No. 23-204

In The Supreme Court of the United States

WY PLAZA, LC,

Petitioner,

v.

SAFEWAY STORES 46 INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY

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SUMMARY OF ARGUMENT

In its Petition, WY Plaza explained the need for this Court's guidance concerning the general no-waiver-by-appellees rule because the Tenth Circuit recently substantially abrogated the rule and other federal circuit courts of appeals have not applied the rule uniformly.

In urging this Court not to disturb the Tenth Circuit's ruling, Safeway first argues that it is easy to follow the Tenth Circuit's new rule because it places an affirmative burden on appellees to advance all possible alternative grounds for affirmance or request a remand *only* within a particular procedural posture, even though other courts have not applied the rule on such a limited or specific basis. Safeway also argues that there is no inconsistency among the circuits or internally in the Tenth Circuit because federal appellate courts that have applied the no-waiver-by-appellees rule only did so in light of the procedural posture on appeal or the peculiar facts of the underlying case. But Safeway's attempts to distinguish myriad other cases on the facts is unavailing and its legal analysis is incorrect.

Review is warranted to provide critical, clarifying guidance to appellate litigants, and particularly appellees, on the appropriate scope of appeals and waiver in federal courts.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO DEFINE THE EXISTENCE AND SCOPE OF THE NO-WAIVER-BY-APPELLEES RULE.

Safeway's discouraging this Court from granting the Petition only highlights the need for review. Safeway argues, as the Tenth Circuit ruled, that WY Plaza should have presented its four alternative bases for affirmance, as that would have allowed the Tenth Circuit to "affirm[] the summary judgment on alternative grounds or determine[] that the affirmative defenses were not sufficient as a matter of law to preclude summary judgment for Safeway." Resp. at 15. As the Petition and the authority cited within explained, however, this would have required WY Plaza—in a single, word-restricted answer brief—to argue four affirmative defenses that the trial court did not reach or consider. It also would have invited the Tenth Circuit to address each possible ground for affirmance, or decline to do so and remand notwithstanding WY Plaza's raising them. In essence, instead of limiting the scope of an appeal to the appealed judgment, Safeway argues that it would be more efficient if appellate courts were forced to consider the appellee's entire case. This is not judicial efficiency, and it ignores the well-established procedural disadvantage such a requirement would place on an appellee. *See* Pet. at 6–10.

Next, Safeway argues—again, as the Tenth Circuit ruled—that WY Plaza and other appellees could simply use magic words to convey what most appellant litigants likely believe should be obvious: "in the event

of a complete reversal of my favorable judgment that I am here defending, I would like the case to be remanded to consider alternative grounds for affirmance that were raised and preserved below, but the trial court did not reach in its judgment." As explained in the Petition, WY Plaza is aware of no authority—and Safeway provides none—that have articulated such a formality. To the extent such a requirement exists, appellate advocates would only benefit from having that clearly articulated by this Court because a lack of prudence in unknowingly omitting a few key words should not deprive appellees of what would otherwise be a proper remand to consider alternative grounds for affirmance that the trial court failed to reach.

Finally, Safeway erroneously asserts that the Tenth Circuit's opinion here results in a clear rule:

> When an appellee is responding to an appeal in which the appellant contends that a district court decision should be reversed and that a judgment should have been entered in favor of the appellant, the appellee must either (a) present to the appellate court its alternative arguments not addressed by the district court, or (b) notify the appellate court that those additional arguments were preserved below and request remand for consideration of those alternative arguments by the district court.

Resp. at 17. But this novel "rule" distorts the general no-waiver-by-appellees rule into something entirely different. Respectfully, it is neither well-defined nor easy to follow, especially given the possible complexity

of various underlying rulings. The easier rule to follow is the one most circuits already apply: that an appellee does not waive alternative grounds for affirmance by failing to advance them on appeal.

In either case, WY Plaza respectfully requests that this Court grant the Petition to define an appellee's duties on appeal so they are not unwittingly subject to waiver.

II. OTHER CIRCUITS APPLY THE NO-WAIVER-BY-APPELLEES RULE GENERALLY, WHICH CONFLICTS WITH THE TENTH CIRCUIT'S OPINION IN THIS CASE.

The Petition explains why the Tenth Circuit's decision not to apply the no-waiver-by-appellees rule in this case conflicts with the practice of other circuits that apply it generally. In response, Safeway labors to find shallow factual distinctions in the underlying cases of appellate court opinions clearly articulating the general no-waiver-by-appellees rule to argue that the rule is narrowly applied. In doing so, Safeway misses the points made in the Petition.

Safeway first argues that because three circuit court opinions "involved situations in which the reversal of a motion for summary judgment in favor of the appellees automatically resulted in a remand . . . those cases are not in conflict with the majority opinion in this case." Resp. at 12. But superficial procedural or factual distinctions do not bear on the existence or applicability of a general rule. The three cases Safeway

cited broadly announced and relied on the general rule that appellees do not waive alternative grounds for affirmance by failing to present them on appeal. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740–42 (D.C. Cir. 1995) (applying the rule without limiting it to any particular procedural posture); *Indep. Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir.), *decision clarified on reh'g*, 465 F.3d 1308 (Fed. Cir. 2006) (same); *Eichorn v. AT&T Corp.*, 484 F.3d 644, 658 (3d Cir. 2007) (same). WY Plaza is not aware of any authority holding that the no-waiver-by-appellees rule is or should be applied only when "reversal of a motion for summary judgment in favor of the appellees automatically result[s] in a remand." If nothing else, Safeway's novel contention only highlights the need for review and clarity.

