No. 22-210

In the Supreme Court of the United States

NEIL DUPREE,
PETITIONER,

v.

KEVIN YOUNGER,
RESPONDENT.

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

BRIEF FOR RESPONDENT

ALLEN E. HONICK
DUSTIN FURMAN
FURMAN HONICK LAW
11155 Red Run Blvd.
Suite 110
Owings Mills, MD 21117
(410) 844-6000

DAVID DANEMAN
WHITEFORD, TAYLOR &
PRESTON, LLP
7 St. Paul Street
Baltimore, MD 21202
(410) 347-8729

LISA S. BLATT
AMY MASON SAHARIA
Counsel of Record
A. JOSHUA PODOLL
SAMIYYAH R. ALI
MARY E. GOETZ
TYLER J. BECKER
JACOB L. BURNETT*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue S.W.
Washington, DC 20024
(202) 434-5000
asaharia@wc.com

* Admitted in Indiana. Practice in the District of Columbia supervised by members of the D.C. Bar as required by D.C. App. R. 49(c)(8).

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Page

Cases—continued:

Constitution, Statutes, Regulations, and Rules:

Page

Rules—continued:

Page

Other Authorities:

Page

Other Authorities—continued:

In the Supreme Court of the United States

NEIL DUPREE,
PETITIONER,

v.

KEVIN YOUNGER,
RESPONDENT.

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

BRIEF FOR RESPONDENT

STATEMENT

The jurisdiction of the appellate courts is limited to "final decisions" of district courts. 28 U.S.C. § 1291. This Court has already held that denials of summary judgment—which are "simply a step along the route to final judgment"—do not "[o]rdinarily" qualify as "final decisions" subject to appellate review. *Ortiz v. Jordan*, 562 U.S. 180, 184, 188 (2011) (citations omitted). And once a trial occurs, appellate courts have no "warrant to upset the jury's decision" based on the legal sufficiency of the evidence absent motions under Rules 50(a) and (b). *Id.* at 191-92. These principles resolve this case: a party may not appeal the denial of a summary-judgment motion after

trial but must instead preserve its arguments in Rule 50 motions.

Petitioner Neil Dupree did not comply with that straightforward requirement. Dupree ordered prison guards to carry out a brutal attack against respondent Kevin Younger. In Younger's subsequent suit, Dupree moved for summary judgment on his affirmative defense of exhaustion. The district court acknowledged, but did not address, the parties' factual disputes on the issue. Instead, the court held that Dupree was not entitled to summary judgment because a parallel officer-misconduct investigation made the administrative-grievance process unavailable. No judgment entered on the exhaustion defense.

Dupree abandoned the defense at trial. He did not present evidence on exhaustion; seek jury instructions or a verdict sheet question on exhaustion; or move for judgment as a matter of law on exhaustion. He then resurrected exhaustion on appeal, conceding that the district court had correctly held that the grievance process was unavailable but arguing that somehow the appellate grievance process was nonetheless available. The Fourth Circuit held that it could not consider Dupree's exhaustion defense because Dupree had not raised exhaustion after losing his summary-judgment motion.

The Fourth Circuit's decision was correct. An order denying summary judgment does nothing but allow a claim or defense to proceed. Requiring parties to continue pursuing all claims and defenses on which they lost at summary judgment promotes "the just, speedy, and inexpensive determination" of civil actions. Fed. R. Civ. P. 1. It provides a clear rule for courts and litigants. It also protects against piecemeal litigation. Litigants often oppose summary judgment on multiple grounds—as

Younger did here. Requiring the losing party to continue pressing his claims or defenses ensures that all potential arguments are ventilated and all factual disputes are resolved, eliminating the possibility of multiple trials and appeals and avoiding complicated remedial questions.

This case proves the point. As Dupree conceded below (but tries to gloss over here), factual disputes relevant to exhaustion remain unresolved in this case. If Dupree had raised his affirmative defense at trial, the parties could have litigated the remaining factual disputes. If Dupree is permitted to litigate exhaustion on appeal notwithstanding his failure to move under Rules 50(a) and (b), the only potential remedy would be a new trial on his defense. But "a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006).

Dupree (at 2) urges the Court to create an exception to *Ortiz*'s rule when denial of summary judgment is based on a "purely legal" ruling, a phrase he does not define. Dupree's position finds no support in the text of Rule 56, which creates just one kind of summary-judgment motion, or Rule 50, which creates one kind of motion for judgment as a matter of law. Dupree's manufactured distinction between "legal" and "factual" summary-judgment orders would create serious practical problems. Courts and litigants would be left to guess whether rulings were "legal," "factual," or mixed. And the consequences of guessing wrong are severe: a party that mistakenly believes a factual issue is legal and does not pursue that argument at trial would forfeit the argument. *See Ortiz*, 562 U.S. at 190.

The text, structure, and history of the Federal Rules, along with the practical implications of the parties' positions, all point in one direction. The Court should hold that an order denying summary judgment is unappealable, no matter the grounds for the decision, and require parties to preserve claims and defenses they lost at summary judgment at trial.

A. Factual Background

1. On September 30, 2013, petitioner Neil Dupree, a lieutenant at a Maryland state prison, directed three prison guards to attack respondent Kevin Younger while he was detained at the prison awaiting trial. Pet.App.3a. In misdirected retaliation for an incident the day before—"blood for blood," as Dupree put it when he ordered the attack, Dist. Ct. Dkt. 290, at 142—the guards entered Younger's cell while he was sleeping, threw him from the top bunk onto the concrete floor, and bludgeoned him with a mace can, radios, and handcuffs used as brass knuckles. Pet.App.3a, 34a, 55a. Still unsatisfied, the guards slammed Younger's head against the floor and toilet and left Younger unconscious in a pool of his own blood. Pet.App.12a, 55a. An hour later, two of the guards returned and brought Younger to the medical unit. Pet.App.12a. The guards ordered Younger to report that his injuries came from falling out of his bunk. Pet.App.12a.

Younger was bedridden for weeks. Pet.App.12a. The attack caused permanent injuries to Younger's face, wrists, ribs, right hand, and right leg. Pet.App.12a. Younger suffered from headaches and anxiety for months and eventually underwent surgery to repair his leg. Pet.App.12a. The guards pleaded guilty to criminal charges or were criminally convicted by a jury for the attack. Pet.App.12a.

2. Younger sought redress for his injuries under Maryland's Administrative Remedy Procedure (ARP). Pet.App.38a-39a. That program requires an aggrieved inmate to file a complaint with his institution's warden. J.A.30-31. If the inmate is not satisfied with the warden's response, he may appeal to the Commissioner of Corrections. Pet.App.38a-39a; J.A.30-31. If the appeal is unsuccessful, the inmate may seek further review from the Inmate Grievance Office, or IGO. J.A.31. The IGO may, but is not required to, dismiss an appeal for failure to file a complaint with the warden or appeal to the Commissioner of Corrections. J.A.48; *accord* Md. Code Regs. ("COMAR") 12.07.01.06E (2013).

Soon after the attack, Younger filed ARP complaints. J.A.226-227, 229. He received no response, however, because he had been moved to another institution and placed in solitary confinement in misplaced punishment for his purported involvement in the prior assault on an officer. *See* Pet.App.42a; J.A.228.

At this second institution, Younger filed another ARP complaint because he had yet to hear back about the initial complaints. The complaint was signed by the officer who received it and presumably delivered to the warden. J.A.185-187. The warden apparently denied the ARP. J.A.228. Younger also wrote to a commissioner within the Department of Corrections who told Younger to "write him," but Younger received no response. J.A.163, 184.

Still seeking redress, Younger approached the IGO. To support his application, Younger provided a copy of the complaint he filed at the second institution. That was all the documentation Younger had at the time: corrections officials confiscated his papers when he was moved and placed in solitary confinement, so he had no records of his

original ARP complaints. Pet.App.42a. No evidence indicates that the IGO spoke with the warden or sought a copy of the files regarding Younger's original complaints. Instead, the IGO conferred with the Commissioner of Corrections' office, which had no record of Younger's appealing an adverse ARP decision. J.A.195-196. The IGO dismissed Younger's grievance for failure to file an initial complaint and appeal to the Commissioner. J.A.196-199.

3. Meanwhile, a separate body called the Internal Investigative Unit, or IIU, was investigating the attack on Younger. Pet.App.42a; *see* Dist. Ct. Dkt. 195-2 (IIU file). The IIU investigates officer misconduct. It is separate from the ARP, under which Younger pursued his grievance. Pet.App.40a; *see* J.A.318-333.

