

No.

IN THE
Supreme Court of the United States

ROXANA TOWRY RUSSELL,
Petitioner,

v.

WALMART INC., AND WAL-MART.COM USA, LLC,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Roxana Towry Russell is an artist who designs sculptural lamps. She owns copyrights in both the lamps and photographs of the lamps. A jury found Walmart infringed Russell's copyrights by selling knock-off lamps on its website. Walmart's product listings used Russell's copyrighted photographs and declared the infringing lamps were "Sold & shipped by Walmart."

Walmart did not appeal the district court's denial of its motion for judgment as a matter of law (JMOL) under Federal Rule of Civil Procedure 50(b). It appealed only from the earlier judgment entered on the verdict. The Ninth Circuit recognized that, as a result, the denial of the Rule 50(b) motion was not before it on appeal. The Ninth Circuit nonetheless held it could review the sufficiency of the evidence by reviewing the denial of Walmart's pre-verdict motion for JMOL under Rule 50(a). It then held, over a dissent, that there was insufficient evidence to hold Walmart liable for infringing Russell's copyrights in the photographs used in Walmart's product listings, even on a secondary-liability theory, because the photographs allegedly were uploaded by a contractor.

The questions presented are:

1. Whether a court of appeals may assess the sufficiency of the evidence supporting a jury verdict by reviewing the denial of a Rule 50(a) motion.
2. Whether the Court should hold this petition pending *Cox Communications Inc. v. Sony Music Entertainment*, No. 24-171—which concerns the proper standard for secondary liability for copyright infringement—and then dispose of this petition as appropriate following its decision in *Cox*.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Roxana Towry Russell was the plaintiff in the district court and the appellee in the court of appeals.

Respondents Walmart Inc. (stock ticker: WMT) and Wal-Mart.com USA, LLC were the defendants in the district court and the appellants in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Roxana Towry Russell v. Walmart Inc. et al.*, Nos. 23-55542 & 24-592 (9th Cir.) (judgment entered June 18, 2025);
- *Roxana Towry Russell v. Walmart Inc. et al.*, No. 2:19-cv-5495 (C.D. Cal.) (judgment entered May 16, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Roxana Towry Russell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-10a) is unreported, but available at 2025 WL 1703638. The court of appeals' order denying Russell's motion to dismiss Walmart's appeal (App., *infra*, 11a-12a) is unreported. The court of appeals' order denying Russell's rehearing petition and request for publication (App., *infra*, 65a-66a) is unreported. The district court's order denying Walmart's motion for judgment as a matter of law (App., *infra*, 13a-20a) is unreported. The district court's opinion denying Walmart's renewed motion for judgment as a matter

of law (App., *infra*, 29a-45a) is unreported, but available at 2023 WL 5506705. The district court's opinion granting Russell's attorney's fees motion (App., *infra*, 46a-64a) is unreported, but available at 2024 WL 305388.

JURISDICTION

The Ninth Circuit entered judgment on June 18, 2025, App., *infra*, 2a, and denied rehearing on October 23, 2025, *id.* at 68a. On January 15, 2026, Justice Kagan extended the time to file this petition to March 22, 2026. No. 25A820. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant portions of Federal Rule of Civil Procedure 50, Federal Rule of Appellate Procedure 4, and 17 U.S.C. § 501 are set forth in the appendix. App., *infra*, 69a-76a.

INTRODUCTION

Where a party seeks to challenge the sufficiency of the evidence supporting a jury verdict, Federal Rule of Civil Procedure 50 requires two motions: a pre-verdict motion for judgment as a matter of law (JMOL) under Rule 50(a), and a renewed, post-verdict motion for JMOL under Rule 50(b). The question here is whether a party may challenge the sufficiency of the evidence on appeal by appealing only the denial of a pre-verdict Rule 50(a) motion, or instead must appeal the denial of a Rule 50(b) motion.

