No. 20-1130

IN THE
Supreme Court of the United States

ERICSSON INC., TELEFONAKTIEBOLAGET LM ERICSSON,
Petitioners,

v.

TCL COMMUNICATION TECHNOLOGY HOLDINGS, LIMITED, TCT MOBILE LIMITED, TCT MOBILE (US) INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

TCL concedes (at 2, 13) that the courts of appeals are in conflict following *Ortiz* v. *Jordan*, 562 U.S. 180 (2011). Some hold that, despite the general rule that parties cannot "appeal an order denying summary judgment" following trial, *id.* at 184, such orders are appealable if the denial of summary judgment rests on "'purely legal' issues," *id.* at 190; see Pet. 18-20. By contrast, four circuits hold that no such "purely legal issues" exception exists. Because denials of summary judgment are not appealable, they hold,

issues are preserved for appeal only if raised in a post-trial motion under Rule 50. See Pet. 16-18.[1]

TCL does not deny the circuit conflict is entrenched. It does not dispute the importance of resolving the conflict. It nowhere denies that the potentially case-dispositive issue recurs with such frequency as to warrant review. Instead, TCL insists "[t]here is no circuit split under *these facts*" because "the district court *effectively granted* summary judgment on * * * a *purely* legal issue," leaving no disputed facts on the issue for resolution at trial. Br. in Opp. 2 (some emphasis added).

TCL's "effectively granted summary judgment" characterization, however, merely restates the "purely legal issue" exception. As the petition explains (at 26-28), the *reason* the Federal Circuit deems an order denying summary judgment to have "effectively" granted summary judgment to the non-movant is not that the order actually enters judgment for the non-moving party. It is that the order resolves "a purely legal issue" against the movant. Indeed, under TCL's theory and the decision below, *every* order that denies summary judgment on a "purely legal" issue "effectively grants" the non-movant summary judgment. Nor does recharacterizing the issue in that way eliminate the conflict; it merely restates it. If TCL's recharacterization were meaningful, the cases *rejecting* an exception for "purely legal issues" would have come out the other way and *allowed* appellate review.

TCL's further assertion that the Federal Circuit "exercised its discretion to excuse" TCL's failure to file a Rule

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[1] TCL now concedes that the Fifth Circuit "prohibit[s] appeals where summary judgment motions were denied on legal grounds, and the movant did not re-raise the summary judgment issue after trial" in a Rule 50 motion. Br. in Opp. 19.

50 motion, Br. in Opp. 2, *supports* granting review. Whether such discretion exists—whether appellate courts have power to direct entry of judgment for the party that lost below absent a Rule 50 motion—is the second question the petition presents. See Pet. i, 22-24. Other circuits hold that failure to file a Rule 50 motion is "jurisdictional" and *cannot* be excused. Pet. 23. This Court has repeatedly held that, absent a Rule 50 motion, a court of appeals is "'powerless'" to set aside a verdict and direct judgment for the losing party. *Ortiz*, 562 U.S. at 189. The court of appeals' insistence that it *has* that power (indeed "discretion," Pet.App.7a) defies those precedents and places Federal Circuit law in conflict with other circuits. Review is warranted.

I. This Case Implicates The Circuit Conflict Over Whether Denials Of Summary Judgment Are Appealable After Trial

In *Ortiz*, this Court held that parties ordinarily cannot "appeal an order denying summary judgment after a full trial on the merits," but left open a possible exception for summary-judgment rulings that address "'purely legal' issues capable of resolution 'with reference only to undisputed facts.'" 562 U.S. at 190. In the ten years since *Ortiz*, the courts of appeals have fractured over that question. See Pet. 15-22. TCL concedes the division in authority. Br. in Opp. 2, 13. And it nowhere disputes the issue is sufficiently important and recurring to warrant review.

A. TCL instead changes the subject. Asserting that this case "involves a narrower subcategory of summary-judgment denials where the district court *effectively granted* summary judgment on * * * a *purely* legal issue," TCL denies the existence of a "circuit split under these facts." Br. in Opp. 2 (some emphasis added). TCL's "effectively grants summary judgment" standard, however,

is another way of saying the district court denied summary judgment on purely legal grounds. TCL does not contend that the district court here *actually* ordered summary judgment for Ericsson. The district court's order does not dismiss, enter judgment on, or otherwise preclude any claim in the case, including TCL's counterclaim of invalidity under § 101. Pet.App.99a; see Pet. 10. The order by its terms simply "denied" TCL's summary-judgment motion. Pet.App.99a. The panel majority and dissent thus agreed that the district court "denied" summary judgment. Pet.App.2a, 29a. And the court of appeals reversed that *denial* of TCL's summary-judgment motion by directing the *entry of judgment* in TCL's favor on appeal. Pet.App.2a, 29a.