Under then-existing Department of Corrections directives and Maryland regulations, an ARP complaint and an IIU investigation could not coexist. Thus, when "the basis of [an ARP] complaint is the same basis for an investigation under the authority of the [IIU]," the warden "shall issue a final dismissal" of the ARP complaint. J.A.108; *accord* COMAR 12.11.01.08 (2013), J.A.345 (requiring agencies, including the IGO, to "[r]elinquish authority for an investigation undertaken by the IIU"). *See generally Ross v. Blake*, 578 U.S. 632, 645-48 (2016) (discussing the Maryland ARP and IIU procedures).

The IIU began its investigation on October 1, 2013, the day after the assault. Dist. Ct. Dkt. 195-2, at 9. IIU personnel interviewed Younger and other inmates, along with Younger's assailants. *Id.* at 15-42. Investigators also reviewed incident reports, logbooks, photographs, and medical records. *Id.* at 6-7. The IIU's investigation sustained charges of misconduct against the guards who assaulted Younger and led to the removal of the prison's warden. *Id.* at 43-58; Pet.App.42a. The IGO knew about

the IIU investigation when it dismissed Younger's grievance. *See* J.A.187.

B. Proceedings Below

1. Still incarcerated and suffering the lasting effects of the attack, Younger filed the present suit in September 2016. Pet.App.3a, 13a. He brought constitutional claims under 42 U.S.C. § 1983, as well as state-law claims that he eventually won in state court. Pet.App.3a, 13a. Dupree twice moved to dismiss Younger's complaint; the district court denied both motions. Pet.App.57a, 86a.

In a motion for summary judgment, Dupree argued that Younger had not exhausted his administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e. J.A.4-19. The PLRA requires prisoners to exhaust "such administrative remedies as are available" before bringing suit in federal court "with respect to prison conditions." *Ross*, 578 U.S. at 638 (quoting 42 U.S.C. § 1997e(a)). Failure to exhaust under the PLRA is "an affirmative defense the defendant must plead and prove." *Jones v. Bock*, 549 U.S. 199, 204, 212 (2007).

A prisoner need not exhaust administrative remedies that are "unavailable," meaning "not capable of use to obtain relief." *Ross*, 578 U.S. at 643. In *Ross*, this Court identified three circumstances in which a remedy is unavailable: (1) when the procedure "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when the scheme is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process." *Id.* at 643-44.

Dupree asserted that Younger failed to "demonstrate[] that he properly had exhausted the ARP process

before resorting to the IGO nor provided a basis for waiving the ARP exhaustion requirement." J.A.10 (citation and internal quotation marks omitted). He attached hundreds of pages of supporting evidence, including material that had not been produced in discovery. J.A.293; *see* J.A.22-233. Dupree acknowledged that federal district courts in Maryland had found that an IIU investigation renders the ARP process "unavailable" and thus unnecessary for exhaustion under *Ross*, 578 U.S. 632. J.A.16-19. But he argued that those decisions were incorrect because the ARP process was not so "opaque" that it was practically unavailable, even in the presence of an IIU investigation. J.A.19; *see Ross*, 578 U.S. at 643-44.

To bolster this argument, Dupree claimed that another inmate assaulted the same day as Younger had successfully navigated the ARP process, proving that the process was available. J.A.15-16. Dupree attached the inmate's grievance file as an exhibit. J.A.200-220. The file shows that when the inmate submitted an ARP complaint about the incident, his complaint was "[d]ismissed" due to the IIU investigation. J.A.203.

Opposing the motion, Younger responded that he did file a grievance. J.A.292. Alternatively, he maintained that the IIU's involvement rendered the administrative remedy process unavailable to him. J.A.294-295. He also argued that prison officials and others "thwart[ed]" his efforts to exhaust the ARP process, rendering the ARP unavailable under *Ross*. J.A.297 (citation omitted). Younger pointed to his testimony that he had filed numerous grievances and not heard back; to the confiscation of his documents when he was forced to move facilities and mistakenly placed in solitary confinement; and to his claim that "various prison administrators" "repeatedly t[old] Younger that his claims were fully preserved." J.A.292,

296-297. Younger did not cross-move for summary judgment.

The district court denied Dupree's motion. The court acknowledged the existence of factual "disputes concerning Younger's adherence to the ARP process." Pet.App.42a. But the court agreed with prior District of Maryland decisions that had "repeatedly held that the availability of the IIU process closes the door to the ARP process" and "fully satisfies the PLRA'[s] exhaustion requirement." Pet.App.40a-41a (citation omitted). The court thus held that Dupree was not entitled to summary judgment on his exhaustion defense.

2. A jury trial followed. Dupree presented no evidence relevant to exhaustion, nor did he request a jury instruction on exhaustion.

At the close of Younger's case, Dupree moved for judgment as a matter of law under Rule 50(a), but did not raise his exhaustion defense. The district court denied the motion. The court noted that one of the officers involved in the assault testified that Dupree ordered him to draw "blood for blood." Dist. Ct. Dkt. 330, at 119. The court further noted that Dupree had provided a different officer a list of cell locations for inmates who were attacked, including Younger. *Id.* In light of that evidence, the court concluded, "clearly there's a jury issue." *Id.* at 121.

The jury found Dupree liable for violating the Fourteenth Amendment under 42 U.S.C. § 1983. Dist. Ct. Dkt. 265. Dupree did not move for judgment as a matter of law under Rule 50(b) or seek a new trial. *See* Pet.App.10a-11a. After trial, Dupree moved unsuccessfully for remittitur under Rule 59. Pet.App.27a. He did not raise his exhaustion defense in that motion.

3. Dupree appealed to the Fourth Circuit. The only issue he raised on appeal was the district court's denial of his motion for summary judgment on exhaustion grounds. Dupree jettisoned the primary argument he had advanced below, conceding that "the district court correctly determined that an IIU investigation 'closes the door to the ARP.'" C.A. Br. of Appellant 15. Dupree instead argued that Younger was required to exhaust remedies before the IGO (the second-level appellate body, *see supra* p. 5), even though the pendency of the IIU investigation meant that he did not need to exhaust remedies through the ARP. *Id.* at 15-18. Dupree also renewed his related factual argument that administrative remedies were available to Younger because another attacked inmate was able to use them to obtain relief. *Id.*

Younger responded that Dupree had changed his argument on appeal. C.A. Br. of Appellee 15. Younger also noted that Dupree's revised argument failed because Younger *had* brought his grievance to the IGO. *Id.* at 18. And, in any event, Younger explained that an IIU investigation rendered *all* parts of the administrative process unavailable, including the appeal to the IGO, under the relevant regulations. *Id.* at 21-25, 36. Younger further argued that if a prisoner could get relief from the IGO even though the first two steps of the process were unavailable to him, the process would be "opaque" under *Ross*. *Id.* at 30-40. And he again argued alternatively that prison and IGO officials "thwart[ed]" his exhaustion efforts. *Id.* at 34-35. Younger also noted that, under Fourth Circuit precedent, Dupree's failure to renew his exhaustion argument in a Rule 50 motion meant that the argument was not preserved for appeal. *Id.* at 16-17.

At oral argument, Younger's counsel highlighted the pending disputes of fact, unresolved by the district court

at summary judgment, regarding whether the administrative-remedy process was "unavailable" under *Ross* due to its opacity and attempts by prison officials to thwart exhaustion. C.A. Oral Arg. at 26:25-28:30 (Jan. 25, 2022). In response, Dupree's counsel acknowledged that "there are factual disputes relevant to the [*Ross*] availability analysis" regarding both "opacity" and "thwarting." *Id.* at 29:07-29:41. Dupree's counsel agreed that those factual disputes "should be resolved if this matter is reversed and remanded." *Id.*

The Fourth Circuit applied its longstanding precedent and held that Dupree could not appeal the exhaustion issue because he did not raise it in a Rule 50 motion before the district court. Pet.App.5a. The panel thus dismissed Dupree's appeal. Pet.App.9a. The court of appeals denied rehearing en banc. Pet.App.111a.

SUMMARY OF ARGUMENT

I. A. This Court's decision in *Ortiz v. Jordan*, 562 U.S. 180 (2011), confirms that orders denying summary judgment are not "'final decisions' subject to appeal." *Id.* at 188 (quoting 28 U.S.C. § 1291). When courts deny summary judgment on a claim or defense, the claim or defense remains live. Parties thus must pursue the claim or defense to final judgment, including by filing Rule 50(a) and (b) motions. Although the Court in *Ortiz* did not address the respondents' request for an exception when an order denying summary judgment involves "purely legal issues," the Court's reasoning applies to such orders equally. Nothing in Rule 56 distinguishes between summary-judgment denials based on application of law to undisputed facts and those based on disputes of fact. And many "legal" issues depend heavily on the underlying facts, which may change at trial.

