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

REPLY BRIEF FOR PETITIONER

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Lieutenant Dupree moved for summary judgment on the grounds that Mr. Younger failed to properly exhaust available administrative remedies as required by the PLRA before bringing suit under § 1983. *See* 42 U.S.C. § 1997e(a). The district court denied that motion on the ground that administrative remedies were unavailable to Mr. Younger under this Court's decision in *Ross v. Blake*, 578 U.S. 632 (2016). That was a purely legal error—*i.e.*, an error in the application of preexisting law to undisputed facts. And because that error is clear on the face of the record, it is reviewable on appeal. That conclusion follows from the final-judgment rule, the history of appellate review, the history of the Federal Rules of Civil Procedure, and common sense.

Mr. Younger claims the rule Lieutenant Dupree seeks is unclear and that permitting appeal of purely legal issues resolved through the denial of summary judgment would pose difficult remedial issues. Resp. 45-47. Not so. If a district court denies summary judgment on the basis of a purely legal error, then the losing party can ask an

appellate court to review that error on appeal. If the losing party prevails, then what happens next depends on the posture of the case. *See* pp. 18-20, *infra*. Here, Lieutenant Dupree would be entitled to an order directing judgment in his favor because the undisputed facts show that he should have been granted summary judgment on his exhaustion defense. *See* pp. 20, *infra*.

Mr. Younger offers no persuasive reason to foreclose appellate review under those circumstances. His unorthodox understanding of the final-judgment rule is based on an apparent misreading of *Ortiz v. Jordan*, 562 U.S. 180 (2011), and 28 U.S.C. § 1291. *See* pp. 3-6, *infra*. His attempt to counter Lieutenant Dupree's historical argument about demurrers misses the point of that history, *see* pp. 10-12, *infra*, and his own historical argument is based on a factual error but would not be relevant either way, *see* pp. 12-13, *infra*.

Mr. Younger also neatly demonstrates the serious problems with his rule through his explanation of how he believes parties should preserve issues in cases like this one. Mr. Younger has come a long way from advising that parties should just "add one sentence" to a Rule 50 motion. Br. in Opp. 11. Now he argues that parties that lose a motion for summary judgment on the basis of a purely legal issue and want the chance to appeal it must insist that witnesses be heard, evidence be taken, and jury instructions be given, all on claims and defenses that the district court has already said fail as a matter of law. Resp. 12, 15-16. All that just for the chance to *appeal* a purely legal error at summary judgment. That rule would be incredibly wasteful and would defeat the purpose of summary judgment, which is to narrow the issues for trial. *See* pp. 8-10, 14-16, *infra*.

At bottom, Mr. Younger is asking this Court to adopt a rule that would prevent appellate courts from correcting clear legal errors even when those errors can be

intelligently reviewed on an undisputed record and when no party is prejudiced by that review. Nothing in the text of the Federal Rules, in any statute, in the history of appellate review, or in this Court's precedents forecloses review in those circumstances. Where a legal error is clear on the face of an undisputed record, a court of appeals has the power to correct the error.

ARGUMENT

I. PURELY LEGAL ISSUES RESOLVED AT SUMMARY JUDGMENT ARE PRESERVED FOR REVIEW

The final-judgment rule resolves this case. Br. 13-15. Under the final-judgment rule, all errors in interlocutory orders are reviewable in a single appeal from the final judgment. Br. 13-14. There are narrow exceptions to that rule, but those exceptions typically arise because an error is harmless or because some later development moots the earlier error. Br. 14. But when a court denies a motion for summary judgment on the basis of a purely legal error, that error is neither harmless nor mooted by any later developments in the case. The final-judgment rule therefore applies, and the error in denying the motion is reviewable on appeal. Br. 14-15.

A. Mr. Younger is mistaken about how the final-judgment rule works: "final decisions" are those that end the litigation on the merits

Mr. Younger argues that the final-judgment rule operates in a way fundamentally different from how most lawyers and first-semester civil procedure students understand it. He argues that only errors in "final decisions" are appealable; that orders denying summary judgment are not "final decisions"; and hence that orders denying summary judgment are never appealable. Resp. 14-18. Mr. Younger is incorrect.

