No.

In the Supreme Court of the United States

NEIL DUPREE, PETITIONER,

v.

KEVIN YOUNGER

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

PETITION FOR A WRIT OF CERTIORARI

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
SEAN A. MIRSKI
SAMUEL F. CALLAHAN
DANA OR
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

QUESTION PRESENTED

This case presents a clear, recognized, and intractable conflict regarding an important issue related to the preservation of legal claims for appeal.

Parties may appeal only from "final decisions of the district courts." 28 U.S.C. § 1291. Thus the general rule is that "[a]n appeal from the final judgment brings up all antecedent issues," *In re Kilgus,* 811 F.2d 1112, 1115 (7th Cir. 1987), and that "all interlocutory orders are reviewable on appeal from the final decree," *Gloria Steamship Co. v. Smith,* 376 F.2d 46, 47 (5th Cir. 1967). "Interlocutory orders therefore may be stored up and raised at the end of the case." *Kurowski v. Krajewski*, 848 F.2d 767, 772 (7th Cir. 1988).

Notwithstanding these precepts, the circuits have squarely divided over whether purely legal claims denied at summary judgment are reviewable on appeal after a jury trial where those claims have not been reasserted in a post-trial motion. In the decision below, the Fourth Circuit acknowledged the 8-3-1 circuit split. But the panel declared itself bound by Fourth Circuit precedent and held that it would "not review, under any standard, the pretrial denial of a motion for summary judgment after a full trial and final judgment on the merits, even in circumstances where the issue rejected on summary judgment and not reasserted in a post-trial motion is a purely legal one." That holding was outcome-determinative—the sole basis on which the court refused to consider petitioner's PLRA exhaustion defense—and this case is a perfect vehicle for resolving the widespread disagreement over this important question.

The question presented is:

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.

RELATED PROCEEDINGS

United States District Court (D. Md.):

Younger v. Green, No. 1:16-cv-03269 (Feb. 4, 2020)

United States Court of Appeals (4th Cir.):

Younger v. Crowder, No. 21-6422 (pending)

Younger v. Dupree, No. 20-6423 (Apr. 18, 2022)

Younger v. Ramsey, No. 20-6262 (July 19, 2022)

Younger v. Green, No. 20-6294 (Aug. 23, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is unpublished but available at 2022 WL 738610. The order of the court of appeals denying rehearing (App. 111a) is unreported. The opinions of the district court denying petitioner's request for remittitur (App. 10a-28a), denying petitioner's motion for summary judgment (App. 29a-54a), denying petitioner's motion to dismiss the amended complaint (App. 55a-82a), and denying petitioner's motion to dismiss the initial complaint or in the alternative for summary judgment (App. 83a-110a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2022. App. 1a. The court of appeals denied a timely petition for rehearing en banc on April 8, 2022. App. 111a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Prison Litigation Reform Act ("PLRA") provides in relevant part:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

STATEMENT OF THE CASE

This case presents a square and indisputable conflict over a significant question of appellate reviewability: whether moving for summary judgment is enough on its own to preserve a purely legal claim or defense for review on appeal post-trial. In the proceedings below, the Fourth

Circuit declared itself bound by a prior divided panel decision that held that the pretrial denial of a motion for summary judgment is never sufficient to preserve an issue for appeal after a full trial and final judgment on the merits, even in circumstances where the issue rejected on summary judgment and not reasserted in a post-trial motion is purely legal. In that earlier decision, *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411 (4th Cir. 2005), a 2-1 majority expressly rejected the position of the Seventh Circuit and adopted the contrary position of the First and Fifth Circuits; the dissent (Judge Motz) would have reached the opposite conclusion. This same issue was raised and resolved at each stage of this case and was dispositive below: The Fourth Circuit refused to consider petitioner's PLRA exhaustion defense because it was not re-raised in a post-trial motion. There are no conceivable obstacles to resolving it in this Court.

This case easily satisfies all the traditional criteria for granting review. The conflict is clear, acknowledged, and entrenched. It has already been recognized by multiple courts and commentators.[1] Eight circuits have explicitly

[1] *E.g.* D. Herr, R. Haydock & J. Stempel, Motion Practice §16.01, 16-5 n.10 (7th ed. 2016) ("Circuit courts are split on the issue."); D. Knibb, Federal Court of Appeals Manual § 1:2 (7th ed.) ("The circuits are split on the need to move after trial under F.R.C.P. Rule 50(b) for judgment as a matter of law as a prerequisite to appeal from a denial of summary judgment when the issue raised is purely a legal one."); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2715 (4th ed.) (noting the conflict); 15B C. Wright, A. Miller, et al., Federal Practice & Procedure § 3914.28 (2d ed.) (noting the conflict); D. Coquillette et al., *Moore's Federal Practice* § 56.130[3][c][ii] (3d ed. 2018) (noting the conflict); Conor Tucker, *How Patent Trial Venue Affects Issue Preservation On Appeal*, Law360 (Aug. 15, 2022), https://bit.ly/3JYXy8C ("The four most popular venues for patent suits straddle an open circuit split on that question recently reiterated by the U.S. Court of Appeals for the Fourth Circuit in its March 11 *Younger v. Dupree* decision."); Kelli