B. Dupree failed to pursue his affirmative defense of exhaustion to a final decision. Civil litigation under the Federal Rules revolves around parties' claims and defenses, not abstract issues and arguments. A court's decision not to enter summary judgment on a claim or defense is simply not a final decision on that claim or defense. For a party to obtain a judgment on the claim or defense that is reviewable on appeal, it must raise the claim or defense at trial—by requesting jury instructions, presenting relevant evidence, and/or requesting judgment as a matter of law under Rule 50. Dupree did none of those things. He therefore abandoned his exhaustion defense.

C. Dupree's proposed exception lacks any foundation in the Federal Rules. The text and history of Rule 56 foreclose Dupree's contention that two distinct types of summary-judgment motions exist. Likewise, the text of Rule 50, the history of motions for judgment as a matter of law, and this Court's cases applying Rule 50 refute the notion that Rule 50 is an inappropriate vehicle to decide and preserve legal issues. And Dupree's argument that orders denying summary judgment on a legal ground merge into the final judgment is wrong. The merger rule does not apply to orders that do not finally settle the merits of claims or defenses. Dupree's examples of pretrial orders merging into final judgment—which neither involve the merits of claims or defenses nor reflect final adjudication of claims or defenses—are inapposite.

II. The history of the Federal Rules does not justify Dupree's exception. Before 1938, summary judgment existed only in limited forms in the various States. Denials of summary-judgment motions were not generally appealable, following English practice. The Federal Rules vastly expanded the scope of the summary-judgment procedure, allowing any party to move for summary judgment, on any

claim or defense, in all types of civil actions. For this reason, Dupree's attempt to equate summary-judgment motions with demurrers—which at common law included both pretrial demurrers and demurrers to the evidence—is misguided. Modern summary-judgment motions are not analogous to common-law demurrers; notably, a party with the burden of proof could not generally demur on his own claim or defense at common law. Finally, Dupree's contention that requiring parties to re-raise legal issues rejected at summary judgment equates to a modern version of a bill of exceptions proves too much. This Court already held in *Ortiz* that parties must re-raise issues from denied summary-judgment motions in Rule 50 motions, with nary a word about bills of exceptions.

III. A rule requiring preservation promotes the just, speedy, and inexpensive determination of actions.

A. A rule requiring preservation facilitates efficient resolution of factual disputes, protects parties' Seventh Amendment right to jury trials, and prevents piecemeal litigation. Parties often oppose summary judgment on multiple grounds. Under Dupree's rule, if a court denies summary judgment on a "legal" ground, the defendant could sit on his hands during trial and resurrect his affirmative defense on appeal. If the defendant prevails on appeal, the Seventh Amendment would require a second trial to resolve the remaining factual disputes. This case illustrates the point: as Dupree admitted below, factual disputes relevant to exhaustion remain unresolved in this case. Requiring preservation in Rule 50 motions facilitates resolution of outstanding factual disputes at initial trials.

B. The preservation requirement also promotes clarity. Dupree's inability to provide a consistent articulation of his rule demonstrates its unworkability. Even courts

that have adopted some variation of Dupree's rule acknowledge the vexing nature of determining whether an issue is based in law, fact, or both. Although Dupree responds that courts are familiar with distinctions between legal questions and factual ones, his primary example—the limited exception that allows defendants denied qualified immunity at the summary-judgment stage to immediately appeal—only illustrates the problem with his rule. An incorrect guess as to whether a qualified-immunity issue is factual or legal matters less in an interlocutory posture. The stakes are much higher here. Under Dupree's rule, the punishment for a litigant who guesses wrong that his issue is "legal" and thus does not re-raise the issue is forfeiture.

C. Finally, a ruling for Dupree will create confounding remedy questions in this case and others like it. Dupree is not entitled to the remedy he requested below—summary judgment—because even if the Fourth Circuit reverses on the issue Dupree raises, factual disputes remain. The only potential remedy would be a new trial, but Dupree never requested a new trial and thus forfeited that relief.

ARGUMENT

I. Denials of Summary Judgment Are Not Appealable

Appellate courts' jurisdiction extends only to "final decisions" of the district courts. 28 U.S.C. § 1291. This Court held in *Ortiz v. Jordan*, 562 U.S. 180 (2011), that orders denying summary judgment are not final decisions and cannot be appealed; Rule 50(a) and (b) motions are required to preserve claims and defenses for appellate review following trial. *Ortiz*'s rationale applies to all denials of summary judgment, no matter the basis. Rule 56 creates one kind of summary-judgment motion, not two, and

permits courts to grant final decisions on claims and defenses, not legal issues in the abstract. Here, the district court denied summary judgment on Dupree's affirmative defense of exhaustion. To preserve the defense for appeal, he needed to move under Rules 50(a) and (b). Because he failed to do so, the appellate court correctly held that it was "powerless" to upset the judgment below. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006).

A. Denials of Summary Judgment Are Not Final Decisions

1. The courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Decisions denying summary judgment "do not qualify" as "final decisions." *Ortiz*, 562 U.S. at 188; *accord id.* at 192 (Thomas, J., concurring in judgment). Instead, as this Court explained in *Ortiz*, denial of summary judgment is "simply a step along the route to final judgment." *Id.* at 184 (majority op.).

Orders denying summary judgment "decide[] only one thing—that the case should go to trial." *Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966). The moving party is free to "rais[e]" again "any of the issues dealt with on the motion" later in the case. 10A Charles Allen Wright, et al., *Federal Practice and Procedure* § 2712 (4th ed.) ("Wright & Miller"). And the order denying summary judgment is eventually "supersede[d]" by "the full record developed" at trial. *Ortiz*, 562 U.S. at 184.

Of course, a defense does not "vanish" when a district court denies summary judgment. *Id.* The defense "remains available." *Id.* A party that desires a judgment on the defense, therefore, must continue to pursue it at trial,

for example by presenting evidence on the defense, requesting jury instructions on the defense, *see* Fed. R. Civ. P. 51, and/or moving for judgment as a matter of law on the defense under Rules 50(a) and (b).

Once a case proceeds to trial, "[a] party's failure to file a Rule 50(b) postverdict motion deprives an appellate court of the power to" "direct the District Court to enter judgment contrary to the one it had permitted to stand." *Unitherm*, 546 U.S. at 400-01 (cleaned up). So too, the appellate court cannot direct a new trial based on "*legal* insufficiency of the evidence" absent a post-verdict motion. *Id.* at 404 (emphasis added). A Rule 50(a) denial, no matter whether based on facts or law (or both), is not a "final decision" reviewable on appeal absent a Rule 50(b) motion. 28 U.S.C. § 1291. The same must therefore be true for denials of summary judgment.

The upshot is that when, as here, a district court denies summary judgment on a defense, the defendant must take steps at trial to pursue it, including moving under Rules 50(a) and (b). Otherwise, no final decision adjudicating the defense exists and the defense is forfeited. *See Unitherm*, 546 U.S. at 404-05 ("No procedural principle is more familiar to this Court than that a … right may be forfeited … by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

2. To be sure, in *Ortiz*, this Court declined to address the respondents' argument that appellate courts may review orders denying summary judgment concerning "purely legal" issues—*i.e.*, issues "about the substance and clarity of pre-existing laws" resolvable "with reference only to undisputed facts." 562 U.S. at 190 (citation omitted). But the Court's reasoning in *Ortiz* applies with full force to all summary-judgment orders.

Ortiz made clear that an order denying summary judgment does not qualify as a "final decision" appealable under § 1291. That is true regardless of whether the district court's ruling turned on a question of law or something else. Nothing in Rule 56's text distinguishes between orders denying summary judgment based on conclusions of law and those based on holdings that the relevant facts are in dispute. (And, of course, many denials of summary judgment may involve both.) In *all* cases, a summary-judgment motion requires courts to identify the governing law and apply it to the undisputed facts. Courts grant or deny summary judgment on "claim[s]" and "defense[s]"—not on legal issues. Fed. R. Civ. P. 56(a). An order denying summary judgment is merely a "step along the route to final judgment," *Ortiz*, 562 U.S. at 184, not a judgment on a claim or defense.

Ortiz also observed that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Id.* at 184. That is equally true when a court denies summary judgment based on issues resolvable "with reference only to undisputed facts." *Id.* at 190 (citation omitted).

Legal issues do not typically exist in the abstract. Take the "purely legal issues" Dupree identifies (at 32-33). Preemption, for example, often turns on "brute facts" regarding "what information [an agency] had before it." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1680 (2019). Application of the statute of limitations may depend on whether the record contains evidence of "wrongful conduct … after the precipitating event" to satisfy the "continuing violations" doctrine. *Paschal v. Flagstar Bank, FSB*, 295 F.3d 565, 572 (6th Cir. 2002) (citation omitted) (cited at Br. 32). And res judicata may involve a

"fact-intensive" privity analysis. *In re L&S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir. 1993).