1. Except for collateral orders, the appealability of an interlocutory order following a final judgment does not

turn on whether the order itself is a "final decision"; interlocutory orders are, by definition, not "final decisions." *Contra, e.g.*, Resp. 1, 11, 15. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).[1] Interlocutory orders do not meet that definition. As Rule 54(b) instructs, and Mr. Younger concedes, "any" interlocutory "decision, however designated," is theoretically subject to revision until final judgment. Fed. R. Civ. P. 54(b); *see also* Resp. 28. That is blackletter law. Charles A. Wright & Mary Kay Kane, Review of Final Decisions, 20 Federal Practice & Procedure Deskbook § 108 (2d ed.).

Once final judgment is reached, all interlocutory decisions lock into place, "merge" with the final decision, and become appealable in the single appeal from the final decision. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). At that point, "[t]he general rule is that … claims of district court error at any stage of the litigation may be ventilated" in "a single appeal" from the final judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). The appealing party does not appeal the interlocutory order itself, *contra* Resp. 4, 14-18, but rather the final judgment into which the order has merged, *see* 15A Charles Alan Wright et al., Federal Practice and Procedure § 3905.1 (3d ed. Sept. 2022 update). That appeal "opens the record and permits review of all rulings that led up to the [final] judgment"—including a denial of a motion for summary judgment. *Id.*

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[1] This Court has at least twenty-five decisions that all define a "final decision" the same way. *See, e.g.*, *Hall v. Hall*, 138 S. Ct. 1118, 1123-24 (2018); *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408 (2015); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009). Mr. Younger does not cite a single case supporting his unusual interpretation of the term.

Mr. Younger is thus incorrect that a party that loses a summary judgment motion on a purely legal issue "must continue to pursue [the issue] at trial." Resp.15. If a court has resolved a purely legal issue against a party, it would be futile and nonsensical for that party to nevertheless try "presenting evidence" on that issue at trial. Resp. 16. Here, the district court held that the existence of an IIU investigation is sufficient to satisfy the PLRA's exhaustion requirements. Pet. App. 42a. That ended Lieutenant Dupree's exhaustion defense.

Mr. Younger counters that Lieutenant Dupree should have soldiered on because district courts are not bound by the law-of-the-case doctrine and can change their minds on earlier rulings any time, even mid-trial. Resp. 27-28. This Court has held the opposite. The law-of-the-case doctrine merely "directs a court's discretion, it does not limit the tribunal's power," *Pepper v. United States*, 562 U.S. 476, 506 (2011); nonetheless, "as a rule courts should be loathe" to revisit earlier decisions "in the absence of extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). The doctrine exists to protect parties from a "vicious circle of litigation" in which they must perpetually relitigate settled issues through "subsequent stages in the same case." *Id.* at 815-16; *see* Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 Mich. St. L. Rev. 895, 957-58 (2014). Yet Mr. Younger would have them do exactly that.

Mr. Younger also errs in contending that "the Court's reasoning in *Ortiz* applies with full force to all summary-judgment orders." Resp. 16; *see also* Resp. 16-17. The Court in *Ortiz* did not seem to think so. As Mr. Younger concedes, *Ortiz* explicitly left open the question whether a party must file a Rule 50(b) motion to preserve a purely legal issue for review. *Ortiz*, 562 U.S. at 190; *see also* Resp. 16; Law Professors Br. at 7-8. *Ortiz* declined to

require Rule 50 motions to preserve purely legal issues for good reason: when a court denies summary judgment on a pure issue of law, "the evidence at trial will have no bearing on the correctness of the district court's pre-trial legal ruling." Law Professors Br. at 4. *Contra* Resp. 17-18.