held that moving for summary judgment on a purely legal issue is enough to preserve the issue for appellate review, three circuits have held the opposite, and one has adopted an idiosyncratic rule of its own. Further percolation is pointless: the arguments have been thoroughly developed on each side, and there is no realistic prospect that either bloc will reverse course. The remaining circuit (the Eleventh) is simply left to pick sides—while parties are left with vastly different appellate rights based only on the fortuity of where they happen to litigate their case.

The existing situation is intolerable. The question presented raises legal and practical issues of surpassing importance, and its correct disposition is critical to the consistent operation of appellate review in the federal courts. It does parties little good to raise a potentially meritorious legal defense on summary judgment only to learn on appeal that doing so was not enough to preserve the issue for review. Parties in most circuits need not (and do not) waste resources and test courts' patience by relitigating issues already resolved against them; yet in the First, Fourth, and Fifth Circuits they must do so under pain of forfeiture. Because this case presents an optimal vehicle for resolving this important question of federal law, the petition should be granted.

1. Petitioner Neil Dupree is a former intelligence lieutenant in the Maryland Reception, Diagnostic & Classification Center ("MRDCC"), a prison operated by the Division of Correction within the Maryland Department of Public Safety and Correctional Services. Petitioner was a "good" and "well-respected" officer who was promoted multiple times for his exemplary service.

Benham Bills, *Rule 50 and Purely Legal Arguments: A Circuit Split*, American Bar Ass'n (June 27, 2013), https://bit.ly/3vDbZZW ("Unless and until the U.S. Supreme Court resolves the current circuit split, counsel should always research and consider the position of the circuit in which he or she is practicing").

See Dist. Ct. Dkt. 291, at 28-29, 133-34, 138-39, 177-78. He served for more than a decade as a corrections officer without incident before the events of this case. Dist. Ct. Dkt. 331, at 144, 181.

2. On September 30, 2013, respondent Kevin Younger, an inmate at MRDCC, was the victim of an assault carried out by three corrections officers. App.3a. Three years later, in 2016, respondent brought this 42 U.S.C. § 1983 action against those officers while also naming petitioner and several other correctional staff and officials as defendants for their purported roles in the incident. App.3a. In his responsive pleading, petitioner asserted the affirmative defense that respondent had failed to properly exhaust his available administrative remedies, as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. C.A. JA 242 (Dkt.15).

3. After the close of discovery, petitioner moved for summary judgment on this defense, but the district court denied the motion. App.3a. No party disputed that ordinarily respondent would have been required to exhaust the mandatory administrative remedy procedure (ARP) process before filing suit. App.36a-42a. But it was also undisputed that an Internal Investigative Unit (IIU) investigation into the incident was pending at the time respondent would have been required to exhaust the mandatory ARP process. App.36a-42a. Based on these undisputed facts, the district court held, as a matter of law, that the IIU investigation made the ARP process not "available" to respondent. App.40a-42a. Accordingly, the court concluded that respondent "satisfied his administrative exhaustion requirements and the PLRA [did] not bar his claims."[2] App.42a.

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[2] As the district court explained: "In this case, there is no dispute that the IIU undertook an investigation concerning [respondent's] assault." App.42a. Consequently, "[t]he Court need not resolve

4. The case proceeded to a jury trial, during which petitioner did not raise his exhaustion defense because there existed no additional evidence relevant to the court's earlier assessment and rejection of the defense. On February 3, 2020, the jury found petitioner and others liable and awarded respondent $700,000 in damages. Petitioner did not raise his exhaustion defense in a post-trial motion.

5. Petitioner appealed, seeking to challenge the district court's holding that the existence of an IIU investigation categorically exempts a prisoner from exhausting the ARP process. C.A. Br. 8-18 (Dkt.14).

6. The panel dismissed the appeal. App.3a. The panel explained, bound by "controlling precedent," that petitioner's failure to renew his exhaustion defense in a post-trial Rule 50(b) motion made the claim unreviewable. App.5a. The panel explained further that "the rule" in the Fourth Circuit is that a party that fails to raise an argument in a post-trial motion forfeits "appellate review of not only factual issues, but also purely legal ones." App.5a. "The circumstances of this appeal," the panel continued, "fall precisely within the scope of that rule." App.5a.