Even if the relevant facts are undisputed at the summary-judgment stage, the evidentiary record may change at trial, when parties must present live witnesses, rather than rely on affidavits. "Many legal questions … will look quite different after developments at trial." *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 789 (6th Cir. 2020). Even for legal issues, the "full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz*, 562 U.S. at 184.

B. Dupree Failed to Obtain a Final Decision on His Affirmative Defense

As *Ortiz* and *Unitherm* make clear, the Federal Rules prescribe a set of procedural mechanisms that parties must follow to obtain final decisions on claims and defenses. Dupree failed to obtain a final decision on his affirmative defense of exhaustion and thus forfeited his defense.

1. The Federal Rules focus on adjudication of claims and defenses—not legal issues in the abstract. The pleading rules instruct parties how to "set out" their "claim or defense." Fed. R. Civ. P. 8(d)(2); *see, e.g.*, Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has[.]"). Once the case begins, the Rules define the scope of civil discovery by reference to each party's "claim or defense." Fed. R. Civ. P. 26(b)(1).

The Rules provide several mechanisms for parties to ask for grant of judgment on a claim or defense based only on the pleadings. Parties may move to dismiss "a claim" by asserting one of several enumerated "defenses," including that a pleading "fail[s] to state a claim upon which

relief can be granted." Fed. R. Civ. P. 12(b)(6). After pleadings have closed, a party may move for "judgment on the pleadings" if the offensive pleading fails to state a claim for relief. Fed. R. Civ. P. 12(c). Parties also may move to "strike from a pleading an insufficient defense." Fed. R. Civ. P. 12(f).

When a court denies a motion directed at the pleadings, the consequence is only that litigation proceeds to discovery. *See* Fed. R. Civ. P. 12(a)(4)(A) ("[I]f the court denies the motion … the responsive pleading must be served[.]"). The challenged claim or defense remains in the case.

2. Summary judgment provides the next, optional avenue for obtaining a final decision on claims and defenses before trial.

Under Rule 56, a party may move for summary judgment on any claim or defense (including ones on which the party bears the burden of proof) by "identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Courts must grant summary judgment if the moving party shows that "there is no genuine dispute as to any material fact" and she is "entitled to judgment as a matter of law." *Id.*

If the court denies a motion for summary judgment, no judgment has been entered on any claim or defense. Judgment has simply been denied. The denial order is not a final decision on the at-issue claims or defenses; it "is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switz. Cheese*, 385 U.S. at 25. Such an "order … [is] simply a step along the route to final judgment." *Ortiz*, 562 U.S. at 184.

Another provision, Rule 56(f), empowers district courts to grant summary judgment on a claim or defense, upon "notice and a reasonable time to respond," even when a party has not asked for it. Fed. R. Civ. P. 56(f). For example, the court may "grant summary judgment for a nonmovant" or "grant the motion on grounds not raised by a party." Fed. R. Civ. P. 56(f)(1), (2); *see, e.g.*, *Albino v. Baca*, 747 F.3d 1162, 1176-77 (9th Cir. 2014) (en banc) (instructing district court to grant summary judgment to nonmoving plaintiff on issue of exhaustion). The court may even "consider summary judgment on its own." Fed. R. Civ. P. 56(f)(3).

3. Once a case proceeds to a jury trial, Rule 50 provides the mechanism for parties to seek judgment on a claim or defense.[1]

During trial, a party may obtain "judgment as a matter of law against [another] party on a claim or defense" if

---

[1] Rule 50 applies in jury trials. Rule 52(c) permits analogous motions in bench trials. More generally, Rules 52(a)(1) and (5)-(6) permit appeals from findings of fact and conclusions of law issued following bench trials.

Some circuits have held that judges, not juries, should resolve disputes of fact related to exhaustion under the PLRA. *See, e.g.*, *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008). The Fourth Circuit has held the same, but only in unpublished opinions. *See Woodhouse v. Duncan*, 741 F. App'x 177, 178 (4th Cir. 2018); *Allen v. Harwood*, 728 F. App'x 222, 222 (4th Cir. 2018) (per curiam). Dupree never argued below that the judge should resolve factual disputes as to exhaustion and has not briefed that question before this Court. This question is therefore not before the Court. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989). The Court may assume for purposes of deciding this case that juries decide disputes of fact as to exhaustion. Alternatively, because this threshold issue has never been addressed in this case, the Court may wish to dismiss the grant of the writ of certiorari.

"a party has been fully heard on an issue … and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1)(B). The party's motion must "specify" both "the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). If the court does not grant a Rule 50(a) motion, the court submits the action to the jury subject to the court's "later deciding the legal questions raised by the motion." Fed. R. Civ. P. 50(b).

Rule 50 requires a court to identify and apply the governing law to the evidence. The court must determine whether the nonmoving party has "a *legally sufficient* evidentiary basis" "under the *controlling law*." Fed. R. Civ. P. 50(a)(1)(B) (emphases added). The Rule 50 standard thus "mirrors" the summary-judgment standard under Rule 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see also* Fed. R. Civ. P. 50 advisory committee's note to 1991 amendment (highlighting "the relationship between the two rules").

The requirement that a party file a Rule 50(a) motion during trial ensures that the nonmoving party has "an opportunity to cure any deficiency in [her] proof that may have been overlooked until called to the party's attention by a late motion for judgment." Fed. R. Civ. P. 50 advisory committee's note to 1991 amendment; *see id.* ("In no event … should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact.").

After trial, a party may renew the pre-verdict motion for judgment as a matter of law. Fed. R. Civ. P. 50(b). If the court grants the motion, it may set aside the jury verdict and enter judgment—"giv[ing] the trial court a last

chance to order the judgment that the law requires." 9B Wright & Miller, *supra*, § 2521 (3d ed.). A Rule 50(b) denial is reviewable on appeal in connection with the final judgment by operation of Rule 58(a)(1). *Unitherm*, 546 U.S. at 401.

Denial of Rule 50(a) motions—like denial of summary-judgment motions—simply allows claims and defenses to proceed. It is not appealable on its own. *Id.* Unless a party files a Rule 50(b) motion renewing the motion, an appellate court lacks "power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Id.* at 400-01 (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)).

4. Here, the district court denied Dupree's summary-judgment motion on his exhaustion defense. Pet.App.30a, 42a. Younger did not cross-move, and the district court did not exercise its discretion under Rule 56(f) to enter judgment in Younger's favor. Accordingly, the court never rendered a final decision on Dupree's exhaustion defense. Dupree did not raise his exhaustion defense in his Rule 50(a) motion, and he filed no Rule 50(b) motion at all. He thus "forfeited" his defense. *Unitherm*, 546 U.S. at 404.

C. Dupree's Proposed Exception Lacks Merit

Dupree insists that summary-judgment motions decided on "purely legal" grounds are an exception to the general rule that denials of summary judgment are not appealable. That argument finds no support in the text or structure of the Federal Rules or this Court's precedent.

1. Dupree relies heavily on the notion (at 4-5) that Rule 56 operates in "two distinct ways." The text of Rule 56 says otherwise.

Rule 56 provides one standard for summary judgment: the moving party must show "that there is no genuine dispute as to any material fact *and* the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). The Rule's use of the "conjunctive 'and'" means that both showings are required. *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620-21 (2021) (citation omitted).

Dupree's argument (at 4) that "there are two distinct ways a party can move for summary judgment" is therefore wrong. A showing that no genuine disputes of material fact exist does not warrant summary judgment unless the movant also is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *contra* Br. 4-5. And because Rule 56 speaks to "claim[s] or defense[s]," not arguments or issues, a showing that the movant is theoretically correct about a dispositive legal question does not warrant summary judgment unless the material facts are undisputed. Fed. R. Civ. P. 56(a); *contra* Br. 5. There is, in other words, only one way to obtain summary judgment: by showing both that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. In every case, the court must both identify the governing law and apply it to the undisputed evidentiary record.

The history of Rule 56 confirms this interpretation. An early draft of the Rule provided for two types of summary judgment. First was summary judgment "on depositions or admissions," which was appropriate when the parties' evidentiary materials "clarified the factual situation, removing any doubt as to the case's applicable facts and leaving only legal questions." Ilana Haramati, *Procedural History: The Development of Summary Judgment*

as Rule 56, 5 N.Y.U. J. L. & Liberty 173, 192 (2010). Second, the proposed rule contemplated summary judgment "on affidavits," which was appropriate "when a claim was facially groundless." *Id.*

The Advisory Committee disposed of the draft distinction. The Committee opted instead for a single standard allowing summary judgment only "when the case was clear 'as a matter of law.'" *Id.* at 206 (citations omitted). That choice is embodied in today's Rule 56. Dupree's attempt to dissect the rule on artificial lines fails.