The Ninth Circuit below held that only an appeal from the denial of a Rule 50(a) motion is necessary. After a jury found Walmart liable for infringing Roxana Russell's copyrights, Walmart failed to appeal the denial of its post-verdict Rule 50(b) motion. The Ninth Circuit agreed the Rule 50(b) ruling was not before it. The Ninth Circuit nonetheless held it could examine the sufficiency of the evidence by reviewing the denial of Walmart's pre-verdict motion under Rule 50(a). Conducting de novo review, the

Ninth Circuit found the evidence insufficient, reversed the district court’s Rule 50(a) ruling in part, and ordered partial JMOL for Walmart.

That decision conflicts with decisions from *every other circuit*. Ten circuits have held they *cannot* review the sufficiency of the evidence absent an appeal from the denial of a Rule 50(b) motion, even if the appellant purports to challenge the denial of a Rule 50(a) motion. Two circuits follow the same general rule, while suggesting narrow plain-error review may be available to prevent manifest injustice. The Ninth Circuit here followed neither approach: It not only reviewed the denial of Walmart’s Rule 50(a) motion, but did so de novo and (over a pointed dissent) ordered judgment for Walmart. Had this case arisen in any other circuit, it would have come out differently.

That conflict warrants this Court’s review. Rules of procedure—particularly those concerning when jury verdicts may be disturbed—should not vary by geography. The decision below short-circuits the careful, precise process the Rules establish for sufficiency-of-the-evidence challenges. That decision threatens to distort review of jury verdicts in our Nation’s largest circuit.

It also defies this Court’s precedent. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), this Court held that the only permissible “basis for review of [a] sufficiency of the evidence challenge in the Court of Appeals” is a district court’s order denying a motion under “Rule 50(b).” *Id.* at 407 (emphasis added). Denial of a Rule 50(a) motion is “not error,” *Unitherm* explained, because district courts always have discretion to let jurors assess the evidence first. *Id.* at 406. Accordingly, *Unitherm* held, a litigant “may *not* challenge the sufficiency of the evidence on appeal on the basis of the District Court’s denial of its Rule 50(a) motion.” *Id.* at 405

(emphasis added). The decision below held the opposite—without mentioning *Unitherm*. The Ninth Circuit’s error is so stark as to render summary reversal appropriate.

At minimum, the Court should hold this petition pending its decision in *Cox Communications Inc. v. Sony Music Entertainment*, No. 24-171, then GVR. *Cox* concerns when online platforms may be held secondarily liable for copyright infringement. Here, the Ninth Circuit found insufficient evidence to hold Walmart secondarily liable for copyright infringement in its online product listings. A GVR would allow the Ninth Circuit to reconsider Walmart’s sufficiency challenge in light of *Cox*. In any GVR, the Court should also direct the Ninth Circuit to consider whether *Unitherm* permits it to entertain that challenge in the first place.

STATEMENT

I. LEGAL BACKGROUND

This case concerns review of a jury verdict of copyright infringement for sufficiency of the evidence. Review of evidentiary sufficiency is governed by Federal Rule of Civil Procedure 50 and Federal Rule of Appellate Procedure 4. Liability for copyright infringement is governed by the Copyright Act.

A. Review of Jury Verdicts for Sufficiency of the Evidence and Judgment As a Matter of Law

1. *Federal Rule of Civil Procedure 50*

“Federal Rule of Civil Procedure 50 sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and establishes two stages for such challenges—prior to submission of the case to the jury, and after the verdict and entry of judgment.” *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399 (2006).

Before the case is submitted to the jury, a party may move for judgment as a matter of law (JMOL) under Rule 50(a). If the district court finds no reasonable jury would “have a legally sufficient evidentiary basis to find for the [nonmoving] party on the [relevant] issue,” the district court “may * * * resolve the issue against the [nonmoving] party.” Fed. R. Civ. P. 50(a)(1)(A). Granting a Rule 50(a) motion is discretionary: “[W]hile a district court is *permitted* to enter judgment as a matter of law when it concludes that the evidence is legally insufficient, it is not *required* to do so.” *Unitherm*, 546 U.S. at 405 (emphasis added). “To the contrary, the district courts are, if anything, encouraged to submit the case to the jury, rather than granting [Rule 50(a)] motions.” *Ibid*.