Accepting Mr. Younger's argument that only errors in "final" interlocutory orders are appealable would revolutionize civil procedure. Mr. Younger's rule would sweep far beyond jury trials. His rule would prevent parties from appealing orders denying motions to dismiss and denying motions for summary judgment, even in cases that end pretrial. *See* Resp. 18-19, 31. Yet this Court has (unanimously) decided at least one appeal of a denial of a motion to dismiss in a case that ended at summary judgment. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 944-45, 951-52 (1997). And it routinely hears cases that end on cross-motions for summary judgment. Orders denying dispositive motions have *always* been treated as reviewable if the action ends pretrial—the only question in *this* case is whether the termination of the action *after* trial somehow changes the equation. It does not.

B. A legal error that forecloses a party from success on a defense at trial is "final" enough to appeal

1. In any event, Mr. Younger's argument fails on its own terms. Mr. Younger claims that the key distinction between an order granting summary judgment and an order denying summary judgment is that "[t]he former finally disposes of a claim or defense; the latter simply allows a claim or defense to proceed to trial." Resp. 31. That distinction is unfounded, as this case shows. Here, the order denying summary judgment did not contemplate that the exhaustion issue would "proceed to trial." Rather, the order unmistakably stated that the existence of an IIU investigation foreclosed Lieutenant Dupree's exhaustion defense. Nothing about the order

invited the parties to continue to litigate the issue. Mr. Younger's claim that Lieutenant Dupree nonetheless should have done so is bizarre. *See* pp. 14-16, *infra*.

2. As a backup, Mr. Younger argues that a trial record can differ from a summary judgment record, a fact that should supposedly preclude appeals of legal issues denied at summary judgment. Resp. 17-18. But his argument proves too much. Taken seriously, it would mean summary judgment itself is illegitimate. After all, the entire premise of summary judgment is that the parties have marshalled the best version of the facts they believe they can prove at trial; the purpose of trial is then to determine whose version of the facts is correct. At summary judgment, the record is thus supposed to be locked on both sides, and the nonmoving party receives the benefit of every doubt. As a consequence, summary judgment is premised on the idea that a party's case can never be stronger at a trial than it is when opposing a motion for summary judgment. It can only be weaker.

That understanding of summary judgment is what makes it fair to end cases at summary judgment at all. It is also what allows for interlocutory appeals of denials of motions for summary judgment raising immunity defenses. If plaintiffs were prejudiced by the inability to have a trial on their claims—even where the facts at summary judgment are undisputed—then interlocutory appeals of immunity denials would always be unfair because the "record" could "change" (*i.e.*, improve) at trial. Resp. 18. Yet those appeals are allowed because this Court has recognized that, at summary judgment, a party opposing the motion is supposed to be ready to tell the court how it plans to put on its case.

3. Pivoting, Mr. Younger argues that no distinction can be drawn between denials of summary judgment based on undisputed facts and those based on genuine disputes of material fact. Resp. 22-24. But the difference

is obvious. To win summary judgment, a movant must establish two things: (a) no genuine dispute of material fact; (b) entitlement to judgment as a matter of law. Fed. R. Civ. Pro. 56(a). Because two different criteria must be met to win summary judgment, summary judgment can be denied for two different, independent reasons. That is just basic logic. And it is virtually always clear on the face of the order whether the basis for the denial was one or the other.

Mr. Younger argues the drafting history of Rule 56 supports his claim that all denials of summary judgment involve latent fact disputes. Resp. 23-24. That is false. The distinction he points to between two draft rules—one "on depositions or admissions," the other "on affidavits"—has nothing to do with the distinction at issue in this case. *See* Resp. 23-24. Regardless, Mr. Younger's recourse to history misses the point. Everyone agrees that there is only one summary judgment rule, but it is inarguable that summary judgment can be erroneously denied two different ways. When it is denied because of a purely legal error, there is no reason to foreclose appellate review.

