No. _____

IN THE

# Supreme Court of the United States

SOUTHERN-OWNERS INSURANCE COMPANY,
*Petitioner*,
v.
AMERICAN BUILDERS INSURANCE COMPANY,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## SOUTHERN-OWNERS INSURANCE COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Dupree* v. *Younger*, 598 U.S. 729 (2023), this Court held that "a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment," and it defined a purely legal issue as one "that can be resolved without reference to any disputed facts." 598 U.S. at 735–36. In this insurance-coverage dispute, the court of appeals paid lip service to *Dupree*. Nonetheless, the court refused to review the merits of petitioner's summary-judgment coverage-exclusion argument, which was based on facts alleged in respondent's complaint and described by respondent as undisputed at summary judgment. That holding sharply conflicts with this Court's decision in *Dupree* and warrants grant of the petition, vacatur of the judgment below, and remand for further consideration in light of *Dupree*.

The question presented is:

Whether a party must reassert in Rule 50 motions a purely legal issue resolved adversely at summary judgment to preserve the issue for appellate review.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Southern-Owners Insurance Co. is a wholly owned subsidiary of Auto-Owners Insurance Co. No publicly held company owns 10 percent or more Auto-Owners Insurance Co.'s stock.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Eleventh Circuit, the United States District Court for the Southern District of Florida, and the Fifteenth Judicial Circuit Court of Florida:

- *American Builders Insurance Co.* v. *Southern-Owners Insurance Co.*, No. 2020-CA-007872 (Fla. Cir. Ct.), no judgment entered because the case was removed to federal court.
- *American Builders Insurance Co.* v. *Southern-Owners Insurance Co.*, No. 20-cv-81357 (S.D. Fla.), judgment entered on August 6, 2021.
- *American Builders Insurance Co.* v. *Southern-Owners Insurance Co.*, No. 21-13496 (11th Cir.), judgment entered on June 20, 2023.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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## PETITION FOR A WRIT OF CERTIORARI

Southern-Owners Insurance Co. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals on panel rehearing is reported at 71 F.4th 847 and reprinted as Appendix A, App. 1a–24a. The original panel opinion of the court of appeals is reported at 56 F.4th 938 and reprinted as Appendix B, App. 25a–47a. The opinion of the district court is unreported and reprinted as Appendix C, App. 48a–71a.

## JURISDICTION

The court of appeals entered its judgment on panel rehearing on June 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT

Earlier this year, this Court confirmed that, to preserve a purely legal challenge raised at summary judgment for appellate review, a party need not reassert that challenge in Rule 50 motions. In this insurance-coverage dispute, Petitioner Southern-Owners Insurance Co. moved for summary judgment based, *inter alia*, on a coverage exclusion that would provide a complete defense. Respondent American Builders Insurance Co. did not dispute the facts underlying Southern-Owners' argument, only the legal effect of those facts. While recognizing that the facts were undisputed, the district court denied

summary judgment because it disagreed with Southern-Owners on the law. The case went to trial, and the jury ruled in favor of American Builders.

Southern-Owners did not reassert its coverage-exclusion argument in Rule 50 motions. It did, however, raise the issue on appeal, and American Builders responded on the merits. On initial hearing, the court of appeals declined to address the issue, relying on its reassert-in-Rule-50-motions-or-forfeit rule. On rehearing, after this Court rejected the reassert-or-forfeit rule, the court of appeals still dodged the issue. Peculiarly, the panel asserted that Southern-Owners still forfeited appellate consideration because it did not explicitly contend in its brief on appeal how the issue was appealable and, as a fallback, because Southern-Owners relied on (undisputed) facts in making its argument.

In so holding, the court of appeals disdained to follow this Court's recent, binding precedent. This Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Dupree*.

**A. Legal background.**

Until this year, the courts of appeals were in conflict over whether, to preserve a purely legal summary-judgment issue for appellate review, a party must reassert the issue in motions for judgment as a matter of law under Federal Rule of Civil Procedure 50. Although a majority of circuits held that the answer to that question is no, some reached the opposite conclusion. The United States Court of Appeals for the Eleventh Circuit was in the minority.