The panel stated that it "appreciate[d]" petitioner's argument that, after the district court "fully and finally resolved" petitioner's exhaustion defense, "nothing could have occurred at the merits trial to change that disposition," and the Fourth Circuit's "precedent is unfair in this context because it 'perpetuates the extinction of [his] potentially meritorious legal defense … simply

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disputes concerning [respondent's] adherence to the ARP process because the IIU investigation satisfied his obligation to subject his claims to administrative exhaustion." App.42a. "Accordingly, [respondent] has satisfied his administrative exhaustion requirements and the PLRA does not bar his claims." App.42a.

because [petitioner]—after the merits trial and without any new facts in hand—did not ask the district court to revisit its earlier, purely legal, decision." App.7a. The panel explained that it was nonetheless "not entitled to circumscribe or undermine an earlier panel decision" and was therefore bound to "adhere to [the court's] … precedent, which can only be altered by th[e] Court sitting en banc or by the Supreme Court." App.8a.

The panel "recognize[d] that there is a circuit split concerning appellate review of a purely legal issue in circumstances such as these" and "acknowledge[d] that [the court's] precedent on this issue adheres to the minority view." App.7a. The panel elaborated: "[b]ased on our review of precedent from the other courts of appeals, the Second, Third, Sixth, Seventh, Ninth, Tenth, D.C., and Federal Circuits appear to allow appellate review of legal issues that were resolved pretrial and not presented to the district court again in a post-trial motion," while "[t]he First and Fifth Circuits, on the other hand, do not permit appellate review in such circumstances." App.7a n.3 (collecting cases).

Nonetheless, the panel held, "[b]ecause the circumstances of this appeal fall precisely within the confines of our … precedent, the exhaustion issue raised by [petitioner] is not properly before us and our review thereof is precluded." App.8a. The Fourth Circuit denied a timely petition for rehearing en banc. App.111a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER A SIGNIFICANT QUESTION

The decision below further cements a "significant circuit split" over whether a party must go through the motions of making a post-trial motion to preserve for appellate review a legal defense that was already fully resolved against the party pre-trial. *Hanover Am. Ins.*

Co. v. Tattooed Millionaire Ent., LLC, 974 F.3d 767, 786 n.10 (6th Cir. 2020). That conflict is at once square and indisputable: the courts of appeals have repeatedly recognized the conflict, rejected each other's positions, and fractured into three firmly opposed factions.[3] The uncertainty over this area is palpable, with individual circuit panels (like the panel below) openly debating the correctness of their circuit's position, calling their own circuit's rule "controversial," *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 824 (7th Cir. 2016), and even questioning the "continuing viability" of the rule on their side of the split, *Williams v. Gaye*, 895 F.3d 1106, 1122 (9th Cir. 2018).

The stark division over this fundamental question of appellate reviewability is untenable. The conflict has been openly acknowledged by courts and commentators alike, and there is no chance it will resolve itself. *See, e.g.*, *supra* note 1. Parties face enormously disparate consequences for failing to make futile post-trial motions based only on where a suit is litigated. And now that the split has

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[3] *See Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 n.2 (7th Cir. 2015) ("There's a split of authority on this point."); *Jones ex rel. United States v. Mass. Gen. Hosp.*, 780 F.3d 479, 488 n.3 (1st Cir. 2015) ("Some circuits have recognized an exception … where a party's challenge is based on a circumscribed legal error … we have declined to do so."); *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 838 (8th Cir. 2014) (explaining "[a]t least seven circuits" permit appeals of purely legal issues denied at summary judgment, while "[a]t least two circuits have disagreed"); *Feld v. Feld*, 688 F.3d 779, 781-83 (D.C. Cir. 2012) (recognizing other "circuits have taken the opposite approach"); *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 n.4 (5th Cir. 2017) (identifying "[c]ontrary" decisions in other circuits); *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 423 (4th Cir. 2005) (refusing to join "other circuits [that] have taken a different approach on this issue, allowing appeals from a denial of summary judgment after a trial where the summary judgment motion raised a legal issue"; "their approach simply conflicts with our own").

reached 8-3-1, with two sides firmly dug in on their respective rules (and one circuit taking a completely different approach), the hope of the split resolving itself has vanished. The conflict is mature and ready for this Court's review. Definitive guidance over the reviewability of pre-trial legal defenses is overdue. The circuit conflict is undeniable and entrenched, and it should be resolved by this Court in this case.

1.a. The decision below directly conflicts with settled law in the D.C. Circuit. In *Feld v. Feld*, the D.C. Circuit confronted the identical question presented here, and a unanimous panel adopted the opposite holding: "[W]e hold a Rule 50 motion is not required to preserve for appeal a purely legal claim rejected at summary judgment." 688 F.3d 779, 783 (D.C. Cir. 2012). In so holding, the D.C. Circuit expressly rejected the First and Fourth Circuits' contrary position, instead siding with the "at least six circuits" that have said that "purely legal" arguments "rejected at summary judgment and not brought again in a Rule 50 motion" are preserved for appeal. *Id.* at 782-83.