C. A requirement to pursue foreclosed claims at trial merely to preserve them has no foundation in the text of the Federal Rules or this Court's precedent

Contrary to Mr. Younger's argument, Resp. 22-28, Rule 50 motions are not necessary to preserve purely legal claims for appeal. Br. 19-43. This Court has never held that such motions have any relevance where the issue that a party seeks to raise on appeal is purely legal. Br. 41-43. Furthermore, Rule 50's text and purpose point away from its use as a vehicle to raise purely legal issues that have nothing to do with the sufficiency of the evidence. Br. 38-41. Rather, the Rules contemplate that purely legal issues should have been resolved and removed from the case pretrial, through motions to dismiss and motions for summary judgment. Br. 4-5, 14, 26 n.4; *see Celotex Corp. v.*

Catrett, 477 U.S. 317, 323-24 (1986) (purpose of summary judgment is "to isolate and dispose of factually unsupported claims or defenses.").

Mr. Younger does not dispute most of the above. *See* Resp. 24-28. He does not dispute that the text of Rule 50 says nothing about appellate preservation. He does not dispute that Rule 50's main purpose is to avoid Seventh Amendment concerns while making appellate review of sufficiency-of-the-evidence claims more economical by reducing retrials.

Nonetheless, Mr. Younger argues that this Court's cases suggest that Rule 50 motions are required to preserve legal claims for appeal. Resp. 26-27. But, as Mr. Younger inadvertently concedes, the cases he quotes and cites for that proposition are all cases involving post-trial sufficiency-of-the-evidence claims. Resp. 16, 22, 27. He argues that the "same principles require parties to re-raise summary-judgment arguments in Rule 50 motions." Resp. 27. They do not.

The holdings in those cases turned on the fact that the appeals involved the sufficiency of the evidence. *See* Br. 41-43. As this Court explained, Rule 50(b) motions were required to permit the plaintiff the opportunity to cure deficiencies in his evidence and to have the motion decided in the first instance by the judge who saw the trial firsthand. *See* Resp. 27. Neither of those fairness concerns is at stake when the facts are undisputed. *See* Law Professors Br. at 13-17.

Nor does *Unitherm* foreclose review. Mr. Younger argues that *Unitherm* held that Rule 50(b) motions are required whenever a party seeks judgment or a new trial on appeal after a verdict. *See* Resp. 45-46 (citing *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01, 404 (2006)). But *Unitherm*'s holding is limited to appeals of unrenewed Rule 50(a) motions attacking evidentiary sufficiency. *See Unitherm*, 546 U.S. at 399-

402, 404-05. And it must be so limited. The whole premise of the final-judgment rule is that an appellate court can order appropriate relief on the basis of errors in pretrial rulings. *See* Br. 17-18. For hundreds of years, this Court has set aside verdicts on the basis of purely legal errors apparent on the face of the record. *See* Br. 22-24. *Ortiz* would not have left the issue in this case open if *Unitherm* had already decided it.

II. THE HISTORY OF APPELLATE REVIEW AND THE FEDERAL RULES SUPPORTS REVIEW IN THESE CIRCUMSTANCES

Lieutenant Dupree's rule is also strongly supported by the history of appellate review and the Federal Rules of Civil Procedure. Br. 19-30.

A. For 150 years before the adoption of the Federal Rules and § 1291, this Court made clear that courts of appeals could review purely legal errors apparent on the face of the record, including denials of demurrers, even after jury trials. Br. 19-24.

Mr. Younger does not dispute that history. *See* Resp. 32-36. Instead, he simply argues it is "irrelevant." Resp. 36. He is mistaken. In enacting § 1291, Congress preserved the preexisting scope of appellate review. Br. 24-25. And the history of demurrers demonstrates that, at the time Congress adopted the Federal Rules and § 1291, there was a long and unbroken history of appellate courts reviewing purely legal issues in circumstances analogous to this case. If a party demurred to the pleadings, the trial court denied the demurrer, and the case went to trial, then that party could still appeal the denial of the demurrer without making a post-trial motion because the issues involved were purely legal and could therefore be resolved without reference to any disputed facts.

The resolution of a purely legal issue at summary judgment is analogous. Like an error in the denial of a demurrer, a purely legal error in a denial of summary judgment can be reviewed and corrected by an appellate court solely on the basis of undisputed facts or allegations. And like an error in the denial of a demurrer, a purely legal error in a denial of summary judgment is not mooted by the trial because the relevant facts or allegations are undisputed. *See, e.g.*, *Teal v. Walker*, 111 U.S. 242, 246 (1884). Because purely legal errors on summary judgment are similar to demurrer denials in these ways, Congress would have expected them to be reviewable on appeal in the same way.