TCL instead argues that the district court's denial "*effectively*" granted summary judgment for Ericsson. Br. in Opp. 19 (emphasis added). But TCL's rationale for characterizing that order as effectively granting the non-movant summary judgment is that the order resolves a purely legal issue—precisely the question that has divided the courts of appeals. Under TCL's theory, *every* order that denies the movant summary judgment on a purely legal issue "effectively" grants the non-movant summary judgment on that issue. TCL's characterization does not mitigate the circuit conflict over whether summary-judgment denials based on legal issues are reviewable—it just restates it.

TCL, for example, asserts that the district court "effectively granted" summary judgment to Ericsson *because* the court "wholly accepted" Ericsson's legal arguments and "no factual disputes remained for resolution at trial." Br. in Opp. 16-17. The panel majority used a similar formulation: It held the denial was effectively a grant because it turned on "the claim language and a comparison

to [the] existing caselaw," not on existence of "factual issues" for trial. Pet.App.4a. In other words, the *reason* TCL claims there was an "effective grant" of summary judgment for Ericsson is that the decision turns on legal rather than factual grounds. TCL makes that explicit: "A summary-judgment denial that effectively grants summary judgment in favor of the nonmovant," it announces, "*by definition* is a summary-judgment motion decided on legal grounds," leaving no factual issues for trial. Br. in Opp. 24 (emphasis added).

TCL's argument thus is not a distinction, but a merits-stage argument for one side of the conflict. Some courts of appeals, like the Federal Circuit and the Sixth Circuit, justify their review of decisions that deny summary judgment on "purely legal" grounds on the theory that such denials are an "effective grant of summary judgment" to the non-moving party. See *Lighting Ballast Control LLC* v. *Philips Elecs. N. Am. Corp.*, 790 F.3d 1329, 1337 (Fed. Cir. 2015); *Paschal* v. *Flagstar Bank*, 295 F.3d 565, 572 (6th Cir. 2002). That rationale is questionable. If the court of appeals truly were reviewing an "effective" grant of summary judgment, the remedy for any error would be to reverse and remand for further proceedings. See 10A C. Wright & A. Miller, *Federal Practice and Procedure*, §2716 (3d ed.). But the Federal Circuit's decision below, like other courts that allow review of denials resting on "purely legal" grounds, does not do that. It overturns *the denial* of a summary-judgment motion, directing the entry of judgment in the movant's favor. Pet. 19-20; see Pet.App.23a. Such arguments go to the merits, regardless, not to the necessity of review.

B. TCL's opening salvo and lengthy effort to show that "*all thirteen circuits*" allow for appeals "from *grants* of summary judgment" without a Rule 50 motion, Br. in Opp.

14-15, is thus pointless. No one disputes that a decision actually granting summary judgment is reviewable. The question is whether decisions that plainly deny summary judgment can be reviewed and reversed on appeal, absent a Rule 50 motion, because the rationale is purely legal (and thereby, in TCL's view, "effectively" grant summary judgment for the non-movant).

"Some circuits hold that if the material facts are not in dispute, and the denial of summary judgment was based on the interpretation of a purely legal question, the denial is appealable" and "a Rule 50 motion is not required to preserve the error." D. Coquillette et al., *Moore's Federal Practice* § 56.130[3][c][ii] (3d ed. 2018); see Pet. 21-22. Others "reject[ ] these distinctions" and require parties to "move for judgment as a matter of law under Rule 50 on discrete legal issues." *Moore's*, *supra*, § 56.130[3][c][ii]; see *Ji* v. *Bose Corp.*, 626 F.3d 116, 127-128 (1st Cir. 2010) (declining to distinguish denials based on "legal error" as opposed to "existence of fact issues").[2] TCL's effort to restate the inquiry merely repeats an argument on one side of the divide.

C. For the same reasons, TCL's argument that its "appeal would be permitted" in circuits that reject the "*purely* legal issue" exception, Br. in Opp. 21, does not withstand scrutiny. The cases TCL cites to illustrate the First, Second, Fourth, and Fifth Circuits' rejection of the "purely legal issue" exception, Br. in Opp. 19, disprove its con-

[2] TCL urges that it would be "futile and wasteful" to require a party to move for judgment as a matter of law under Rule 50 after losing on a legal issue on summary judgment. Br. in Opp. 18. But that goes to the merits. Courts that apply a legal-issue exception invoke identical arguments to justify that rule. Pet. 19. But not all circuits accept that reasoning. Pet. 17-18.