In *Feld*, the plaintiff sued her estranged brother for assault, battery, and false imprisonment after an altercation between the siblings at his property. *Id.* at 781. The brother counterclaimed that the plaintiff had trespassed on his property. *Id.* Before trial, "in what was effectively a motion for summary judgment," the plaintiff moved for a judgment as a matter of law claiming that her brother's admitted use of force to remove her from his property violated D.C. law because any use of force to remove a person from one's property violates D.C. law. *Id.* The district court denied the motion, and the case proceeded to trial. *Id.* The plaintiff did not renew her legal argument in a post-trial motion. *Id.* The plaintiff appealed the district court's determination that the defendant was

allowed to use force in removing her from his property. *Id.*

On appeal, the defendant argued that the plaintiff's failure to renew her argument in a post-trial motion deprived the appellate court of jurisdiction. *Id.* The D.C. Circuit disagreed. *Id.* The court recognized that it lacked jurisdiction to "review a challenge to the legal sufficiency of evidence that was rejected at summary judgment and not re-raised in a Rule 50 motion." *Id.* (citing *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011)). But the court recognized—and stated that it explicitly agreed with the six circuits that hold—that the same rule does not apply to preserving purely legal arguments that were rejected at summary judgment. *Id.* at 782.

The D.C. Circuit explained that the reason for requiring Rule 50 motions to preserve challenges for appeal "does not apply when the district court rejects a purely legal argument at summary judgment." *Id.* A Rule 50 motion preserves for appeal questions of the legal sufficiency of the evidence. *Id.* at 782. But the denial of summary judgment on purely legal grounds does not implicate evidentiary sufficiency. *Id.* In fact, the D.C. Circuit explained, re-raising a rejected legal argument post-trial is futile because "the district court would have been faced with precisely the same question" it had already rejected pretrial. *Id.*

In reaching its holding, the D.C. Circuit expressly considered and rejected the Fifth and Fourth Circuits' position that all claims rejected at summary judgment and not renewed post-trial are unreviewable on appeal. *Id.* at 782-83. The court acknowledged that the Fourth Circuit's rule is grounded in the concern that distinguishing between "legal" and "factual" claims can sometimes be difficult. *Id.* at 783 (quoting *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995)). But while "determining whether an issue is

based in law or fact or some combination of the two is sometimes 'vexing,'" nonetheless "there are cases in which it is clear the appellant has raised a pure issue of law." *Id.* In those cases, the court explained, appellate review is appropriate. *Id.*

b. The Fourth Circuit's decision also squarely conflicts with established law in the Seventh Circuit. In *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714 (7th Cir. 2003), the defendant filed a motion to dismiss the plaintiff's breach of contract claim, which the court treated as a motion for summary judgment. 320 F.3d at 717. That motion was denied, the jury found in favor of the plaintiff, and the defendant did not re-raise his defense in a post-trial motion. *Id.* at 717-18. On appeal, the plaintiff argued that the court of appeals could not review the defendant's claim because he had failed to "mak[e] it in his motions for judgment as a matter of law during and after trial." *Id.* at 718. In rejecting that argument, the Seventh Circuit adopted a position directly at odds with the Fourth Circuit's approach, holding that the court of appeals may review a "court's denial of summary judgment" post-verdict where the denial "is not based on the adequacy of the evidence." *Id.* at 718-20.

Like the D.C. Circuit, the Seventh Circuit explained that when a claim rejected at summary judgment is purely legal, the justification for refusing to review a denial of summary judgment post-trial "does not apply." *Id.* at 718-19. In cases where the claim rejected is purely legal, the denial of summary judgment is not rooted in a prediction about whether the evidence will be sufficient to support a verdict, and thus is not mooted by the presentation of the parties' evidence at trial. *Id.* As further support for its holding, the Seventh Circuit cited cases from the Third, Sixth, Eighth, Ninth, Tenth, and Federal Circuits reviewing post-verdict denials of summary judgment of legal issues involving contract

interpretation, res judicata, governmental immunity, and collateral estoppel. *Id.* (collecting cases).

Like the D.C. Circuit, the Seventh Circuit also considered and explicitly rejected the Fourth Circuit's rule. *Id.* at 719-20. The court appreciated the Fourth Circuit's concern—"that it is often difficult to determine in a particular case whether the basis for the district court's denial of the motion was legal or factual"—but explained that the rule is nevertheless overinclusive. *Id.* "[I]f the legal question can be separated from the factual one then we see no bar to reviewing the legal question notwithstanding the party's failure to raise it in a motion for judgment as a matter of law at trial." *Id.*[4]

c. A divided panel of the Federal Circuit reached the same conclusion in *Ericsson Inc. v. TCL Communication Technology Holdings Limited*, 955 F.3d 1317 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2624 (2021). In *Ericsson*, the plaintiff brought a patent infringement case against the defendant as part of a larger dispute between the parties, *Ericsson Inc. v. TCL Commc'n Tech. Holdings, Ltd.*, No. 2:15-CV-00011-RSP, 2020 WL 3469220, at *1 (E.D. Tex. June 23, 2020). After trial, the jury awarded $75 million in damages and returned a verdict of willful infringement against the defendant. *Id.* Earlier in the case, the defendant had moved for summary judgment on the grounds that the patent at issue was ineligible for patenting under 35 U.S.C. § 101, but the defendant failed to re-raise the defense in a post-trial motion for judgment as a matter of law under Rule 50. 955 F.3d at 1320-21.