After the jury returns its verdict, the losing party “may file a renewed motion” for JMOL under Rule 50(b). Fed. R. Civ. P. 50(b). As a renewal of the earlier motion, a Rule 50(b) motion is limited to arguments made in the party’s Rule 50(a) motion. Fed. R. Civ. P. 50(b) advisory committee’s note (1991). If the district court finds the evidence insufficient to sustain the verdict, it may “order a new trial” or “direct the entry of [JMOL]” for the moving party. Fed. R. Civ. P. 50(b).

This Court has repeatedly held there is only one way to obtain appellate review of the sufficiency of the evidence—by appealing the denial of a post-verdict motion under Rule 50(b). In *Unitherm*, for example, the Court held a litigant “may *not* challenge the sufficiency of the evidence on appeal on the basis of the District Court’s denial of its Rule 50(a) motion.” 546 U.S. at 405 (emphasis added). The “denial of [the] preverdict [Rule 50(a)] motion cannot form the basis of [the litigant’s] appeal,” the Court explained, “because the denial of that motion [i]s not error.” *Id.* at 406. Denying a Rule 50(a) motion is “merely an

exercise of the District Court’s discretion, in accordance with the text of the Rule and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence.” *Ibid.*

A Rule 50(b) motion, moreover, calls for “the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.” *Unitherm*, 546 U.S. at 401. Limiting appellate review to the denial of a Rule 50(b) motion ensures the appellate court has “the benefit of postverdict input from the district court.” *Id.* at 401 n.3; see *id.* at 401-402. The Court has reiterated those principles time and again. See *Dupree v. Younger*, 598 U.S. 729, 734 (2023); *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011).

2. *Federal Rule of Appellate Procedure 4*

Because Rule 50(b) motions are filed “after the entry of judgment” on a jury’s verdict, Fed. R. Civ. P. 50(b), parties sometimes file notices of appeal before those motions are resolved. Federal Rule of Appellate Procedure 4 specifies procedures for appealing orders on Rule 50(b) motions in that situation.

If a party files a notice of appeal after judgment, but before a Rule 50(b) or other post-judgment motion is resolved, “the notice becomes effective to appeal [the] judgment” once all post-judgment motions are decided. Fed. R. App. P. 4(a)(4)(B)(i). That initial notice does not cover orders entered *after* it was filed, such as a later order denying a Rule 50(b) motion. A “party intending to challenge an order disposing of any [Rule 50(b) or other post-judgment] motion” instead “must file a notice of appeal, or an amended notice of appeal,” after that order is entered. Fed. R. App. P. 4(a)(4)(B)(ii).

B. Direct and Secondary Copyright-Infringement Liability

The Copyright Act gives a copyright owner “exclusive rights” to “reproduce,” “distribute,” and “prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106. “Anyone who violates any of the exclusive rights” is liable for infringement, § 501, entitling the copyright owner to actual or statutory damages, § 504. Liability may be direct or indirect. Defendants are directly liable when their purposeful actions cause the infringement. 6 Patry on Copyright § 21:40. Defendants may be subject to indirect or “secondary liability on a theory of contributory or vicarious infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

Lower courts have wrestled with how secondary copyright liability applies to internet services, producing a “split of authority” over “the appropriate standard for imposing contributory liability in this setting.” Gov’t CVSG Br. 15-16 in No. 24-171. This Court granted certiorari in *Cox Communications Inc. v. Sony Music Entertainment*, No. 24-171, to resolve that conflict. See Pet. i, 16-23 in No. 24-171, cert. granted, 145 S. Ct. 2841 (2025). Argued last December, *Cox* is awaiting decision.