The same applies to *Ms. S. v. Reg'l Sch. Unit 72*, which explained what the First Circuit described as the "*the general rule* that 'the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver." 916 F.3d 41, 48–49 (1st Cir. 2019) (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) (emphasis added)). Although the *Ms. S.* Court did state that "[w]hether application of this general rule is justified 'depends on the particular facts' of the case," *see id.* at 49 (quoting *Field v. Mans*, 157 F.3d 35, 41 (1st Cir. 1998)), it did not explain what those particular

facts are which, again, only highlights the need for this Court's guidance.

Safeway also mischaracterizes *Schering*, which favorably acknowledged the general rule that "the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision . . . should not operate as a waiver" because "[t]he urging of alternative grounds for affirmance is a *privilege rather than a duty*." 89 F.3d 357, 358 (7th Cir. 1996) (emphasis added). The Court went on to say that "the present case does not involve a mere failure to have presented an alternative ground in a previous appeal" because the appellee in that appeal "did not have an alternative ground for affirmance." *See id.* Safeway quotes *Schering* out of context in arguing that it is not in conflict with the Tenth Circuit's opinion here. It is. *Schering* articulated a general rule that the Tenth Circuit has now rejected. The same is true for *Kessler v. Nat'l Enterprises, Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000).

In sum, Safeway can likely identify innumerable, immaterial factual and procedural differences between the case underlying the decision here and the cases underlying others that articulate the no-waiver-by-appellees rule, but those differences do not limit application of a general rule to the particular factual and procedural settings of each case. Instead, they consistently state and apply a general rule that appellees do not risk waiver by failing to advance alternative grounds for affirmance. Because that rule has not been uniformly applied among the circuits, and was outright

rejected here, this Court should grant review to clarify its existence and scope.

III. *OLDENKAMP* ARTICULATES THE GENERAL NO-WAIVER-BY-APPELLEES RULE THAT SHOULD HAVE APPLIED IN THIS CASE.

In support of granting review, the Petition highlights that, before the Tenth Circuit's decision here, it had actually embraced the general rule. *See* Pet. at 12. For instance, the Tenth Circuit's decision in *Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1249 (10th Cir. 2010) held that although the appellees "could have advanced [an] argument as an alternative ground for affirming the district court's ruling in their favor, [an appellee] is not required to raise alternative arguments." In response, Safeway quotes extensively from the majority opinion to support its argument that *Oldenkamp* can be procedurally distinguished from the instant case. Safeway misunderstands *Oldenkamp*, overemphasizes immaterial factual and procedural distinctions, narrows the rule, and broadly misses the points made in the Petition.

In *Oldenkamp*, the district court ruled on cross-motions for summary judgment, granting summary judgment in favor of the plaintiffs-appellees on their breach of contract claim. *Id.* at 1245. On appeal, the Tenth Circuit concluded that the district court had erred in granting summary judgment in the appellees' favor and reversed. *Id.* at 1246, 1248. The Tenth Circuit

then recognized that the appellees had raised an issue below that could serve as an alternative ground to support summary judgment in their favor and remanded for consideration of that issue despite the fact that the appellees had not raised it on appeal because they were "not required to raise alternative arguments." *See id.* at 1249.

Relying almost solely on the majority opinion, Safeway argues that the no-waiver-by-appellees-rule does not apply here because *Oldenkamp* "require[d] remand following the appeal, while the present case [did] not," *see* Resp. at 6, and that the *Oldenkamp* appellees "would have known that a reversal on appeal would result in a remand to the district court." *See* Resp. at 9.[1] But it was not *Oldenkamp*'s procedural posture that

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[1] Safeway also cites to *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 964 (10th Cir. 2009), to argue that "the rule requiring appellees to raise every possible ground for affirmance should be applied in some cases." *See* Resp. at 11. As a preliminary matter, the assertion that such a rule exists is unsupported. In *Haynes*, the general no-waiver-by-appellees rule was not before the Court. Instead, it was addressing the law-of-the-case doctrine in the context of a substantive ruling that was not challenged by an appellee in a prior appeal *and* for "almost six years . . . and barely two months before the second trial." *See Haynes Trane Serv. Agency, Inc.*, 573 P.3d at 964. Thus, the Court concluded that instead of revisiting that ruling, "the better course is to leave the posture of the case as both parties accepted it for six years" and noted that it was "not presented with a circumstance in which the *law-of-the-case doctrine* should be applied with leniency to the former appellee." *Id.* (emphasis added). In contrast, the general no-waiver-by-appellees rule applies where, as here, an appellee defended an entirely favorable judgment in the first instance without presenting the appellate court with all possible alternative grounds for affirmance.

prompted the Tenth Circuit to invoke the no-waiver-by-appellees rule. Rather, the Tenth Circuit acknowledged that the appellees were not required to raise alternative bases for affirmance, which directly contradicts what it did here when it ruled that "WY Plaza should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion" or "asked [it] to remand for the district court to consider the defenses of estoppel, accord and satisfaction, waiver, and failure to mitigate damages." *Safeway Stores 46 Inc. v. WY Plaza LC*, 65 F.4th 474, 496 (10th Cir. 2023).

Safeway's argument that application of the no-waiver-by-appellees rule should be limited to only "a case requiring remand following the appeal," *see* Resp. at 6, along with the majority's rationale, creates an after-the-fact limitation and ignores that the rule is of general application, and narrows the rule in a way that was never articulated in *Oldenkamp*. Such a rule would likewise create uncertainty the Petition seeks to avoid, as whether an appeal would necessarily be remanded after a reversal, is itself often an exercise in hypotheticals. Contrary to Safeway's argument, the Tenth Circuit endorsed and followed the general no-waiver-by-appellees rule before the decision below.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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