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[4] The Seventh Circuit continues to adhere to this rule. *Lexington Ins. Co. v. Horace Mann Ins. Co.*, 861 F.3d 661, 669 (7th Cir. 2017); *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016); *Lawson v. Sun Microsystems, Inc.,* 791 F.3d 754, 761 (7th Cir. 2015).

Like the D.C. Circuit, Seventh Circuit, and others, the Federal Circuit held that the failure to re-raise this purely legal claim in a post-trial motion was no barrier to review because no "material issues of fact prevented judgment." *Id.* at 1321. "Once the district court held that the … patent was not directed to an abstract idea at step one, there was no set of facts that [the defendant] could have adduced at trial to change that conclusion." *Id.* As a result, the Federal Circuit reasoned, "the district court effectively entered judgment of eligibility to [the defendant]." *Id.* And this was "sufficient to preserve the issue for appeal."[5] *Id.*

Judge Newman dissented. *Id.* at 1331-39 (Newman, J., dissenting). An order denying summary judgment, she urged, is not appealable once the case has been tried. *Id.* at 1331-32. Other circuits, she maintained, had rejected the notion that such orders become appealable merely because they rest on "legal" rather than "factual" grounds. *Id.* at 1332-33. Moreover, she stated, the majority's decision was contrary to this Court's holding in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), "that, in the absence of [a Rule 50] motion an appellate court is *without power* to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Ericsson*, 955 F.3d at 1332 (emphasis added).

d. The D.C., Seventh, and Federal Circuit's holdings align with the decisions of five other circuits, all of which permit the review of legal claims rejected at summary judgment even when those claims were not re-raised in a

[5] As an alternative holding, the Federal Circuit held that, even if there had been a waiver, it had discretion to address the argument anyway, and it chose to exercise that discretion, writing "to the extent the issue was not properly preserved below," we "exercise our discretion … to review … the merits." 955 F.3d at 1324; *see id.* at 1322-24.

post-trial motion. *See Rothstein v. Carriere,* 373 F.3d 275, 284 (2d Cir. 2004) (although "a Rule 50 motion is required to preserve a challenge to the sufficiency of the evidence," when an objection is based "on a question of law, the rationale behind Rule 50 does not apply, and the need for such an objection is absent"); *Stampf v. Long Island R.R. Co.,* 761 F.3d 192, 201 n.2 (2d Cir. 2014) (reaffirming circuit rule); *Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding, LLC,* 784 F.3d 177, 187 (3d Cir. 2015) ("[I]f an earlier dispositive argument is not renewed through motions for judgment as a matter of law under Rule 50(a) and Rule 50(b), the litigant propounding the argument may not seek appellate review of a decision rejecting it, *unless that argument presents a pure question of law* that can be decided with reference only to undisputed facts." (emphasis added)); *In re AmTrust Fin. Corp.,* 694 F.3d 741, 750-51 (6th Cir. 2012) ("The district court's [contract] ambiguity ruling was a pure question of law. Thus, under this circuit's longstanding precedent, the district court's decision 'may be appealed even in the absence of a post-judgment motion." (citations omitted)); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004) ("The Trust is correct that generally this court will not review a denial of a summary judgment motion after a full trial on the merits. … This general rule, however, does not apply to those denials of summary judgment motions where the district court made an error of law that, if not made, would have required the district court to grant the motion."); *Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997) ("Failure to renew a summary judgment argument—when denial was based on factual disputes—in a motion for judgment as a matter of law under Fed. R. Civ. P. 50(a)(1) at the close of all the evidence is considered a waiver of the issue on appeal. … By contrast, when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a

purely legal question, such a decision is appealable after final judgment.").

2. The First, Fourth, Fifth, and Eighth circuits have expressly rejected the view of the D.C., Second, Third, Sixth, Seventh, Ninth, Tenth, and Federal Circuits. The First, Fourth, and Fifth Circuits all bar the review of any claims unless they are re-raised in a post-trial motion. The Eighth Circuit follows its own rule that it may review claims as long as they are "preliminary" and unrelated to the merits.

a. The leading cases in the Fourth Circuit are *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*, 51 F.3d 1229 (4th Cir. 1995), and *Varghese v. Honeywell International, Inc.*, 424 F.3d 411 (4th Cir. 2005). In *Chesapeake*, the Fourth Circuit refused to consider a party's request to set aside a jury verdict on the basis of legal arguments raised in a summary judgment motion but not renewed after trial in a Rule 50 motion. The court viewed drawing a distinction between legal and factual issues a "dubious undertaking," made unnecessary by the fact that "a party that believes the district court committed legal or factual error in denying summary judgment has [other] adequate remedies," including "mov[ing] for judgment as a matter of law under [Rule] 50 and then seek[ing] appellate review of the motions if they are denied." 51 F.3d at 1235-36.