2. Dupree also contends that parties need not raise legal issues decided at summary judgment in Rule 50 motions because Rule 50 is an inappropriate vehicle to decide and preserve legal issues. According to Dupree (at 39), Rule 50's "intended use" is to decide "the sufficiency of evidence entered into the trial record, not to decide questions of pure law that do not depend on that record."

Dupree is wrong. First, as already discussed, the Rule 50 standard "mirrors" the summary-judgment standard under Rule 56. *Anderson*, 477 U.S. at 250; *see supra* p. 21. Dupree's assumption that Rule 56 is fit for deciding legal issues but Rule 50 is not is therefore incorrect. The principal difference between the two Rules is that Rule 56 considers evidence produced in the case to date, while Rule 50 considers evidence introduced at trial. That difference says nothing about the propriety of raising legal issues. In both cases, the court must identify the governing law and apply it to the record. If anything, the court's stronger understanding of the case after trial weighs in favor of considering legal issues in Rule 50 motions.

Rule 50's text further undermines Dupree's argument. Dupree (at 39-40) isolates the words "sufficient evidentiary basis" to argue that the Rule is (or should be) limited to questions of evidentiary sufficiency. But he ignores the many instances where Rule 50 expressly contemplates that Rule 50 motions may present legal questions. Rule 50(a) authorizes courts to grant judgment as a matter of law based upon the "controlling law." Fed. R. Civ. P. 50(a)(1)(B). The Rule requires courts to find "that a reasonable jury would not have a *legally sufficient* evidentiary basis to find for the party on [an] issue." Fed. R. Civ. P. 50(a)(1) (emphasis added). In other words, the sufficiency of the evidence necessarily turns on the applicable law; the two go hand in hand.

Subsection (a)(2) requires movants to "specify … the law and facts that entitle the movant to … judgment." Fed. R. Civ. P. 50(a)(2). And section (b) provides that when a court does not grant a pre-verdict motion, "the court is considered to have submitted the action to the jury subject to the court's later deciding the *legal questions* raised by the motion." Fed. R. Civ. P. 50(b) (emphasis added). All of that explains why "judgment as a matter of law may be granted on purely legal issues unrelated to the sufficiency of evidence at trial." 9 James W. Moore, *Moore's Federal Practice* § 50.05[3] (2023); *see also K&T Enters. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996) ("A motion for judgment as a matter of law … can … be made on purely legal grounds, as Rule 50(b) makes clear.").

Nor does history help Dupree. This Court recognized as far back as 1935 that "[a]t common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the

ultimate ruling on the questions reserved." *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659 (1935).

Finally, the cases Dupree cites do not warrant a different conclusion. He (at 39) first points to a handful of lower-court cases for the proposition that courts "frown upon" raising legal issues in a Rule 50 motion. But one of his cases is inapposite. *See Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1121 (11th Cir. 2016) (explaining that, when considering a Rule 50(b) motion after the jury verdict, the "sufficiency of the evidence," not the "jury's findings," matters (citation omitted)). Another involves the admissibility of expert testimony and the court's *post*-trial trebling of damages. *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 161 & n.12, 163-65 & n.17 (4th Cir. 2012).[2] The other two cases are from circuits that adopt Dupree's proposed rule. *See Lexington Ins. Co. v. Horace Mann Ins. Co.*, 861 F.3d 661 (7th Cir. 2017); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837 (10th Cir. 2012).

Dupree's citations (at 41-43) to this Court's decisions fare no better. He argues that Rule 50 exists only for sufficiency-of-the-evidence challenges because the Court's cases considering Rule 50(b) involved those types of arguments. But the cited cases point away from Dupree's proposed exception. In two of the four cases, the Court explicitly contemplated using Rule 50 motions to resolve legal issues. *See Johnson v. N.Y., N.H. & H. R. Co.*, 344 U.S. 48, 53 (1952) ("This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the postverdict movant

[2] The court "assume[d]" without "decid[ing]" that several other "purely legal issues" were preserved "despite the failure to move postverdict under Rule 50(b)." *Belk*, 679 F.3d at 165 n.17.

and thus emphasizes the importance of the legal issues."); *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574 (1948) ("Whether a verdict should have been directed … depends upon a number of factors, including an interpretation of the law of Illinois where the contract was made.").

In all four cases, the Court emphasized that abandoning Rule 50's procedures would undercut the "principles of fairness" underlying the rule. *Unitherm*, 546 U.S. at 401 (citation omitted). In particular, ignoring Rule 50 would deprive district courts of their discretion to finally decide questions "with a fresh personal knowledge of the issues involved" and to "correct [their] own errors without delay, expense, or other hardships of an appeal." *Cone*, 330 U.S. at 216 (citation omitted); *see Unitherm*, 546 U.S. at 401; *Johnson*, 344 U.S. at 53-54; *Globe Liquor*, 332 U.S. at 574. Those same principles require parties to re-raise summary-judgment arguments in Rule 50 motions.

Citing Justice Frankfurter's opinion in *Johnson*, Dupree responds that requiring a party to renew arguments in Rule 50 motions would be a "hollow formality." Br. 29; *see also* Br. 27, 30. But Justice Frankfurter dissented in *Johnson*. This Court held there that parties must renew arguments in Rule 50(b) motions even where the court reserves ruling under Rule 50(a)—notwithstanding Justice Frankfurter's protestations about "lifeless formalit[ies]." 344 U.S. at 53-54, 62.

3. Dupree (at 31) also invokes "law-of-the-case principles" for the notion that district courts cannot reconsider rulings denying summary judgment. The law-of-the-case doctrine, however, does not apply to a district court's reconsideration of rulings rendered before final judgment. *See, e.g.*, *Keepseagle v. Perdue*, 856 F.3d 1039, 1048 (D.C. Cir. 2017); *Peralta v. Dillard*, 744 F.3d 1076, 1088

(9th Cir. 2014) (en banc). Dupree's lone case, *Pepper v. United States*, 562 U.S. 476 (2011), is not to the contrary. That case simply held that the law-of-the-case doctrine did not limit a resentencing judge's discretion on remand. *Id.* at 506-07.

The court always retains authority "to modify or rescind its orders at any point prior to final judgment." *Dietz v. Bouldin*, 579 U.S. 40, 46 (2016); Fed. R. Civ. P. 54(b). Various factors might influence a court to reconsider an earlier ruling denying summary judgment, including the development of additional or different facts at trial or the realization that an earlier ruling was incorrect. That authority to "[s]elf-correct[] is manifestly important" in order to avoid "the greater delay and expense that would result from persisting in the error and eventual appellate reversal." 18B Wright & Miller, *supra*, § 4478.1 (3d ed.).

4. Dupree (at 13-19) also invokes the general rule that parties' "claims of district court error at any stage of the litigation may be ventilated" upon entry of final judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citation omitted); *see also* 28 U.S.C. § 1291. And Dupree maintains (at 14) that "exceptions" to that general rule "are few and well-defined."

Orders denying summary judgment, however, *are* a well-recognized exception to the merger rule. Denials of summary judgment are "strictly … pretrial order[s] that decide[] only one thing—that the case should go to trial." *Switz. Cheese*, 385 U.S. at 25. They do not conclusively "settle … anything about the merits of the claim." *Id.* A conclusive ruling on the merits of claims or defenses comes after trial, when a jury returns a verdict and the district court enters final judgment, or when the district court decides a Rule 50 motion.

As a result, this Court has explained, an order denying summary judgment is "simply a step along the route to final judgment." *Ortiz*, 562 U.S. at 184. Once a trial takes place, "the full record developed in court supersedes the record existing at the time of the summary-judgment motion" and any defenses (exhaustion here, qualified immunity in *Ortiz*) "must be evaluated in light of the character and quality of the evidence received in court." *Id.* Orders denying summary judgment thus do not merge with the final judgment for purposes of appeal.

The characterization of a summary-judgment order as involving "purely legal issues" does not change this conclusion. An order denying summary judgment does nothing but *decline* to enter judgment on a claim or defense. Under Dupree's argument, the entry of final judgment would transform a subset of orders *denying* summary judgment into orders granting judgment on a claim or defense to the other party. Nothing about the fact that an order involves a legal issue permits that atextual result.

For these reasons, Dupree's claim (at 17-18) that orders denying summary judgment are like "other kinds of appealable pretrial orders" is incorrect, as Dupree's examples illustrate. Most of the examples Dupree cites involve rulings unrelated to the merits of claims or defenses. The decisions to disqualify counsel, compel the production of privileged information, and decline to impose sanctions for discovery misconduct, for example, are not rulings on the underlying merits. *See* Br. 17-18 (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009), *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985), *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76 (3d Cir. 2019)).