Mr. Younger responds that motions for summary judgment are not lineal descendants of demurrers. *See* Resp. 34-36. That misses the point. In modern litigation, motions for summary judgment serve the same function as and often operate in similar ways to demurrers. Br. 25-27. Their actual similarity, not their lineal relationship, is what makes demurrers "antecedent[s]" of motions for summary judgment. Br. 22.

Mr. Younger also dismisses the history of appellate review of demurrers because motions for summary judgment and demurrers do not *always* operate in the same way. Resp. 34-36. But that is conceded. Br. 26. The point is that where a motion for summary judgment decides purely legal issues, that motion is similar to a demurrer in the only way that is relevant for purposes of appellate review: both involve purely legal issues that can be resolved without reference to any disputed facts. Br. 26.

None of the distinctions between demurrers and motions for summary judgment disturbs that key point. Mr. Younger points out that there were two types of demurrers at common law: demurrers to the pleadings and demurrers to the evidence. Resp. 34-36. But that

makes no difference. The denial of a demurrer, of whatever kind, was always sufficient to place a legal error in the record and preserve it for review without a post-trial motion. Mr. Younger also finds it significant that demurrers to the evidence might have been limited to those parties who did not have the burden of proof on a particular claim or defense. *See* Resp. 35-36. But that too is not relevant where the issue is purely legal and thus does not turn on disputes about the evidence (or who has the burden of proof). Mr. Younger points out that demurrers to the evidence did not go to juries but ended the case with a judgment for one of the parties. Resp. 36. But cases involving denied demurrers to the pleadings *did* go to juries and were appealable without a post-trial motion, even after a jury verdict. *Teal*, 111 U.S. at 245-46.

The close similarity between demurrers and motions for summary judgment is why the primary case upon which Mr. Younger repeatedly relies for his historical analysis reasons by analogy from the practice of appellate review of demurrers. *See Fisher v. Sun Underwriters Ins. Co. of New York*, 179 A. 702, 707 (R.I. 1935).

B. To bolster his claim that denials of summary judgment are not reviewable, Mr. Younger invokes the history of appellate review of summary judgment denials. But his argument is based on a factual mistake and, even if it were not, the sources and time period to which he looks do not shed any useful light on the question anyway.

Mr. Younger claims that around the turn of the 20th century, parties could not appeal the denial of motions for summary judgment in England and two states, even after final judgment. Resp. 33-34. But in fact the rule Mr. Younger is citing is a rule disallowing *interlocutory* appeals of summary judgment denials. Mr. Younger's only case—*Fisher v. Sun Underwriters Insurance Co. of New York*, 179 A. 702 (R.I. 1935)—had nothing to do with the appeal of denials of summary judgment *post-trial*; it

merely held that plaintiffs could not file immediate *interlocutory* appeals from a summary judgment denial. *See Fisher*, 179 A. at 708. Of course, whether parties could take interlocutory appeals from summary judgment denials is an entirely different question than whether parties can appeal purely legal issues resolved at summary judgment *after* a final judgment in a case. And as the *Fisher* case shows, even if the right to file interlocutory appeals were relevant, the historical evidence is at best mixed: parties could apparently take interlocutory appeals of summary judgment denials in New York at the time (and to this day), *see Fisher*, 179 A. at 706; N.Y. C.P.L.R. 5701(a)(2)(iv)-(v) (McKinney); in England before 1894, *see Fisher*, 179 A. at 704; and in Rhode Island before 1935, *see id.* at 707-08.

C. The history of the Federal Rules of Civil Procedure also supports appellate review here. Br. 27-30. The Rules were designed to eliminate "hollow formalit[ies]" that serve no purpose. Br. 29; *see* Br. 27-29. And the Rule drafters sought to eliminate needless barriers to appellate review by removing the "bill of exceptions" from federal practice. Br. 28-29.