II. FACTUAL BACKGROUND

A. Russell’s Copyrighted Sculptural Lamps and Photographs

Roxana Russell is “a mother, a homemaker, an artist, and entrepreneur.” 3-ER-137.¹ She runs a small business designing and selling high-quality artistic lamps. Russell is best known for a series of sculptural pendent lamps that

¹ “_ER-__” and “_SER-__” citations refer to the Excerpts of Record (C.A. Dkt. 20) and Supplemental Excerpts of Record (C.A. Dkt. 32) filed in No. 23-55542 (9th Cir).

evoke jellyfish, seeking to capture their “ethereal, other-worldly, underwater, floating” qualities. 3-ER-142.



7-ER-889; see 7-ER-882-895.

After receiving “overwhelmingly positive” feedback on her lamps, Russell took professional-quality photographs of her lamps for an online portfolio. 3-ER-147-148. She registered copyrights for both her lamps and her photographs. 7-ER-875-897.

After posting her portfolio online, Russell was “inundated” with requests to purchase her lamps and publish her photographs. 3-ER-152. Russell’s photographs have appeared in high-end magazines like *Architectural Digest Italia*, *Italian Glamour*, and *Wired Magazine*, U.K. 3-ER-152-154. The lamps have been featured in popular television shows like *Pretty Little Liars* and *Extreme Makeover Home Edition*, and displayed in aquariums, stores, and elite hotels. 3-ER-155-160. The lamps retail for between \$375 and \$475 each. 3-ER-161-163.


B. Walmart’s Infringement

Long the world’s largest retailer, Walmart has faced increasing pressure from internet retailers like Amazon. To compete, Walmart sought to aggressively expand its online offerings. 4-ER-312. It built an online storefront, Walmart.com, offering millions of products it touts as “[s]old and shipped by Walmart.” 4-ER-262.

1. In 2019, Russell’s husband received an online pop-up ad for what seemed to be one of his wife’s lamps—sold on Walmart.com. 3-ER-164-165. The Russells investigated and found listings on Walmart’s website for knockoff “Ethereal Jellyfish” pendent lamps. *Ibid.*; 7-ER-907, 911, 915. The listings used Russell’s own copyrighted photographs of *her* lamps. App., *infra*, 4a-5a, 40a-41a; 3-ER-165-167.

7-ER-915.

Home / Decor / Lighting & Light Fixtures / Ceiling Fixtures




1Pcs Glow Ethereal Jellyfish Lampshade Ceiling Chandelier Light Pendant Hanging Lamp

[Write a review](#) [Details](#) Walmart # 573836538


\$49.31

Free shipping
Arrives by Friday, Apr 19 [Options](#)

Actual Color: 

1 [Add to Cart](#)

Pickup not available

 Sold & shipped by Walmart

[Add to List](#) [Add to Registry](#)

Product Highlights
Merchandise

[See More Info](#)

[Tell us if something is incorrect](#)

f p t

Walmart sold knockoffs of three of Russell’s copyrighted lamps—“Medusa,” “Polyp,” and “Ophelia”—through listings that used two of Russell’s copyrighted photographs. App., *infra*, 33a, 36a-37a; 3-ER-165-168; 2-SER-355 (comparison). The listings represented that the knockoffs were “[s]old & shipped by Walmart.” App., *infra*, 4a; 7-ER-906-922.

2. According to Walmart, the lamps were supplied by Sunsea Grocery, one of Walmart’s “drop-ship vendors” (DSVs). App., *infra*, 3a-4a, 32a. DSVs are suppliers that Walmart selects and contracts with to source items sold on Walmart.com. *Id.* at 41a; 4-ER-254-256, 276-277, 279.