In *Varghese*, a divided panel of the court applied its *Chesapeake* precedent to refuse to consider another purely legal issue on appeal, despite the defendant's claim that "a [judgment as a matter of law] motion was not the appropriate avenue for its legal challenge and that appellate review of the pretrial denial of summary judgment [wa]s therefore proper." 424 F.3d at 422. The court "recognize[d] that several other circuits have taken a different approach on this issue, allowing appeals from a denial of summary judgment after a trial where the

summary judgment motion raised a legal issue and did not question the sufficiency of the evidence." *Id.* at 423. But those circuits' "approach simply conflicts with our own." *Id.*

Judge Motz dissented in relevant part. *Id.* at 424-27. Judge Motz argued that post-judgment review is available when "the sole basis of the … denial of summary judgment was rejection of a purely legal defense—here preemption." *Id.* at 425. "The evidentiary concerns," she reasoned, "are simply not at issue when a party seeks to reassert on appeal a legal defense that the court below rejected at the summary judgment stage." *Id.*

b. In *Ji v. Bose Corp.*, 626 F.3d 116 (1st Cir. 2010), a unanimous First Circuit panel adopted the same rule that the Fourth Circuit follows: "[I]n order to preserve its challenge for appeal, a disappointed party must restate its objection in a motion for judgment as a matter of law ('JMOL')…. We have not recognized an exception to this rule, as some circuits have done, when a party's challenge is based on a circumscribed legal error, as opposed to an error concerning the existence of fact issues." *Id.* at 127-28. "Instead, our rule is that even legal errors cannot be reviewed unless the challenging party restates its objection in a motion for JMOL." *Id.*

In *Ji*, the plaintiff, a model, sued the defendant corporation and a photographer for the improper use of her image to promote a home entertainment system. *Id.* at 119. Pre-trial, the defendants unsuccessfully moved for summary judgment on plaintiff's right-to-publicity and privacy claims and did not re-raise those claims after trial. *Id.* at 120. When the defendants sought to press the "pure legal issue" again on appeal, the First Circuit refused to consider it because the defendants had not "properly preserved it in a motion for judgment as a matter of law." *Id.* at 127.

The First Circuit explained that the denial of a motion for summary judgment "is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on issues on which summary judgment was sought." *Id.* As a consequence, a trial on the merits effectively moots any decision on summary judgment, and a challenge to the judgment instead must be made in a post-verdict motion for judgment as a matter of law. *Id.* The First Circuit saw no basis for departing from this rule, regardless of whether the claimed basis for summary judgment was factual or "pure[ly] legal." *Id.*

In reaching that conclusion, the First Circuit expressly recognized that other Circuits had reached a contrary conclusion, explaining, "[w]e have not recognized an exception to this rule, as some circuits have done, when a party's challenge is based on a circumscribed legal error, as opposed to an error concerning the existence of fact issues." *Id.* In a footnote, the court explained that "[a]t least two other circuits have excused explicitly the failure to move for JMOL and have reviewed the challenge anyway if it was based on a purported legal error." *Id.* at 127 n.9 (citing *Chemetall*, 320 F.3d at 720 and *Ruyle*, 44 F.3d at 841). The court nonetheless explained that it was bound by its precedents to refuse to review any claims raised only at summary judgment "until the Supreme Court says otherwise." *Id.*[6]

c. The Fifth Circuit reached the same conclusion as the First and Fourth Circuits in *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591 (5th Cir. 2017): "With the question now squarely before us, we hold that following a

[6] The First Circuit has consistently reaffirmed its position. *Hisert ex rel. H2H Assocs., LLC v. Haschen,* 980 F.3d 6, 8 & n.3 (1st Cir. 2020) (adhering to *Ji*); *Jones ex rel. United States v. Mass. Gen. Hosp.,* 780 F.3d 479, 488 n.3 (1st Cir. 2015) (same).

jury trial on the merits, this court has jurisdiction to hear an appeal of the district court's legal conclusions in denying summary judgment, *but only if* it is sufficiently preserved in a Rule 50 motion." 861 F.3d at 596 (emphasis added). The court explained that "[i]n doing so, [it] join[s] with the First, Fourth, and Eighth Circuits." *Id.* (citing *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 838 (8th Cir. 2014), *Ji*, 626 F.3d at 128, and *Chesapeake*, 51 F.3d at 1235). To the extent the Fifth Circuit described the basis for its decision, it explained that barring review is the "general rule" and that circuit precedent did not support recognition of an exception for legal issues. *Id.* at 595-96.