Mr. Younger does not appear to dispute any of the above. *See* Resp. 23-24, 27. He claims only that forcing Rule 50 motions is not, in fact, a "hollow formality," Resp. 27, and that requiring parties to pack Rule 50 motions full of already-decided legal issues would not "mark a return to the bill of exceptions," Resp. 36. But Mr. Younger's proposed rule carries so many costs and is so bereft of any concrete, nonspeculative benefits that calling it a "hollow formality" might be understatement. *See* pp. 14-18, *infra*; *see also* DRI Br. at 11-12. And requiring parties to furnish courts with a list of arguments they plan to appeal is the definition of a bill of exceptions. *See* Br. 21.

III. REQUIRING PARTIES TO PRESS DOOMED CLAIMS AT TRIAL MERELY TO PRESERVE THEM FOR APPEAL WOULD BE EXTREMELY WASTEFUL

A. Requiring parties to press doomed claims at trial would be astonishingly inefficient

Mr. Younger argues that even where a court has already held at summary judgment that a claim fails as a matter of law, the losing party must nevertheless plow ahead and litigate the claim anyways at trial in order to preserve it for appeal. Resp. 2, 12, 16. That cannot be right.

Mr. Younger's rule would be incredibly wasteful. On pain of forfeiting the right to challenge a purely legal error on appeal, parties would be forced to call and cross-examine witnesses, spar over jury instructions, and subject judges and juries to days of extra trial, all over issues that the court has already held are categorically foreclosed. One struggles to imagine a greater exercise in futility or inefficiency.

This case demonstrates the costs Mr. Younger's rule would inflict. If this case had proceeded under Mr. Younger's rule, Resp. 2, 9, 12, 15-16, the trial would have played out as follows:

- Mr. Younger would have put on his affirmative case and rested without any mention of exhaustion, as he in fact did.
- Lieutenant Dupree would then have put on his defense case. To preserve the issue of exhaustion for appeal, he would have introduced evidence showing Mr. Younger failed to properly exhaust his administrative remedies—even though the court had already held, as a matter of law, that Lieutenant Dupree could not win on the issue.
- At the close of his case, Lieutenant Dupree would have made a ceremonial Rule 50(a) motion, which

the judge would have denied for the exact same reason as before: because an IIU investigation was pending.

- Next, even though the judge had already (twice) denied Lieutenant Dupree's exhaustion argument on the basis of the undisputed facts, Mr. Younger in his rebuttal case would have put on additional "thwarting" evidence to try to further rebut Lieutenant Dupree's exhaustion defense. Resp. 41.
- Mr. Younger then would have needed to move under Rule 50(a) for judgment as a matter of law on exhaustion to preserve his ability to appeal in case of a runaway verdict on exhaustion—which the court would almost certainly have denied to permit the jury to bring in a verdict.
- Then Lieutenant Dupree would have moved again for judgment as a matter of law under Rule 50(a) because the undisputed facts show that there was no thwarting in this case. The court would again have denied the motion because of the IIU investigation.
- Then the case would have gone to the jury with disputed "jury instructions," Resp. 16, including an instruction to find for Mr. Younger on exhaustion if there was an IIU investigation (and presumably an instruction that this fact was already established in Mr. Younger's favor).
- Finally, following the adverse verdict, Lieutenant Dupree would have been required to make a ritual Rule 50(b) motion on exhaustion, which would have been denied—yet again—because of undisputed facts about the IIU investigation.

All of that would have been required just to permit Lieutenant Dupree the *opportunity* to appeal the district court's erroneous conclusion that the IIU investigation

foreclosed Lieutenant Dupree's affirmative defense. What is more, none of the facts adduced at the trial just described would have differed from the undisputed facts that were already presented to the district court at summary judgment. The appellate court's task in reviewing Lieutenant Dupree's denied Rule 50(b) motion from the counterfactual trial above would be *identical* to its task in reviewing his denied motion for summary judgment in this case. Other than requiring the parties to clutter up the trial with irrelevant evidence and motions,[2] and forcing the judge and jury to sit through additional hours of evidence and motions practice, the posture of this appeal would be *exactly the same*. Mr. Younger's proposed rule would have, in short, gained nothing and cost much—the exact opposite of "just, speedy, and inexpensive." Fed. R. Civ. P. 1. *Contra* Resp. 13.