In *Dupree* v. *Younger*, 598 U.S. 729 (2023), this Court resolved the conflict. It unanimously held that "a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment"—"that is, [an] issue[] that can be resolved without reference to any disputed facts." 598 U.S. at 735–36.

**B. Factual background.**

This case arises out of a construction-site accident. A few years ago, Beck Construction of Central Florida, Inc. subcontracted Ernest Guthrie LLC ("Guthrie LLC") to complete the interior framing and carpentry on a homebuilding project. App. 49a. Partway through the project, Guthrie LLC's employee, Ernest Guthrie ("Mr. Guthrie"), fell off the home's roof and sustained severe injuries. *Ibid*. The present dispute is between two of the insurers whose policies may have provided coverage for Mr. Guthrie's injuries. App. 48a–49a.

Beck held a $1 million commercial general liability policy with American Builders. App. 49a. Guthrie LLC also had a $1 million commercial general liability policy, albeit with Southern-Owners. *Ibid.* Guthrie LLC's policy had an endorsement naming Beck as an additional insured with respect to liability arising out of Guthrie LLC's work for Beck and making the Southern-Owners policy primary for such claims against Beck. App. 49a–50a.

After Mr. Guthrie's personal-injury attorney made a settlement demand, American Builders tendered its $1 million policy limit to Mr. Guthrie. App. 50a, 53a. American Builders also notified Southern-Owners that it intended to seek equitable subrogation based on the Southern-Owners

endorsement naming Beck as an additional insured on the policy. App. 53a–54a. Southern-Owners did not agree to pay anything on account of Mr. Guthrie's claim. App. 54a.

**C. Proceedings below.**

1. After Southern-Owners declined to pay, American Builders brought a common-law bad-faith equitable-subrogation claim against Southern-Owners in Florida state court. App. 8a. Southern-Owners removed the case to the district court. *Ibid.*

The parties filed cross-motions for summary judgment. App. 48a. In relevant part, Southern-Owners contended that its policy's employer-liability exclusion eliminated coverage for Mr. Guthrie's claim. App. 68a. The exclusion provides, among other things, that the policy does not cover "'[b]odily injury' to [a]n 'employee' of *any insured* arising out of and in the course of employment by any insured." *Ibid.* (emphasis added). Because the parties agreed[1] that Mr. Guthrie was an employee of Guthrie LLC and was injured in the course of his employment, App. 48a–49a (describing these facts as undisputed), the exclusion facially eliminated coverage for Mr. Guthrie's claim (and thus any liability Southern-Owners may have to American Builders), App. 68a–69a.

The district court denied the parties' motions for summary judgment. App. 71a. With respect to

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[1] Indeed, American Builders alleged in its complaint that Beck subcontracted with Guthrie LLC and that Mr. Guthrie was Guthrie LLC's only employee. Dist. Ct. Dkt. No. 1-1 at 4 (¶¶ 6–8 of the complaint). American Builders included those same facts in its statement of undisputed facts at summary judgment. Dist. Ct. Dkt. No. 34 at ¶¶ 3, 8.

Southern-Owners' coverage-exclusion argument, the district court did not identify any genuine issue of material fact. App. 69a. Rather, the district court was persuaded by case law it understood to hold that similar exclusions did not bar coverage where, as here, a separation-of-insured provision exists in the policy. *Ibid.* These provisions, the district court concluded, "create separate insurable interests in each individual insured under the policy, such that the conduct of one insured will not necessarily exclude coverage for all other insureds." *Ibid.* (quoting *Evanston Ins. Co.* v. *Design Build Interamerican, Inc.*, 559 F. App'x 739, 742 (11th Cir. 2014)).

