* at 1320. The case proceeded to trial where a jury found infringement and awarded damages. *Ibid.* On appeal, however, a divided panel of the Federal Circuit held—as a matter of law—that the patent claims were *not* patent-eligible subject matter. *Id.* at 1331. The court thus reversed and remanded. Judge Newman dissented, however, reasoning that the defendant had not raised patent ineligibility in a post-trial motion, and—in her view—the Fifth Circuit's bar against raising "purely legal issues" unless they were "sufficiently preserved in a Rule 50

motion" forbade reaching the issue. *Id.* at 1332 (Newman, J., dissenting; citation omitted). But there is no discernible reason to shield this sort of legal error from review.

Many other serious issues can arise from district courts' erroneous legal rulings. Constitutional and statutory interpretation, the viability of affirmative defenses, choice-of-law determinations, preemption and immunity issues, contract interpretation—all of these issues may involve purely legal issues, and errors on any of them might escape correction under a rule that conditioned appellate review on a party having re-litigated, via a Rule 50 motion, issues raised and resolved at summary judgment. This Court should end that practice.

C. Principles of judicial economy weigh in favor of allowing judicial review of purely legal determinations without a redundant Rule 50 motion.

Allowing parties to appeal purely legal decisions fully briefed on summary judgment (without first filing a Rule 50 motion) also serves the interest of judicial economy. A litigant should not be required to repeatedly raise points they made—and lost—earlier in the litigation simply to satisfy a technical preservation requirement that serves no meaningful practical purpose. In fact, our system usually *discourages* parties from repeatedly raising the same legal arguments at later stages of a case. And for good reason.

Under the law-of-the-case doctrine, for example, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper* v. *United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona* v.

California, 460 U.S. 605, 618 (1983)). The exceptions to that doctrine are generally reserved for extraordinary situations where controlling law has changed, relevant evidence has become newly available, or reconsideration is necessary to correct a clear error and prevent manifest injustice. See generally Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. Pa. L. Rev. 595, 597-613 (1987).

In the main, this approach allows the trial court to streamline the issues as trial approaches and manage its docket—without constantly having to revisit its own rulings. To be sure, some issues may warrant reconsideration, whether by motion or *sua sponte*. But the clarity and utility of the law-of-the-case doctrine is generally better served when issues are cleared from the trial court's plate. Litigants then can focus their discovery, briefing, and trial preparation by relying on a settled legal landscape—without the potential need to challenge or defend at every turn the trial court's previous decisions. And even in circuits that do not apply law-of-the-case doctrine before final judgment, Rule 50(a) was never intended to function as a motion for reconsideration of summary judgment decisions. *E.g.*, Steinman, *Puzzling Appeal*, 2014 Mich. St. L. Rev. at 958 n.217.

Similarly, judicial economy is better served if the courts of appeals can review legal rulings at summary judgment that did not require further factual development—even if the losing party did not file a Rule 50 motion raising the same issue. Naturally, litigants must choose their best arguments for appeal from the bank of errors they perceive in the rulings below. But reducing unnecessary procedural hurdles allows the courts of appeals to consider key legal issues on their

merits. Requiring redundant Rule 50 motions—on pain of forfeiture—is an obstacle to appellate review of such issues, and one that imposes unnecessary burdens and expenses on the parties.

Applied nationally, the rule below would threaten to multiply Rule 50 motions as litigants maximize the issues they preserve for appeal—even if they ultimately might not raise them. A leading treatise addresses a similar issue in the context of the law-of-the-case doctrine:

> A trial court could not operate if it were to yield to every request to reconsider each of the multitude of rulings that may be made between filing and final judgment. All too often, requests would be made for no purpose but delay and harassment. Other requests, made in subjective good faith, would reflect only the loser's misplaced attachment to a properly rejected argument. Even the sincere desire to urge again a strong position that perhaps deserves to prevail could generate more work than our courts can or should handle. A presumption against reconsideration makes sense.

18B C. Wright & A. Miller, Fed. Prac. & Proc. Juris. § 4478.1 (3d ed. 2022). So too here: a presumption that a fully briefed and litigated legal issue is preserved for appeal makes sense and avoids creating incentives to delay, harass adversaries, and unduly burden trial judges.

From the filing of the complaint until the verdict is read, issues are sheared from the case and the dispute is gradually pared down. This occurs through motions to dismiss, discovery disputes, summary judgment motions, motions in limine, and many other

devices. And at each clash, one side will come away aggrieved—and with potentially appealable issues. But our system generally does not require parties to make the same arguments over and over to preserve them for appeal. A rule that required parties to revisit settled issues could lead to a barrage of unnecessary motions, just as trial or judgment approached. This would serve little practical purpose, and would come at the cost of wasting both judicial and private resources.

D. Exaggerated fears of "wasted trials" resulting from appellate review of purely legal decisions do not warrant affirmance.

While some authorities have expressed a fear that allowing appeals from denied summary judgment motions will result in wasted trials (see Steinman, *Puzzling Appeals*, 2014 Mich. St. L. Rev. at 974-975 (collecting authorities)), such fears are exaggerated.

First, when a case presents close, dispositive legal issues that could obviate a trial, a party may request certification of the legal issue to avoid an unnecessary trial. When "there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation," an appeal may be certified. 28 U.S.C. § 1292(b). Such certification was a "judge-sought, judge-made, judge-sponsored enactment" to the end of reducing unnecessary trials. *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697, 702 (5th Cir. 1961). District courts can manage fears of unnecessary trials by certifying close questions under § 1292(b); and if the court of appeals has concerns with the ruling below, it can take up the matter on an interlocutory basis, potentially "material[ly] advanc[ing] the ultimate termination of

the litigation." 28 U.S.C. § 1292(b). Indeed, this Court has recognized that "litigants confronted with a particularly injurious or novel" ruling should look to 1292(b) in this way. *Mohawk*, 558 U.S. at 110-111.

Second, and more importantly, the final judgment rule itself accepts the risk that some trials may have to be repeated. "[T]he possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 436 (1985). Instead, "[i]nherent in the final judgment rule is the possibility that some cases will proceed further than they should have, resulting in increased costs for parties and non-parties alike." *United States* v. *Academy Mortgage Corp.*, 968 F.3d 996, 1007 (9th Cir. 2020). But "[t]his cost is tolerated under the fundamental calculus of the final judgment rule:" "[w]hatever the costs in some particular cases, it is hoped that in general and for most cases the rule works better for both litigants and the court system." 15A C. Wright & A. Miller, *supra*, at § 3914.6. Thus, the concern that some trials may end up having been unnecessary is well-understood and accepted.

Third, the risk of a "wasted trial" must be weighed against the comparative injustice of allowing a legally infirm judgment to stand. Justice should endeavor to reach the right result on the merits—not to permit the party who ought to have lost to maintain its erroneous win. To the extent that the trial was "wasted," it was wasted because of a district court's legal error. That is no justification for committing the further mistake of refusing to allow appellate review of that legal error and right the wrong done.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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MARCH 2023