While DSVs can create product listings, Walmart supervises and controls those listings. App., *infra*, 41a. Walmart “requires [DSVs] to post photographs on their listings.” 4-ER-272-273. Walmart employees (“category specialists”) then can “work with suppliers to improve pictures,” “override” the “content uploaded by the suppliers,” and exercise “final say when it comes to the content that appears on [Walmart’s] site.” 4-ER-280-282; see 7-ER-898-904.

Walmart considers sales of DSV-listed items to be “first-party” or “1P” sales. App., *infra*, 40a; 4-ER-245-246, 368. Customers buying those items pay Walmart directly, and Walmart takes title before the items are shipped to customers. App., *infra*, 4a, 42a-43a; 4-ER-265-270. Product listings do not mention the DSV supplier; they describe the merchandise as “sold and shipped by Walmart.” App., *infra*, 4a, 41a; 3-ER-368; 4-ER-257, 275.²

² There are also “Marketplace Sellers” who sell on Walmart.com. Unlike DSVs, Marketplace Sellers are “third parties, operating independently from Walmart,” who “sell in their own name”; their

Walmart asserted that Sunsea uploaded Russell's copyrighted photographs to Walmart's servers for use in the knockoff lamps' Walmart.com listings. D. Ct. Dkt. 386 at 9-10. But Walmart's trial witnesses conceded they did not actually know whether Walmart or Sunsea uploaded them. *E.g.*, 5-ER-473-475; see D. Ct. Dkt. 416 at 13-14. The listings nowhere mentioned Sunsea; they represented the lamps were "Sold & shipped by Walmart." 7-ER-907, 915; App., *infra*, 4a.

III. PROCEDURAL HISTORY

A. District Court Trial and Judgment

Russell sued Walmart for infringing her copyrights in her lamps and photographs. See 17 U.S.C. § 501(b); 28 U.S.C. § 1338 (jurisdiction). Russell argued that Walmart was liable for copyright infringement either directly (because Walmart sold the knockoff lamps and used her photographs in the Walmart.com listings) or secondarily (because Walmart at least materially contributed to the infringement or Sunsea acted as Walmart's agent). 6-ER-795-801. Walmart blamed Sunsea for the infringing products and listings. 6-ER-817-821. It also raised an affirmative defense under the Digital Millennium Copyright Act (DMCA). 3-ER-123-125.

At the close of Russell's evidence at trial, Walmart moved for JMOL under Rule 50(a) on its DMCA defense and (without elaboration) "causation." App., *infra*, 14a. The district court denied Walmart's motion in relevant part. *Id.* at 19a.

The jury found Walmart liable for copyright infringement with respect to both the lamps and the photographs. App., *infra*, 23a. It awarded Russell \$75,000 in statutory

products are not listed as "sold and shipped by Walmart." App., *infra*, 4a, 40a; 4-ER-252-253, 259. Marketplace Sellers are not at issue here.

damages. *Id.* at 24a-25a, 27a.³ The district court entered judgment on the verdict on May 16, 2023. *Id.* at 21a-28a.

B. Post-Judgment Proceedings

1. On June 13, 2023, Walmart filed a renewed motion for JMOL under Rule 50(b). D. Ct. Dkt. 386. Walmart argued that the jury lacked sufficient evidence to find it directly liable for infringement. *Id.* at 7-11. Walmart also sought JMOL on its DMCA defense. *Id.* at 11-17. The motion did not challenge Russell’s prima facie case of secondary liability. App., *infra*, 44a.

Before its Rule 50(b) motion was decided, Walmart filed a notice of appeal from the district court’s May 16 judgment. D. Ct. Dkt. 389. After docketing the appeal, the Ninth Circuit clerk advised that appellate proceedings would be stayed until Walmart’s Rule 50(b) motion was decided and that, if Walmart wished to “challenge the district court’s ruling on the motion,” it “must file an amended notice of appeal” as Appellate Rule 4(a)(4)(B)(ii) requires. App., *infra*, 65a-66a.