The same is true of procedural decisions like whether to bifurcate trial, certify a class action, or remand for lack of subject-matter jurisdiction. *See* Br. 18 (citing *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 595, 601-04 (9th Cir. 2016), *Rosario v. Livaditis*, 963 F.2d 1013, 1015-16 (7th Cir. 1992), *Lewis v. Rego Co.*, 757 F.2d 66, 69 (3d Cir. 1985)). All of those rulings represent final, albeit interlocutory, decisions regarding particular procedural questions, and are reviewable without further objection. *See* Fed. R. Civ. P. 46.

Dupree (at 34) also highlights pretrial claim-construction rulings in patent cases under *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), arguing it "makes no sense" to require parties to raise claim-construction arguments in a Rule 50 motion. But under *Markman*, district courts enter findings of fact and conclusions of law, which are independently reviewable on appeal under Rule 52. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 322 (2015) (citing Fed. R. Civ. P. 52(a)(6)). The same may be true for the choice-of-law determination in *Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569, 571-72 (7th Cir. 1995) (cited at Br. 17), in which a party's request for a pretrial "hearing" on the choice-of-law issue was "distinct" from its request for summary judgment.

Dupree (at 17) similarly invokes a Tenth Circuit decision allowing appellate review of an order denying a motion to dismiss for lack of personal jurisdiction. *See First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127 (10th Cir. 1987). Orders resolving personal-jurisdiction issues under Rule 12(b)(2), unlike orders denying motions to dismiss for failure to state a claim under Rule 12(b)(6) and orders denying summary judgment, often involve factual findings by the district court. *See* 4

Wright & Miller, *supra*, § 1067.6 (4th ed.). Indeed, in Dupree's cited case, the district court appears to have weighed competing affidavits in concluding that minimum contacts with the forum state existed. *First City Bank*, 820 F.2d at 1131.

Outside the context of personal jurisdiction, the Tenth Circuit has ruled that "a defendant may not, after a plaintiff has prevailed at trial, appeal from the pretrial denial of a Rule 12(b)(6) motion to dismiss, but must instead challenge the legal sufficiency of the plaintiff's claim through a motion for judgment as a matter of law." *ClearOne Commc'ns, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011). That makes sense: it would be odd to vacate an otherwise valid judgment based on a denial of a motion to dismiss given that the parties can amend the pleadings to conform to the evidence at trial. *See Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996); Fed. R. Civ. P. 15(b). In any event, this Court has not resolved the question whether denials of motions to dismiss under Rule 12(b)(6) are appealable upon final judgment.

Dupree's last example (at 18) of an order that merges into the final judgment is an order granting summary judgment. To state the obvious, an order granting summary judgment is not equivalent to an order denying summary judgment. The former finally disposes of a claim or defense; the latter simply allows a claim or defense to proceed to trial.

5. Finally, Dupree points to orders denying qualified and sovereign immunity on legal grounds. Because those orders are appealable, Dupree claims, "[t]here is no merit to any argument that [orders denying] summary judgment rulings are … incapable of appellate review." Br. 18-19. Again, Dupree is incorrect. Denials of immunity on

purely legal grounds are immediately appealable because "[w]hen summary judgment is denied to a defendant who urges that qualified immunity shelters her from suit, the court's order *finally and conclusively* disposes of the defendant's claim of right not to stand trial." *Ortiz*, 562 U.S. at 188 (emphasis added) (cleaned up). That is an exception to the ordinary rule that denials of summary judgment "are by their terms interlocutory"—that is to say, not final—and do not merge into a final judgment. *Id.* (cleaned up).

II. The History of the Federal Rules Supports Affirmance

Dupree also asserts (at 19-30) that the history of the Federal Rules and of appellate review more generally supports the conclusion that denials of summary-judgment motions on purely legal grounds are appealable. Dupree is wrong on both counts.

1. Modern-day summary judgment was a novel procedure when the Federal Rules were enacted in 1938. Before the Federal Rules' adoption, summary judgment existed only in limited forms. It was exclusively a plaintiff's remedy in most states, unless the defendant filed a counterclaim. Haramati, *supra*, at 173, 179-84. And nearly all states that allowed parties to bring summary-judgment motions limited the procedure to select causes of action and liquidated claims. *See id.* at 193, 196-97, 200-01, 206-07.

The Federal Rules changed the scope of existing summary-judgment procedures significantly. The Rules allowed any party to move for summary judgment. Fed. R. Civ. P. 56(a). The Rules extended summary judgment to *all* civil causes of action. *Id.* And the Rules authorized summary-judgment motions on any claim or defense. *See Proceedings of the Institute on Federal Rules*, *in* Rules of

Civil Procedure for the District Courts of the United States with Notes and Proceedings of the Institute on Federal Rules 295-96 (William W. Dawson, ed. 1938). The upshot of those changes was a new procedure with no analogue in English or American law.

When the Rules were enacted, denials of summary-judgment motions were not generally appealable. "[S]ummary judgment procedures in the United States had their source in English practice." John A. Bauman, *The Evolution of the Summary Judgment Procedure*, 31 Ind. L.J. 329, 343 (1956). Where state practice varied from English practice, the variations were "traceable to local conditions or judicial structure." *Fisher v. Sun Underwriters Ins. Co.*, 179 A. 702, 704 (R.I. 1935). In England, denials of summary judgment could not be appealed under the Judicature Act of 1894. *Id.*

States' practices largely followed the English rule. For example, denials of summary judgment could not be appealed in Rhode Island and Connecticut. *See id.* at 707-08 (reversing earlier decision); Charles E. Clark, *The New Summary Judgment Rule*, 3 Conn. Bar J. 1, 11-12 (1929). The reason in both States was the same: denials of summary judgment were not "final judgment[s]." Clark, *supra*, at 12; *see Fisher*, 179 A. at 707. The Rhode Island Supreme Court expressly distinguished between denials and grants of summary judgment in reaching this conclusion. *Fisher*, 179 A. at 706. A party whose motion is denied, the court explained, "loses no … right." *Id.* By

contrast, a decision granting summary judgment "will, by operation of law, lead to final judgment." *Id.*[3]

2. Notwithstanding this history, Dupree (at 19-20) labors to convince the Court that "[d]emurrers are the direct antecedents of summary judgment motions." Because denials of pretrial demurrers were appealable after final judgment at common law even without a post-verdict motion, he reasons (at 22-27), denials of summary judgment must also be appealable after final judgment under the Federal Rules.

Dupree's argument conflates ordinary pretrial demurrers on the pleadings with demurrers to the evidence. Regardless, neither ordinary demurrers nor demurrers to the evidence are the ancestors of summary-judgment motions.

Dupree (at 22-24) cites a number of cases involving common-law demurrers on the pleadings. These demurrers are decidedly not analogous to modern summary-judgment motions. As Dupree's own authorities recognize, "[t]he Federal Rules replaced the demurrer and the code motion to dismiss with the Rule 12(b)(6) motion." *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 22 (2010); *see Proceedings of the Institute on Federal Rules, supra*, at 241-42.

Given that background, it is no surprise that common-law demurrers on the pleadings share certain attributes with modern-day motions to dismiss. Those demurrers

---

[3] Denials of summary judgment were appealable in New York, but that difference came from local "New York practice which permits appeals from interlocutory rulings to a considerable extent." Clark, *supra*, at 12.

could be taken by a defendant after receiving a complaint or a plaintiff after receiving a defendant's answer. Benjamin Shipman, *Hand-Book of Common-Law Pleading* 95 (1894). Upon a demurrer, the court would review the "face" of the opposing party's pleading, assume the facts it contained to be true, and determine whether the plaintiff was legally "entitled … to the redress he seeks, in the form of action which he has chosen." *Id.*; *see also Dunn, McCormack & MacPherson v. Connolly*, 708 S.E.2d 867, 869-70 (Va. 2011) (modern-day example of demurrer practice). That procedure resembles today's motion to dismiss, not today's motion for summary judgment.

Elsewhere, Dupree (at 27) claims that a different type of demurrer—a demurrer to the evidence—is the "common-law antecedent[]" to a summary-judgment motion.[4] But a demurrer to the evidence has no modern-day equivalent at all.

A party that did not have the burden of proof could (but was not required to) demur to the evidence at trial after its adversary's case closed. *See* Charles H. King, *Trial Practice—Demurrer Upon Evidence as a Device for Taking a Case from the Jury*, 44 Mich. L. Rev. 468, 470 (1945). As with a pretrial demurrer, a demurrer to the evidence accepted the truth of the opposing party's proof and challenged the legal sufficiency of the claim. *Id.* at

[4] Dupree (at 22, 27) cites a dissenting opinion by Justice Rehnquist for the proposition that "motions to dismiss and motions for summary judgment" are the descendants of demurrers. But Justice Rehnquist was referencing "demurrers *to the evidence*," not ordinary demurrers on the pleadings. *See Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 349-50 (1979) (Rehnquist, J., dissenting) (emphasis added). And Justice Rehnquist provided no support for the claim that summary-judgment motions descended from demurrers to the evidence.