d. The Eighth Circuit's rule is distinct from those of the other circuits and falls in a category of its own. In *New York Marine and General Ins. Co. v. Continental Cement Co., LLC*, 761 F.3d 830 (8th Cir. 2014), the Eighth Circuit held that the court may hear an appeal from a denial of a summary judgment motion "involving preliminary issues, such as a statute of limitations, collateral estoppel, or standing," even though it has no power to hear an appeal of "the denial of a summary judgment motion involving the merits of a claim" that was not raised in a post-trial motion. 761 F.3d at 838.

The Eighth Circuit reached that conclusion to adhere to an earlier panel decision. *Id.* at 837-39. In an earlier case, the circuit "firmly rejected any 'dichotomy[ ] between a summary judgment denied on factual grounds and one denied on legal grounds [as] both problematic and without merit.'" *Id.* at 838 (quoting *Metropolitan Life Insurance Co. v. Golden Triangle*, 121 F.3d 351, 355 (8th Cir. 1997)). But that case contained "a footnote" in which the court "recognized a distinction between the denial of a summary judgment motion involving the merits of a claim and one involving preliminary issues, such as a statute of limitations, collateral estoppel, or standing." *Id.*

Thus, while recognizing that "[a]t least seven circuits" "have carved out an exception for arguments made at summary judgment that are 'purely legal' in nature," and that "[a]t least two circuits have disagreed," the Eighth Circuit now follows a third path and will review "preliminary issues" rejected at summary judgment, but not others. *Id.* In *N.Y. Marine*, the court determined that choice of law "is generally preliminary to determination of the merits in a case" and thus "can be reviewed on appeal if it has been denied in a summary judgment motion." *Id.* at 838-39. The court then went on to adjudicate the choice of law issue on the merits.

3. Numerous commentators have recognized the sharp circuit conflict over this question. *See, e.g.*, Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When are Such Denials Reviewable?*, Mich. St. L. Rev. 895 (2014); Jesse Leigh Jenike-Godshalk, Comment, *Appealed Denials and Denied Appeals: Finding a Middle Ground in the Appellate Review of Denials of Summary Judgment Following a Full Trial on the Merits*, 78 U. Cin. L. Rev. 1595, 1608, 1610 (2010); Paul S. Morin, Note, *The New Temporal Prime Directive: Ortiz & the Death of Post-Trial Appeals from Pre-Trial Summary Judgment Denials*, 24 Regent U. L. Rev. 205 (2011); Bradley Scott Shannon, *Why Denials of Summary Judgment Should be Appealable*, 80 Tenn. L. Rev. 45, 63 (2012); Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 Notre Dame L. Rev. 1521, 1549-57 (2012). A more openly acknowledged and widespread division in circuit authority is difficult to imagine.

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The conflict over the reviewability of pre-trial legal issues is square and intractable. It has generated an 8-3-1 circuit split. Deep division on the issue is reflected

nationwide—every circuit other than the Eleventh has weighed the arguments and chosen a side. Neither bloc will change enough to resolve the split; to the contrary, any further changes are bound only to exacerbate confusion and conflict between and within the circuits. Until this Court intervenes, parties will continue to face disparate chances of successful appeals depending on the circuit. Review is urgently warranted.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

1. The question presented is of obvious legal and practical importance. The circuit conflict has now reached twelve circuits, with courts resolutely disagreeing over the proper rule. The standard for appellate reviewability is a critically important issue in every civil case in the country. It is essential for all stakeholders to know the steps they must take to preserve their legal rights for appeal. As it now stands, parties have different appellate review rights based on nothing more than the fortuity of where their case happens to arise. Nor is there any hope of this issue resolving itself. Each side of the split has staked out its position, and the competing arguments have been thoroughly examined. The question is ripe for review.

a. The sheer number of reported decisions confirms the issue's importance, and there is no genuine dispute that the issue arises constantly in courts of appeals nationwide. In 2020 alone, at least 14 court of appeals decisions addressed whether a party could appeal a summary-judgment denial without raising the issue in a post-trial motion.[7] There is a reason experts are tracking

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[7] *Hisert on Behalf of H2H Assocs., LLC v. Haschen*, 980 F.3d 6, 7–8 (1st Cir. 2020); *Kidis v. Reid*, 976 F.3d 708, 720 (6th Cir. 2020); *Gerics v. Trevino*, 974 F.3d 798, 802-08 (6th Cir. 2020); *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 785 n.10

this issue, flagging the conflict, and cautioning parties to beware the uncertainty until this Court weighs in. *See, e.g.*, Kelli Benham Bills, *Rule 50 and Purely Legal Arguments: A Circuit Split*, American Bar Ass'n (June 27, 2013), https://bit.ly/3vDbZZW; Conor Tucker, *How Patent Trial Venue Affects Issue Preservation On Appeal*, Law360 (Aug. 15, 2022), https://bit.ly/3JYXy8C.