The district court denied Walmart’s Rule 50(b) motion on August 17, 2023. App., *infra*, 29a-45a. The court held the evidence supported a finding that Walmart directly infringed Russell’s copyrights on both the lamps and the photographs. *Id.* at 40a-44a. At the very least, the court ruled, the evidence showed Walmart was sufficiently involved in the infringement to establish “secondary liability.” *Id.* at 43a-44a. “Walmart’s challenges to the secondary liability theories [we]re without merit.” *Id.* at 44a. And, more fundamentally, Walmart “never advanced any basis for directing a verdict as to the secondary copyright infringement theories” until its Rule 50(b) “Reply.”

³ Walmart was found not liable on non-copyright claims not at issue here. App., *infra*, 25a.

Ibid. “[A]ny challenges to those theories,” the court ruled, were thus “waived.” *Ibid.*

Walmart did not file a new or amended notice of appeal from the district court’s denial of its Rule 50(b) motion. App., *infra*, 3a n.1.

2. On January 2, 2024, the district court granted Russell’s motion for attorney’s fees and costs. App., *infra*, 46a-64a. While reducing the award to reflect Russell’s limited success (on non-copyright claims), the court found Walmart had forced Russell to accrue “unnecessary attorneys’ fees” by, among other things, “unreasonably” asserting a slew of “defenses that it knew were meritless” even after the court had rejected them at summary judgment. *Id.* at 52a-53a, 63a.

On January 4, 2024, Walmart appealed the attorney’s fees order. D. Ct. Dkt. 434. That notice of appeal did not mention the order denying Walmart’s Rule 50(b) motion, entered over four months earlier. The Ninth Circuit consolidated Walmart’s two appeals and ultimately decided them in a single judgment. C.A. Dkts. 17, 45.⁴

C. Court of Appeals Proceedings

1. *Walmart Challenges the Sufficiency of the Evidence on Appeal Despite Concededly Not Appealing the Denial of Its Rule 50(b) Motion*

In its opening appeal brief, Walmart argued it was “entitled to judgment as a matter of law on the copyright infringement claim.” C.A. Dkt. 19 at 15 (capitalization omitted); see *ibid.* (seeking “‘de novo [review of] the denial of a motion for judgment as a matter of law’”). Walmart attacked the sufficiency of the evidence as to both direct and secondary liability. *Id.* at 16-24, 28 (citing *Perfect 10*,

⁴ “C.A. Dkt.” citations refer to No. 23-55542 (9th Cir.).

Inc. v. Giganeews, Inc., 847 F.3d 657, 671 (9th Cir. 2017)). Although the district court’s Rule 50(b) order had ruled that Walmart waived any challenge to secondary liability by not raising the issue until its Rule 50(b) reply, App., *infra*, 44a, Walmart’s brief did not mention that ruling.

Russell urged the Ninth Circuit to dismiss or strike Walmart’s sufficiency challenge.⁵ Because “Walmart never filed an amended (or new) notice of appeal” after the district court denied its Rule 50(b) motion, she explained, Walmart had not presented “the denial of Walmart’s Rule 50(b) motion” for appellate review. C.A. Dkt. 31 at 23-24; see C.A. Dkt. 25 at 12-18. Under this Court’s *Unitherm* decision, she urged, a litigant “may not challenge the sufficiency of the evidence on appeal on the basis of the District Court’s denial of its Rule 50(a) motion.” C.A. Dkt. 31 at 25 (quoting *Unitherm*, 546 U.S. at 405) (emphasis added); see C.A. Dkt. 25 at 15-16. Accordingly, Russell explained, the court of appeals lacked authority “to review the sufficiency of the evidence.” C.A. Dkt. 31 at 26; see C.A. Dkt. 25 at 14, 17.