472. If the demurring party lost, judgment was entered against it immediately. *Id.* If the demurring party won, judgment would be entered for it without having to wait for a jury. *Id.* That "demurrer to the evidence" is not analogous to any modern procedure.

Demurrers to the evidence also differ from motions for summary judgment in significant ways. Unlike motions for summary judgment, demurrers to the evidence were made once evidence was entered at trial, not before trial. And demurrers to the evidence resulted in final judgment even if denied; the demurring party would lose the case. *Id.* at 470.

In all events, and critically here, the party that bore the burden of proof ordinarily could not demur on his own claim or defense. *See* Shipman, *supra*, at 95, 109-10; King, *supra*, at 469-70. Here, Dupree bore the burden of establishing that Younger did not exhaust his administrative remedies. *See Jones v. Bock*, 549 U.S. 199, 207 (2007). As a result, a demurrer would have been unavailable to him at common law. Whatever else a demurrer may be, it is not analogous to summary-judgment motions like the one Dupree filed in this action. Common-law rules on appealing demurrers are irrelevant.

3. Finally, Dupree (at 28, 41) insists that requiring parties to re-raise purely legal arguments in Rule 50 motions would mark a return to the bill of exceptions abolished by Rule 46. That argument proves too much.

A bill of exceptions was a list of every legal and evidentiary objection in the entire proceeding. *See* Shipman, *supra*, at 112-13; *see also* Br. App. 1a-3a (exemplar bill of exceptions identifying rulings such as "Order extending time in which to answer"). In abolishing bills of exception, the Federal Rules made clear that a party did not need to

take a "formal exception" to rulings it believed were wrong. Fed. R. Civ. P. 46.

Rule 46 was not intended to, and did not, excuse parties from properly preserving claims and defenses for appeal. There is no dispute, for example, that a party cannot appeal an order denying summary judgment based on genuine disputes of material fact—bill of exceptions or not. *Ortiz*, 562 U.S. at 181. Nor may a party appeal the denial of a Rule 50(a) motion without moving under Rule 50(b). *Unitherm*, 546 U.S. at 400-01. In both instances, a party must make what some might call a "redundant" motion to preserve an issue for review. *Cf.* Br. 29. But in both cases, such a motion is necessary given the structure of the Federal Rules—just as a further motion is necessary here.

III. Affirmance Promotes Just, Speedy, and Inexpensive Determination of Actions

The Federal Rules are designed to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Requiring parties to preserve arguments raised in summary-judgment motions promotes those goals. Dupree's contrary rule undermines them.

A. Affirmance Prevents Piecemeal Litigation

1. A clear rule requiring parties to preserve at trial all issues raised in denied summary-judgment motions facilitates efficient resolution of factual disputes. In so doing, it protects parties' Seventh Amendment right to a jury trial, while at the same time mitigating the prospect of multiple trials and appeals.

Parties often oppose summary judgment on multiple grounds. Some will involve what Dupree calls "legal issues"; others will revolve around factual disputes; many will involve mixed questions of law and fact. If the court accepts one argument, it need not reach the others and the claim or defense may proceed to trial—even if more than one argument would independently warrant denial of summary judgment. That is a function of Rule 56's text: in deciding a summary-judgment motion, the court considers the viability of "claim[s] or defense[s]," not arguments or issues. Fed. R. Civ. P. 56(a).

When a party opposes summary judgment on multiple grounds, Dupree's approach risks introducing serious inefficiencies. Consider Dupree's flagship example of a "purely legal issue" often resolved at the summary-judgment stage: the statute of limitations (at 31-32). A plaintiff may respond to a statute-of-limitations defense, as Dupree hypothesizes (at 32), by asserting that Congress did not supply a limitations period. At the same time, the plaintiff also may advance a factual argument, such as tolling of the limitations period through fraudulent concealment.

Under Dupree's rule, if a court denied summary judgment based on the "legal issue," the defendant could sit on its hands during trial and resurrect its affirmative defense on appeal. If the plaintiff prevailed, the Seventh Amendment would require a new trial on remand for a jury to decide the facts relevant to the fraudulent-concealment question. A second appeal would follow the second trial. That iterative process is directly contrary to Rules 1 and 56: "Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal." *Holley v. Northrop Worldwide Aircraft Servs., Inc.,* 835 F.2d 1375, 1377 (11th Cir. 1988).

Requiring parties to preserve all summary-judgment arguments in a Rule 50 motion would mitigate the prospect of inefficient, piecemeal litigation. A plaintiff confronted with a Rule 50(a) motion on an affirmative defense could move to re-open her case to introduce proof on that defense; could use cross-examination to build her record; or could present relevant evidence in a rebuttal case after the defense case closed. The court could then ask the jury to resolve the remaining factual disputes, producing a final judgment on the defense reviewable on appeal on all grounds and saving the parties from a second trial. "[F]inal determination of the case is expedited greatly" under this approach. *Unitherm*, 546 U.S. at 405-06 (citation omitted).

Dupree (at 34-35) claims that district judges will be annoyed by Rule 50 motions preserving arguments that were the subject of unsuccessful summary-judgment motions. But, as anyone who has sat through a jury charge conference can attest, district judges understand that preserving issues for appeal is part of the trial process. *See* Fed. R. Civ. P. 51(b)-(c). "[T]he trial lawyer cannot be criticized for making a clear objection or request." ABA, *Preserving Appellate Complaints in Federal Courts* 4 (2020). If anything would burden the courts unduly, it is the extra work and additional trials created by Dupree's rule.

Amici echo petitioner's "cluttering" concerns, arguing that "incorporation by reference is a disfavored practice," permitted only in a pleading under Rule 10(c). DRI Br. 8; *see* Br. 36-37. While Rule 10 affirmatively discusses incorporation by reference of statements in pleadings, it does not foreclose incorporation by reference in motions and

oppositions.[5] If an argument is sufficiently important to warrant inclusion on appeal, surely a party can find space for it in a Rule 50 motion. District courts and litigants routinely navigate issues related to page limits and incorporating arguments; this case does not present any unique considerations on that front.

2. This case concretely illustrates the need for parties to preserve summary-judgment arguments at trial. Dupree tells the Court no fewer than five times (at 3, 7, 8, 16-17, 36), that no factual disputes exist regarding exhaustion, and even claims without citation (at 36) that Younger agrees. Dupree conceded the very opposite at oral argument in the Fourth Circuit, *supra* p. 11, for good reason. Younger argued in response to Dupree's motion for summary judgment that he had exhausted remedies and that, alternatively, prison officials thwarted his exhaustion efforts. J.A.292, 296-297; *see also Ross v. Blake*, 578 U.S. 632, 644 (2016). He also argued that the ARP was "unavailable" because the Department of Corrections cannot grant relief through the ARP process for an incident the IIU investigated. J.A.294-295.

The district court resolved only the latter argument, acknowledging that factual issues otherwise existed, Pet.App.40a-42a—a point Dupree buries in a footnote (at 8 n.2). Dupree's exhaustion defense, therefore, was live at the time of trial. But Dupree did not pursue it. On appeal, Dupree conceded the fundamental legal issue he had litigated at summary judgment—whether the pendency of

---

[5] Dupree cites *DeSilva v. DiLeonardi*, 181 F.3d 865 (7th Cir. 1999), for the notion that incorporation by reference is not "easy," but that case involved an appellate litigant who incorporated arguments in appellate briefs by reference to the district-court docket.

the IIU investigation relieved Younger of the need to exhaust ARP remedies—and shifted focus to an argument that Younger was required to exhaust remedies before the IGO. *See supra* p. 10.

Had Dupree raised this argument in a Rule 50(a) motion at the close of Younger's case, Younger would have presented evidence he had exhausted remedies under Dupree's new theory. Younger also would have presented his thwarting evidence. *See supra* pp. 8, 10. The jury could have ruled in his favor—or the court could have entered judgment—on either ground. That approach would have been far more efficient.

B. Affirmance Promotes Clarity

Requiring parties to request judgment on claims and defenses in Rule 50 motions provides a clear rule that is easy for litigants and courts to follow. Dupree's contrary rule only sows confusion.

1. To start, Dupree's distinction between "pure legal issues" and "issues of fact" is impossible to administer consistently. Even Dupree cannot articulate his own rule with any degree of consistency. Sometimes, Dupree focuses on the content of the motion, asserting that summary-judgment *motions* raising purely legal issues preserve those issues for appellate review. Br. 10, 11, 13, 26, 38. This case flunks that test. The exhaustion defense raised in Dupree's motion was not purely legal. Dupree attached a declaration, hundreds of pages of documentary evidence, and deposition testimony excerpts in an attempt to prove the *fact* that Younger had not exhausted remedies through the ARP process. *See* J.A.22-233; Dist. Ct. Dkt. 186-2; 186-3; 186-4; 186-5. And Dupree's argument at summary judgment that the ARP process was "availa-

ble" to Younger depended on factual evidence that another inmate successfully navigated the process despite an IIU investigation. J.A.15-16, 200-220.