B. Any gain in "clarity" from a rule requiring ritual Rule 50 motions would be outstripped by its drawbacks

Mr. Younger is also incorrect that a line between "legal" and "factual" summary judgment denials "is impossible to administer consistently." Resp. 41. Simply put, an issue is purely legal when it can be resolved "with

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[2] Mr. Younger mistakenly claims that parties can simply incorporate earlier arguments in a Rule 50 motion by reference (even as they put on a full trial to provide the evidentiary support for those arguments). Resp. 39-40; Resp. 40 n.5. He does not cite to a single court decision, local rule, or other authority to support that contention. In fact, courts routinely reject arguments made in that fashion. *See, e.g.*, *Pickard v. Dep't of Just.*, 217 F. Supp. 3d 1081, 1085 (N.D. Cal. 2016); *01 Communique Lab'y, Inc. v. Citrix Sys., Inc.*, No. 06-cv-253, 2017 WL 1065573, at *4 (N.D. Ohio Mar. 21, 2017), *aff'd*, 889 F.3d 735 (Fed. Cir. 2018); *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, No. 00-cv-1693, 2003 WL 24901381, at *1 (D. Or. July 5, 2003). Page limits thus have real bite when litigants need to use Rule 50 motions to preserve purely legal issues for appeal. *See* DRI Br. at 3-11.

reference only to undisputed facts." *Ortiz*, 562 U.S. at 190 (citation omitted). That is the rule the circuits on the long side of the split all apply. *E.g.*, *In re AmTrust Fin. Corp.*, 694 F.3d 741, 750-51 (6th Cir. 2012). *Contra* 43-44. And it is not an impossible line to draw. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 328 (2015) ("Courts of appeals have long found it possible to separate factual from legal matters."); *see* Steinman, *supra*, at 940-46. In fact, it is not even an especially difficult line to draw, and courts will have no problem policing it in the mine run of cases. Br. 32-34.

Mr. Younger fails to demonstrate otherwise. He complains in the abstract that the rule is not clear, and he musters quotes saying the law-fact line can occasionally be difficult to administer. Resp. 43-45. Notably, however, Mr. Younger does not actually point to a single case in which a court has struggled to decide whether an issue decided at summary judgment was legal or factual. That silence is telling. Eight circuits have administered that line over hundreds (if not thousands) of cases spanning multiple decades. If Mr. Younger were right about the "impossibility" of administering the rule those circuits follow, one would expect to find (at minimum) dozens of cases in which panels split over whether an issue was legal or factual. Mr. Younger, however, has apparently struggled to find even a single case in which that has occurred. *See* Resp. 41-44.

To be sure, there will be hard cases. There always are. But in the vast majority of appeals, the difference between a purely legal denial of summary judgment and a denial based on factual disputes will be obvious. Br. 32-34, 36. And even if determining whether an issue is purely legal can be difficult in some cases, it is no more difficult than the many other threshold questions appellate courts are called upon to resolve every day.

As a fallback, Mr. Younger argues that requiring Rule 50 motions to preserve all issues for appeal "promotes clarity." Resp. 45. But any modest gain in clarity from requiring repeated belt-and-suspenders motions is outweighed by the substantial costs that come with requiring litigants to engage in pointless rituals just to preserve claims for appeal. Br. 34-37. In any event, Rule 50 was not created to promote appellate clarity. The point of filing a Rule 50 motion is to win judgment as a matter of law, not to list out issues for appeal.

IV. NO DIFFICULT REMEDIAL QUESTIONS ARISE FROM REVIEWING A DISTRICT COURT'S FAILURE TO GRANT SUMMARY JUDGMENT ON THE BASIS OF PURELY LEGAL ERROR

Mr. Younger protests that the rule Lieutenant Dupree seeks in this case would pose difficult remedial issues. *See* Resp.41-47. Mr. Younger is wrong.