In response, Walmart insisted it was “not seeking to appeal the order denying the Rule 50(b) motion.” C.A. Dkt. 26 at 6; see C.A. Dkt. 37 at 14-18. Walmart conceded it did not “file a new or amended notice of appeal after the district court denied its renewed motion for judgment as a matter of law.” C.A. Dkt. 26 at 1; C.A. Dkt. 37 at 14. But Walmart argued it could challenge the sufficiency of the

⁵ Russell moved to dismiss Walmart’s merits appeal and strike corresponding portions of its opening brief. C.A. Dkt. 25. A motions panel denied the motion without prejudice, App., *infra*, 12a; Russell then renewed the arguments in her response brief, while also addressing the merits, C.A. Dkt. 31.

evidence because it had appealed “the judgment” entered on the jury’s verdict. C.A. Dkt. 26 at 4; C.A. Dkt. 37 at 16.

2. *The Ninth Circuit Holds It May Review the Sufficiency of the Evidence by Reviewing the Denial of Walmart’s Rule 50(a) Motion—Then Grants Walmart JMOL as to Russell’s Copyrighted Photographs*

The Ninth Circuit held it could review the sufficiency of the evidence, and on that basis ordered JMOL for Walmart as to the copyrighted photographs.

a. The Ninth Circuit conceded the denial of Walmart’s Rule 50(b) motion was not before it. It acknowledged Walmart “fail[ed] to appeal the district court’s order denying the 50(b) motion.” App., *infra*, 3a n.1. And it agreed “Walmart does not challenge the 50(b) order.” *Ibid.* The Ninth Circuit nonetheless held it could review the sufficiency of the evidence by reviewing “the district court’s denial” of “Walmart[’s] mo[tion] for judgment as a matter of law *at trial*” under “Fed. R. Civ. P. 50(a).” *Id.* at 3a, 6a n.2 (emphasis added). The panel did not cite *Unitherm*, despite Russell’s invocation of that precedent, see C.A. Dkt. 31 at 25; C.A. Dkt. 25 at 15-16.

b. Reviewing the sufficiency of the evidence “de novo,” App., *infra*, 3a, the Ninth Circuit reversed in part.

The court affirmed Walmart’s liability as to Russell’s copyrighted lamps, observing (among other things) that the “product listings” “did not contain Sunsea’s name,” but instead “stated that the lamps were [s]old & shipped by Walmart.” App., *infra*, 4a. The court recognized that Walmart disputed its “involvement,” but held “the jury was not required to believe Walmart over Russell.” *Ibid.*

Over a dissent, the court found insufficient evidence to support Walmart’s liability as to the copyrighted photo-

graphs that appeared in the product listings Walmart used to sell the infringing lamps. App., *infra*, 4a-6a. Applying its precedents on copyright-infringement liability for internet platforms, the panel likened Walmart to the operator of an “online platform” to which a third party “uploaded the infringing content.” App., *infra*, 4a-6a (citing *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723 (9th Cir. 2019); *Giganews*, 847 F.3d 657). Most relevant here, the panel held Russell “did not present adequate evidence for the jury to find Walmart secondarily liable for Sunsea’s infringement of the photographs.” App., *infra*, 6a. It declared there was insufficient evidence “Walmart materially contributed to or induced Sunsea’s infringement, which is necessary to prove contributory liability,” or that “Walmart had a direct financial interest in the infringing activity, which is necessary to prove vicarious liability.” *Ibid.* (citing *Zillow*, 918 F.3d at 745-746). The panel thus reversed in part, ordering JMOL for Walmart as to Russell’s copyrighted photographs. *Ibid.*

c. Judge Desai dissented as to the photographs. The infringing photographs, she observed, appeared on product listings that gave “no indication that Sunsea had any involvement” but instead “stated that the lamps were [s]old & shipped by Walmart.” App., *infra*, 7a-8a. She concluded jurors could reasonably find that “Walmart posted the listings” or, at minimum, “exercised control over the listings”—not least because “Russell introduced evidence that Walmart employees can edit the content of listings posted by third-party vendors and have done so in the past, retaining ‘final’ say over the content.” *Ibid.* Judge Desai criticized the majority for “usurp[ing] the jury’s judgments” and “relying on Walmart’s evidence, rather than discarding it.” *Id.* at 9a. “[V]iewing the evidence in Russell’s favor,” Judge Desai found “sufficient

evidence for the jury to find Walmart liable for copyright infringement on all counts.” *Id.* at 8a-9a.⁶