The case went to trial, and the jury returned its verdict in favor of American Builders. App. 2a. Southern-Owners filed motions for judgment as a matter of law or a new trial, but those motions did not reassert the coverage-exclusion defense. App. 9a. The district court denied the motions. *Ibid.*

2. On appeal, Southern-Owners raised the district court's rejection of its coverage-exclusion defense at summary judgment. C.A. Dkt. No. 18 at 1, 45–53. American Builders did not question that the issue was properly raised and responded to Southern-Owners' argument on the merits. C.A. Dkt. No. 24 at 52–58. American Builders did not dispute the facts on which Southern-Owners relied but rather the legal effect of those facts under Florida law. See *ibid.*

In its initial opinion, the court of appeals declined to reach the coverage-exclusion issue. It asserted that Southern-Owners forfeited the issue because it did not brief why the issue was appealable. App. 45a. Regardless, the court explained, the Eleventh Circuit's then-prevailing rule barred consideration of

any summary-judgment arguments unless they were reasserted in Rule 50 motions. *Ibid.*

3. Southern-Owners filed a petition for panel rehearing or rehearing en banc on the coverage-exclusion issue. While the petition was pending, this Court decided *Dupree*, rejecting the reassert-or-forfeit rule with respect to purely legal issues.

The court of appeals granted the petition for panel rehearing. The panel issued a revised opinion on the coverage-exclusion issue. Although it acknowledged this Court's decision in *Dupree*, it said that Southern-Owners' coverage-exclusion argument was "presumptively unappealable without being re-raised" in Rule 50 motions because "the issue *potentially* relied on facts in dispute at summary judgment." App. 23a (emphasis added). The panel held that Southern-Owners forfeited the issue because "Southern-Owners raised the merits of the coverage defense" but failed to explain "how the denial of the defense is appealable" until its petition for rehearing. *Ibid.* The Eleventh Circuit therefore refused to reach the merits of Southern-Owners' argument. App. 24a.

## REASONS FOR GRANTING THE PETITION

This Court has recognized that a GVR order may issue when "recent developments that [the Court has] reason to believe the court below did not fully consider . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," so long as such "a redetermination may determine the ultimate outcome of the litigation."

*Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

This case ticks all those boxes: although the Eleventh Circuit's opinion on rehearing paid lip service to *Dupree*, its holding cannot be squared with this Court's decision. There is no doubt that a redetermination in Southern-Owners' favor could be outcome-determinative: under Florida law, a bad-faith claim cannot proceed absent coverage under the policy. E.g., *Hartford Ins. Co.* v. *Mainstream Const. Grp., Inc.*, 864 So. 2d 1270, 1272 (Fla. Dist. Ct. App. 2004). Reaching the merits of Southern-Owners' coverage-exclusion argument could therefore result in judgment in its favor.

## I. Because it relies on facts alleged by American Builders, Southern-Owners' coverage-exclusion issue indisputably is purely legal under *Dupree*.

To begin, *Dupree* removed all doubt regarding the appealability of Southern-Owners' coverage-exclusion argument. In *Dupree*, this Court held that "purely legal issues resolved at summary judgment" need not "be renewed in a post-trial motion." 598 U.S. at 738. It clarified that "purely legal issues" are those "that can be resolved without reference to any undisputed facts." *Id.* at 735. This definition makes sense: "[f]rom the reviewing court's perspective, there is no benefit to having a district court reexamines a purely legal issue after trial, because nothing at trial will have given the district court any reason to question its prior analysis." *Id.* at 736. A repeat-motion requirement would mandate a meaningless, "empty exercise." *Id.* at 737.

Southern-Owners' coverage-exclusion argument plainly is appealable under *Dupree*. In Florida, as in most states, the construction and application of an insurance contract is a question of law for the court. See, e.g., *Fayad* v. *Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005) ("[W]hether damage caused by blasting comes within the scope of the exclusionary clause is a question of law."). That is what Southern-Owners asked the district court do here: apply the employer-liability exclusion in the policy to conclude that it barred coverage for Mr. Guthrie's claim because he was an employee of Guthrie LLC.

In making its argument, Southern-Owners did not rely on any disputed facts. Quite the opposite, Southern-Owners' argument relies on facts that *American Builders* alleged in its complaint and included in its statement of undisputed facts at summary judgment. Compare App. 68a–69a, with Dist. Ct. Dkt. No. 1-1 at 4 (¶¶ 6–8 of the complaint); Dist. Ct. Dkt. No. 34 at ¶¶ 3, 8. Unsurprisingly, in American Builders' response to Southern-Owners' summary-judgment motion, American Builders did not dispute any of those facts. App. 48a–49a (describing the facts as undisputed). The district court denied summary judgment not because of the existence of a genuine factual dispute but because it believed that such exclusions do not bar coverage for claims like Mr. Guthrie's as a matter of law. App. 69a.