tention. In each case, the district court resolved a legal issue against the party moving for summary judgment, leaving no factual dispute on that issue for trial. See *Hisert ex rel. H2H Assocs., LLC* v. *Haschen*, 980 F.3d 6, 9 (1st Cir. 2020) (choice of law); *Omega SA* v. *375 Canal, LLC*, 984 F.3d 244, 253 (2d Cir. 2021) (whether contributory liability under trademark law allows a willful-blindness theory); *Bunn* v. *Oldendorff Carriers GmbH & Co.*, 723 F.3d 454, 460 (4th Cir. 2013) (whether liability under § 5(b) of the Longshore and Harbor Workers' Compensation Act was limited to "duty to warn" theory, or could instead encompass simple negligence); *Feld Motor Sports, Inc.* v. *Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017) (whether contract was ambiguous).

Under the theory TCL urges and the Federal Circuit echoed here, the court in each of those cases "effectively granted" summary judgment for the non-moving party. Yet in two of the cases, the court of appeals held review was foreclosed. See *H2H*, 980 F.3d at 9; *Omega*, 984 F.3d at 253. In the other two, the courts ruled that the summary-judgment decision was not appealable after trial, but found the issue preserved for appeal because the appellant had raised it under Rule 50 after trial—precisely what TCL did not do here. *Feld Motor Sports*, 861 F.3d at 596; *Bunn*, 723 F.3d at 459-460. The courts holding that summary-judgment denials are not appealable absent a Rule 50 motion would *not* have "permitted" TCL's appeal here. Br. in Opp. 21.

TCL's other authorities fare no better. TCL offers a series of cases from the First, Second, Fourth, and Fifth Circuits that, TCL argues, show that "appeals *are permitted* where motions for summary judgment were denied in a way that effectively granted summary judgment to the nonmoving party." Br. in Opp. 19. But those cases did not

"effectively" enter judgment for the nonmovant. They *actually* did so.

National Electrical Manufacturers Association v. *Gulf Underwriters Insurance Co.*, 162 F.3d 821 (4th Cir. 1998), which TCL invokes as its prime authority, Br. in Opp. 20-21, proves the point. Gulf moved for summary judgment that it had no duty to defend the insured under a policy exclusion. 162 F.3d at 823. The district court "denied Gulf's motion for summary judgment, and concluded the pollution exclusion did not relieve Gulf of its duty to defend NEMA." *Ibid.* It then "*sua sponte entered partial summary judgment* for NEMA on this issue." *Id.* at 824 n.3 (emphasis added). The court expressly stated that it was only because of that actual entry of partial summary judgment for NEMA that the court was "not precluded from reviewing the district court's denial of Gulf's motion." *Ibid.*

TCL's remaining First, Second, Fourth, and Fifth Circuit cases are to the same effect. The courts did not review an "effective" grant of summary judgment for the nonmovant, but an *actual* grant of judgment or dismissal of a claim. See *Nat'l Union Fire Ins. Co.* v. *Lumbermens Mut. Cas. Co.*, 385 F.3d 47, 49 (1st Cir. 2004) (entry of judgment under Rule 54(b)); *Galvin* v. *U.S. Bank, N.A.*, 852 F.3d 146, 153 (1st Cir. 2017) (dismissal of claims); *Clearlake Shipping PTE Ltd.* v. *Nustar Energy Servs., Inc.*, 911 F.3d 646, 649-650 (2d Cir. 2018) (dismissal of claims); *Luig* v. *N. Bay Enters., Inc.*, 817 F.3d 901, 904 (5th Cir. 2016) (dismissal of counterclaim).

That is not the situation here. The district court only "denied" TCL's summary-judgment motion. Pet.App.99a. It did not *sua sponte* grant judgment for Ericsson. Nor did it dismiss TCL's counterclaim of invalidity under § 101. Thus, TCL's appeal would not fall within the limited

category of "decisions reviewing denied motions for summary judgment when the district court granted the opposing party[ ] * * * summary judgment." *Chesapeake Paper Prods. Co.* v. *Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1237 n.11 (4th Cir. 1995).[3]

TCL's appeal thus would be barred in the First, Second, Fourth, and Fifth Circuits for failure to file a Rule 50 motion. But the Third, Seventh, Ninth, Tenth, D.C., and Federal Circuits would allow it under an exception for denials based on legal issues. See Pet. 15-22. TCL's attempt to distinguish "these facts," Br. in Opp. 2, disproves itself.