b. Review is also essential because the practical stakes are substantial. In *Ericsson*, 955 F.3d 1317, the Federal Circuit set aside a $75 million jury verdict on the basis of a legal defense never asserted in a post-trial motion. And *Ericsson* is not unique. Other sizeable verdicts have been set aside by courts of appeals reviewing legal defenses raised only at summary judgment and never re-raised post-trial. *See Eon Corp. IP Holdings v. Silver Spring Networks*, 815 F.3d 1314, 1316 (Fed. Cir. 2016) (setting aside $13 million verdict); *Hillmann v. City of Chicago*, 834 F.3d 787, 792 (7th Cir. 2016) (setting aside $1.6 million verdict); *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 756, 761 (7th Cir. 2015) (setting aside $1.5 million verdict). In this case, petitioner faces a $700,000 judgment solely because he was unable to reassert his exhaustion defense on appeal. This issue is enormously significant, with profound real-world stakes.

(6th Cir. 2020); *Hurt v. Corn. Energy, Inc.,* 973 F.3d 509, 516 (6th Cir. 2020); *In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067, 1072–73 (9th Cir. 2020); *Gulf Eng'g Co., L.L.C. v. Dow Chem. Co.*, 961 F.3d 763, 766 (5th Cir. 2020); *Universal Truckload, Inc. v. Dalton Logistics, Inc.,* 946 F.3d 689, 699-700 n.5 (5th Cir. 2020); *Watley v. Felsman*, 839 F. App'x 728, 729 n.1 (3d Cir. 2020); *Hernandez v. Fitzgerald*, 840 F. App'x 333, 337 n.4 (10th Cir. 2020); *Sooroojballie v. Port Auth. of N. Y. & N.J.,* 816 F. App'x 536, 539-540 (2d Cir. 2020); *In re Fancher,* 802 F. App'x 538, 544 (11th Cir. 2020); *Buie v. Dhillon,* No. 19-5105, 2020 WL 873502, at *1 (D.C. Cir. Feb. 14, 2020); *Ferguson v. Waid,* 798 F. App'x 986, 988-989 (9th Cir. 2020).

2. This case is an optimal vehicle for deciding this important question. The dispute turns on a pure question of law: whether the rejection of a legal defense at summary judgment is enough to preserve it for appeal. That claim was squarely raised and resolved below; the court of appeals thoroughly addressed the question and treated it as dispositive. The body of law is well-developed and the case-specific stakes are significant—with a $700,000 judgment hanging in the balance. Nor is there any doubt that this issue was outcome-determinative. The court of appeals applied the minority rule and petitioner's appeal was dismissed; had the court instead applied the majority rule, petitioner's appeal would have been decided on the merits. The stark division over this fundamental legal issue was the reason for the decision below.

a. This case does not present the obstacle to review that dissuaded the Court from granting certiorari in *Ericsson*. In *Ericsson*, the verdict-winner sought certiorari after the Federal Circuit set aside the verdict on the basis of a legal error below. *See* Petition, *Ericsson*, 141 S. Ct. 2624 (Mem.) (No. 20-1130). But, unlike in this case, the Federal Circuit gave an independent and adequate reason for its decision to review the error—namely, it chose to exercise its "discretion to hear issues that have been waived." *Ericsson*, 955 F.3d at 1322; *see also id.* at 1322-24. "[T]o the extent the issue … was not properly preserved below," the court said, "we nonetheless exercise our discretion to address and resolve the issue." *Id.* at 1323. That holding prevented this Court from reaching the question presented without also resolving the thorny issue of whether the Federal Circuit abused its discretion by excusing the waiver.

b. Unlike in *Ericsson*, there is no conceivable obstacle to deciding the question presented in this case. The appeal was resolved exclusively on the basis of

appellate reviewability. The court of appeals ruled against petitioner solely because he did not re-raise his earlier PLRA exhaustion claim in a post-trial motion. And the underlying claim resolved at summary judgment was incontestably purely legal—the district court held as a matter of law that the pendency of an IIU investigation exempts a prisoner from exhausting the ARP process, and therefore once an IIU investigation is shown (and it is undisputed that there was an IIU investigation here), the PLRA's exhaustion requirements are satisfied. *See* App.40a-42a. Petitioner's appeal would have been heard on the merits had his case arisen in the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Federal, or D.C. Circuits, but instead it was dismissed because this case arose in the Fourth. This clean presentation is the perfect backdrop for a definitive resolution of the issue by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
SEAN A. MIRSKI
SAMUEL F. CALLAHAN
DANA OR
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

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APPENDIX