Other times, Dupree focuses on the order, claiming that an *order* denying summary judgment "on purely legal grounds" is appealable whether or not the movant brings a post-trial motion. Br. 18; *see also* Br. 2, 4, 12, 14, 20, 27, 32, 37, 40-43. This case flunks that test as well. Although the district court denied summary judgment based on the legal conclusion that the ARP process was unavailable to Younger, it also noted the existence of factual "disputes concerning Younger's adherence to the ARP process." Pet.App.42a.

Still other times, Dupree claims in the abstract that "purely legal questions" or "purely legal arguments" are fully preserved. Br. 2, 3, 4, 11, 13, 14, 18, 19, 32, 38, 40, 41; *see also* Br. 2, 3, 13, 18, 38, 41 ("legal errors"). But he does not define those terms. Elsewhere he qualifies his test with phrases such as "and divorced from the evidence at trial." Br. 2; *see also* Br. 3, 32; Law Professors' Br. 6, 8, 12. That qualification is entirely circular here: no evidence on exhaustion was presented at trial because Dupree abandoned his exhaustion defense by failing to move under Rule 50(a).

Dupree's inability to articulate a clear rule warrants skepticism. Does his rule turn on the content of the motion or the order? What if the motion or order rests on multiple grounds, some legal and some factual? What if the at-issue ground presents a mixed question of law and fact? *See U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018) ("Mixed questions are not all alike."). What if the district court commits a legal error and, as a result, holds that genuine disputes of material fact exist?

What if some evidence relevant to the at-issue claim or defense was presented at trial? He does not and cannot answer those questions.

If any party's rule sets a "trap for the unwary," as Dupree puts it (at 29), it is Dupree's. Litigants seeking to determine which issues to include in a Rule 50 motion would need to parse their briefs, the court's rulings, or both to decide which issues qualify as legal and which do not. Appellate courts, for their part, would be required to pick through the district-court record to confirm that arguments that were not preserved in Rule 50 motions count as "purely legal." On both ends that process is unpredictable, burdensome, and inefficient. *See supra* p. 38.

2. Even the courts that have adopted Dupree's rule acknowledge that "determining whether an issue is based in law or fact or some combination of the two is sometimes 'vexing.'" *Feld v. Feld*, 688 F.3d 779, 783 (D.C. Cir. 2012) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)); *see also Ortiz* Tr. 30-31 (The Chief Justice: distinguishing between legal issues and factual issues "just creates an awful lot of difficulty that we don't need to buy into").

That difficulty is compounded by differences among courts that permit review of summary-judgment denials regarding how to define a "legal" or "preliminary" issue. The Tenth Circuit, for example, distinguishes between "summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide." *Ruyle*, 44 F.3d at 842. The Sixth Circuit defines "pure questions of law" as those that "can be asked and answered *without reference to the facts of the case*." *Hanover*, 974 F.3d at 789 (citation omitted). The Eighth Circuit

takes still another approach, holding that parties may appeal directly from denials of summary-judgment motions "involving preliminary issues." *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co.*, 761 F.3d 830, 838 (8th Cir. 2014).

Dupree responds (at 36) that courts are already familiar with drawing distinctions between legal and factual questions in cases involving qualified immunity. That is cold comfort to a litigant attempting to divine which summary-judgment arguments are "purely legal" and which are not in a shifting landscape of legal standards.

Immunity raises unique concerns that are not relevant here. Although the Court has recognized a "limited exception" that allows defendants denied qualified immunity at the summary-judgment stage to immediately appeal, *Ortiz*, 562 U.S. at 188, the exception is not grounded in a cross-cutting distinction between legal issues and factual issues. Rather, the Court recognized the exception because of the use-it-or-lose-it nature of qualified immunity, which is immunity from suit. As the Court explained in *Ortiz*, "[w]hen summary judgment is denied to a defendant who urges that qualified immunity shelters her from suit, the court's order 'finally and conclusively disposes of the defendant's claim of right not to stand trial.'" *Id.* (cleaned up) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985)).

What is more, the vagaries of what counts as legal versus factual issues matter less in the context of interlocutory appeals of qualified-immunity rulings. If a qualified-immunity defendant wrongly guesses that a denial of summary judgment presents a "legal" question and appeals as a result, the worst that will happen is that the appeal will be dismissed. The defendant may still pursue the qualified-immunity defense at trial and appeal after final judgment.

By contrast, under Dupree's rule, if a litigant guesses incorrectly that a denial of summary judgment presents a "legal" question and thus does not renew the argument in a Rule 50 motion, he has forfeited the argument. No second chance exists. *See Ortiz*, 562 U.S. at 190 (citation omitted) (holding, contrary to litigant's assertion, that defense was factual and thus unappealable).

Requiring preservation of claims and defenses in Rule 50 motions thus promotes clarity. The decision below provides a single, easy-to-follow rule governing preservation of *all* claims and defenses that were the subject of denied summary-judgment motions. Dupree's rule would create two rules with uncertain boundaries, undercutting the "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

C. Affirmance Avoids Difficult Remedial Questions

Finally, a rule allowing parties to appeal denials of summary judgment on "pure legal issues" without taking further steps to preserve their arguments would present complicated remedial questions.

If an appellate court reverses a denial of summary judgment, what is the appropriate remedy on remand? Dupree leaves this question unanswered in his brief; he never tells the Court what should happen on remand if he wins in this Court.

The only remedy Dupree asked for below was summary judgment in his favor. In cases, unlike this one, where the only issues presented to and resolved by the district court are legal issues divorced from the facts, entry of judgment in favor of the appellant might be the appropriate remedy. But that is precisely the remedy *Unitherm* proscribes absent a Rule 50(b) motion. 546 U.S. at 400-01.

Here, however, even if the Fourth Circuit concluded that the district court erred in holding that the pending IIU investigation rendered the ARP process unavailable to Younger (contrary to the decisions of virtually every district court in Maryland), Dupree would not be entitled to summary judgment on remand. As already discussed, both the district court and Dupree acknowledged the existence of unresolved factual disputes relevant to exhaustion. *See supra* pp. 11, 40.

Dupree does not explain how those factual disputes could be resolved. The only conceivable option is a new trial. *See Fountain v. Filson*, 336 U.S. 681, 683 (1949) (per curiam) (reversing where appellate court's instruction that district court enter judgment on remand to one party deprived the other party of the "opportunity to dispute the facts material to that claim"). But "a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court." *Unitherm*, 546 U.S. at 404. Dupree made none. He did not file a Rule 50(b) motion. *See* Fed. R. Civ. P. 50(b) (identifying a new trial as a remedy). He did not move timely for a new trial under Rule 59(a). Nor did he request a bench trial on exhaustion under Rule 52. Given Dupree's failure to request a new trial, it would be unfair to allow him a second bite at the apple.

Giving Dupree a new trial would be doubly unfair in this case: if Dupree had re-raised his exhaustion defense in a Rule 50(a) motion, the parties could have resolved the remaining factual disputes in the trial he already had. *See supra* pp. 9, 11. Permitting parties who lose at summary judgment to forego Rule 50 motions would stunt development of facts relevant to alternative legal theories at trial.

Amici Law Professors dismiss concerns that Dupree's rule would lead to "wasted trials" as "exaggerated." Law Professors' Br. 23-24. The professors are wrong. Dupree's rule would incentivize defendants who lose summary judgment on an affirmative defense to present no evidence relevant to that defense at trial in the hope of sandbagging the plaintiff on appeal. The possibility of wasted trials would arise virtually every time a court denied summary judgment on a mixed issue of law and fact. The burdens that even a small set of unnecessary trials would impose dwarf the minimal burden of including issues worth preserving in a Rule 50 motion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ALLEN E. HONICK
DUSTIN FURMAN
FURMAN HONICK LAW
11155 Red Run Blvd.
Suite 110
Owings Mills, MD 21117
(410) 844-6000

DAVID DANEMAN
WHITEFORD, TAYLOR &
PRESTON, LLP
7 St. Paul Street
Baltimore, MD 21202
(410) 347-8729

LISA S. BLATT
AMY MASON SAHARIA
Counsel of Record
A. JOSHUA PODOLL
SAMIYYAH R. ALI
MARY E. GOETZ
TYLER J. BECKER
JACOB L. BURNETT*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue S.W.
Washington, DC 20024
(202) 434-5000
asaharia@wc.com

Counsel for Respondent

MARCH 29, 2023

* Admitted in Indiana. Practice in the District of Columbia supervised by members of the D.C. Bar as required by D.C. App. R. 49(c)(8).