Mr. Younger seems preoccupied primarily by the possibility that, in some cases, Lieutenant Dupree's rule might lead to a remand for additional trial proceedings. *See* Resp. 46-47. Mr. Younger argues that his rule would eliminate the risk of multiple trials and appeals. Resp. 37-39, 46-47.

But Mr. Younger's cure is orders of magnitude worse than the supposed disease. *See* Law Professors Br. at 23-24; Steinman, *supra*, at 960-65. To even trigger further trial proceedings, a purely legal error at summary judgment would need to be appealed, reversed on appeal, *and* remanded because material factual disputes remain. Seeking to avoid that result in some small fraction of cases, Mr. Younger would require parties in *every* case to introduce and argue over *all* the evidence conceivably relevant to claims and defenses, including claims and defenses that have already been squarely foreclosed as a matter of law. Mr. Younger thus "prevents piecemeal litigation," Resp. 13, in the worst way possible: by

jamming *all* possible litigation into the first trial—even litigation over claims and defenses that are concededly futile.

Mr. Younger describes the slim possibility of a reversal and remand for additional trial proceedings as a "bomb planted within the litigation [that] explode[s] on appeal." Resp. 39. But his preferred solution would hit the detonate button in *all* cases, requiring preemptive trial on all the issues even in the overwhelming majority of cases in which the explosives would otherwise never detonate. Not only is that rule the height of inefficiency, it is contrary to the settled practice governing partial grants of summary judgment, where the risk of an occasional remand for additional proceedings has never been reason for a judge and jury to try already resolved claims and defenses. Mr. Younger gives no basis why the rule should be any different for denials of summary judgment that are legally equivalent.

Even if this Court were to accept Mr. Younger's avoid-remands-at-all-cost approach, that still would not justify Mr. Younger's categorical rule. At minimum, parties should be able to appeal an erroneous failure to *grant* summary judgment on the basis of the undisputed facts. If a party were to win an appeal in such a case, the result would be an order that judgment be entered in that party's favor, and there would be no possibility of additional trial proceedings.

If this Court were to adopt that narrower rule, it would be Lieutenant Dupree's task on remand to persuade the Fourth Circuit that the undisputed facts in this case establish, as a matter of law, that Mr. Younger failed to properly exhaust administrative remedies and that this case does not implicate any of the *Ross v. Blake* exceptions. *See* 578 U.S. 632, 643-44 (2016) (explaining that an administrative procedure is not available when the

grievance process was a "dead end"; the process was "opaque"; or the prisoner was "thwart[ed]" from using it).

Lieutenant Dupree would prevail under that standard. Mr. Younger now claims that this case involves disputed facts about exhaustion. Resp. 40-41, 45-46. But it simply does not. The grievance process was not a "dead end" or "opaque" under *Ross*; the undisputed facts show that reasonable prisoners were able to make use of the process to obtain relief. *See* Resp. 8 (citing JA15-16); JA204-16. Nor was Mr. Younger "thwarted." As Lieutenant Dupree argued in the district court, JA338-43; *contra* Resp. 10-11, 40-41, the undisputed facts show that Mr. Younger knew the steps he needed to follow, JA225-28; that no one stopped him from following those steps; that he in fact filed an ARP grievance and had it denied, JA227-28; and that he simply failed to perfect an appeal of the denial of his ARP grievance by sending the denied grievance to the Commissioner of Corrections as he was required to do to exhaust the process, *see* Resp. 5-6 (citing, *inter alia*, JA228, JA196-99). Mr. Younger does not claim anyone stopped him from sending his denied ARP grievance to the Commissioner of Corrections, and it is undisputed that he did not do so. *See* JA183-84, 195, 199. There was no "thwarting" here.

In any event, the question for this Court is not whether Lieutenant Dupree will win his appeal on the merits, only whether he should have the opportunity to have it heard. In light of the final-judgment rule, the history of appellate review, the history of the Federal Rules, and the first principle of the law—common sense—the answer is yes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 2023