II. TCL'S CLAIM THAT THE FEDERAL CIRCUIT HAD "DISCRETION" TO EXCUSE FAILURE TO FILE A RULE 50 MOTION SUPPORTS REVIEW

The Federal Circuit's assertion that it had "discretion" to overlook TCL's failure to file a Rule 50 motion, Pet. 7a-11a, underscores the need for review. This Court has repeatedly held that "a party's failure to file a postverdict motion under Rule 50(b)" deprives appellate courts of

[3] TCL's remaining cases, from circuits that recognize an exception for "purely legal" summary-judgment denials, Br. in Opp. 21-26, almost all involved *actual* entry of judgment for the nonmovant as well, see *Brown* v. *Zurich-Am. Ins. Co.*, 137 F. App'x 476, 477-478 (3d Cir. 2005) (summary-judgment denial later "convert[ed] * * * into a final order so * * * [the plaintiff] could appeal"); *ANR Advance Transp. Co.* v. *Int'l Bhd. of Teamsters*, 153 F.3d 774, 777 (7th Cir. 1998) (*sua sponte* grant); *Twin City Pipe Trades Serv. Assoc., Inc.* v. *Wenner Quality Servs., Inc.*, 869 F.3d 672, 675 (8th Cir. 2017) (express grant); *Buckingham* v. *United States*, 998 F.2d 735, 738 (9th Cir. 1993) (*sua sponte* grant); *Welding* v. *Bios Corp.*, 353 F.3d 1214, 1216 (10th Cir. 2004) (parties stipulated to final judgment after denial of summary judgment with no trial); *Leahy* v. *District of Columbia*, 833 F.2d 1046, 1047 (D.C. Cir. 1987) (*sua sponte* dismissal of case). And they are all beside the point regardless, as they arise in circuits that recognize and would permit appeal under the "purely legal issues" exception in any event.

"'*power* to direct the District Court to enter judgment contrary to the one it had permitted to stand.'" *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 400-401 (2006) (emphasis added) (quoting *Cone* v. *W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)). "[A]bsent such a motion," appellate courts are "'powerless' to review" the issue and direct judgment for the party that lost below. *Ortiz*, 562 U.S. at 189 (quoting *Unitherm*, 546 U.S. at 405). The Second, Fifth, Sixth, and Ninth Circuits thus hold that an appellate court lacks "*jurisdiction* to hear an appeal" seeking judgment as a matter of law where the appellant did not file a post-trial Rule 50 motion. *Feld*, 861 F.3d at 596 (emphasis added); see Pet. 23. Other circuits treat Rule 50 as a mandatory claim-processing rule that *must* be enforced where the opposing party insists. See *Frank C. Pollara Grp., LLC* v. *Ocean View Inv. Holding, LLC*, 784 F.3d 177, 185-186 (3d Cir. 2015); Pet. 23-24.

The Federal Circuit's decision departs from those decisions—and defies this Court's rulings. The Federal Circuit now declares it is not "powerless to review" issues absent a Rule 50 motion, claiming not just power but "discretion" to review such issues (here, over Ericsson's vigorous objection). Pet.App.7a. TCL's assertion that this Court's rulings are "instructive on the requirements of Rule 50" but do not "encroach upon an appellate court's discretionary power," Br. in Opp. 28, simply repeats the defiance. *Ortiz* and other decisions of this Court rule that a court of appeals is "'*powerless*'" to set aside the jury verdict and direct the entry of judgment for the defendant absent a Rule 50 motion. 562 U.S. at 189 (emphasis added). TCL never explains how a court could exercise "discretion" to hear the matter where it lacks "*jurisdiction* to hear [the] appeal" at all. *Feld*, 861 F.3d at 596 (emphasis added).

TCL's assertion that there is no "*general principle* to contain appellate courts' discretion" to excuse waiver, Br. in Opp. 26 (emphasis added), ignores the *specific principle* that *Ortiz*, *Unitherm*, and *Cone* explicitly announce—that, "[a]bsent [a Rule 50] motion," appellate courts are "'powerless' to review" the issue and direct judgment for the losing party below, *Ortiz*, 562 U.S. at 189 (quoting *Unitherm*, 546 U.S. at 405); see *Cone*, 330 U.S. at 218. *Unitherm* explicitly rejected the notion—advanced by the *Unitherm* dissent—that Rule 50 affords courts "discretion" to excuse waiver to "avoid manifestly unjust results in exceptional cases." 546 U.S. at 407, 409 (dissenting opinion). TCL's effort to justify the Federal Circuit's purported exercise of "discretion" is thus irrelevant. This Court has held—and other courts of appeals have recognized—that there is no such discretion to exercise; the absence of a Rule 50 motion deprives the court of *power*. The Federal Circuit's adoption of a contrary rule, in defiance of this Court's clear holdings and in conflict with other courts of appeals, underscores the need for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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