Because the facts were undisputed at summary judgment, nothing at trial changed them, and it would have been pointless for Southern-Owners to "copy and paste" its summary-judgment argument "into post-trial format." *Dupree*, 598 U.S. at 737. Given its

posture, Southern-Owners' coverage-exclusion argument is appealable.

## II. The Court should issue a GVR order because the court of appeals flouted *Dupree*.

Although Southern-Owners' coverage-exclusion argument is appealable under *Dupree*, the Eleventh Circuit declined to reach its merits. Instead, the court of appeals asserted that Southern-Owners forfeited the issue because it did not explain in its initial brief why the issue is appealable. App. 23a–24a. The Eleventh Circuit's forfeiture analysis is tantamount to a rejection of *Dupree*. "When this Court applies a rule of federal law to the parties before it," however, "that rule is the controlling interpretation of federal law and *must* be given *full retroactive effect* in *all cases* still open on direct review and as to all events, regardless of whether such events predate or postdate" this Court's decision. *Harper* v. *Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (emphasis added). The Court should give the Eleventh Circuit an opportunity to more fully consider *Dupree* and correct its flawed analysis.

To start, the rule adopted in *Dupree* is simply an application of the "general rule . . . that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" *Dupree*, 598 U.S. at 734 (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 712 (1996)). The rule that sufficiency-of-the-evidence summary-judgment denials are not reviewable on appeal after a trial is the *exception* to that general rule. See *id.* at 734–35. As a result, there is no reason to impose some special requirement to explain a

purely legal summary-judgment issue's appealability. Rather, just like any other district court order, appealability is assumed following entry of judgment.

What's more, Southern-Owners did not fail to raise anything in its initial brief. To be sure, a party must raise all issues *decided by the district court* that the party asks the court of appeals to *review* in its opening brief. See, e.g., Fed. R. App. P. 28(a)(5); *Access Now, Inc.* v. *Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) ("[T]he law is by now well settled in this Circuit that a *legal claim or argument* that has not been briefed before the court is deemed abandoned and *its merits* will not be addressed." (emphasis added)). And Southern-Owners followed that rule here: it included its coverage-exclusion argument in its list of issues presented, C.A. Dkt. No. 18 at 1, and dedicated nearly 10 pages of its brief to the argument, *id.* at 45–53. American Builders had no difficulty joining issue with Southern-Owners in its own brief. See C.A. Dkt. No. 24 at 52–58.

Southern-Owners' initial brief not only extensively addressed the merits of its coverage-exclusion argument but also articulated why the issue is purely legal. Southern-Owners explained that "a bad faith claim against an insurer fails as a matter of law absent coverage under the policy" under Florida law, C.A. Dkt. No. 18 at 45, and cited numerous cases making clear the construction of an insurance contract is a question of law for the court, see *id.* at 50. Southern-Owners also explained that its argument turns on "facts [that] have been undisputed since the inception of this lawsuit." *Ibid.* American Builders did not dispute any of these points in its response brief; rather, it contended that Southern-

Owners' argument was foreclosed by other case law applying Florida law. See C.A. Dkt. No. 24 at 52–58.

The Eleventh Circuit's forfeiture analysis imposes an unheard-of hurdle to appellate review: the appellant not only must have raised the issue in the district court and addressed its merits in its initial brief on appeal (like Southern-Owners here) but also must separately raise and argue whether it properly preserved the issue. And it must do so even if the opposing party does not challenge preservation. That hurdle is senseless—precisely the sort of "empty exercise" this Court rejected in *Dupree*. 598 U.S. at 737; cf. *Foman* v. *Davis*, 371 U.S. 178, 181–82 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities.").

At a minimum, the Eleventh Circuit's decision is the product of incomplete consideration of *Dupree*. This Court should grant the petition and provide the court of appeals the opportunity to correct its potentially outcome-determinative error.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further consideration in light of *Dupree*.

Respectfully submitted,

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