3. *The Ninth Circuit Denies Rehearing and Refuses To Publish Its Decision*

Russell sought panel and en banc rehearing, again arguing that *Unitherm* barred the court of appeals from assessing the sufficiency of the evidence by reviewing the denial of a Rule 50(a) motion. C.A. Dkt. 52 at 1-2, 12-14. Russell also requested publication of the panel’s decision. C.A. Dkt. 51. She urged that, if the Ninth Circuit was going to adopt a “new rule” “diverging” from this Court’s precedent, it should at least declare its decision precedential. *Id.* at 1, 3. And she explained that the panel’s conclusion that “online retailers like Walmart are not liable (either directly or indirectly) for images that are part of their own listings on their own online marketplace” has “broad implications for copyright enforcement in the digital era.” *Id.* at 2.

The Ninth Circuit denied rehearing and declined to publish its decision. App., *infra*, 68a.

REASONS FOR GRANTING THE PETITION

Everyone—the Ninth Circuit, Walmart, and Russell—agrees that the order denying Walmart’s Rule 50(b) motion was not before the court of appeals. The Ninth Circuit nonetheless held it could assess the sufficiency of the evidence by reviewing the denial of Walmart’s pre-verdict Rule 50(a) motion. It then overturned the verdict on de novo review, ordering JMOL for Walmart as to the infringing photographs in Walmart’s product listings.

⁶ The panel identified no independent error in the fee award, but vacated in light of “Russell’s [now-]partial success on her copyright claims.” App., *infra*, 6a; see *id.* at 9a-10a n.2 (Desai, J., dissenting). The fee ruling thus rests on the sufficiency-of-the-evidence ruling.

That decision conflicts with decisions from *every other circuit*—as well as from this Court. Circuit after circuit holds that, when the denial of a Rule 50(b) motion is not presented on appeal, the court of appeals *cannot* review the sufficiency of the evidence supporting a jury verdict. Correctly so. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), this Court held that a party “may *not* challenge the sufficiency of the evidence on appeal on the basis of the District Court’s denial of its Rule 50(a) motion.” *Id.* at 405 (emphasis added). A party can challenge the sufficiency of the evidence only by appealing the denial of a Rule 50(b) motion—something Walmart concededly failed to do.

By reviewing the sufficiency of the evidence based solely on the district court’s denial of Walmart’s Rule 50(a) motion, the Ninth Circuit did precisely what *Unitherm* forbids—and what no other circuit would tolerate. Review is warranted to resolve that circuit conflict and correct the Ninth Circuit’s departure from this Court’s precedent. Indeed, the Ninth Circuit’s error is so stark that the Court may wish to consider summary reversal.

At minimum, the Court should hold this petition pending *Cox Communications Inc. v. Sony Music Entertainment*, No. 24-171, and then grant, vacate, and remand the case for further consideration. *Cox* involves the standard for secondary copyright-infringement liability as applied to the internet. The same issue is presented here: The Ninth Circuit found insufficient evidence to hold Walmart secondarily liable for the infringing photographs in its online product listings. Clarification of the secondary-liability standard in *Cox* plainly could affect the outcome here, especially as two of the four judges below found ample evidence to support Walmart’s liability for the infringing photographs.

Given Walmart’s failure to appeal the denial of its Rule 50(b) motion, however, the Ninth Circuit never should have considered Walmart’s sufficiency challenge, on secondary liability or anything else. Because the case must be returned to the Ninth Circuit at least in light of *Cox*, the Court may wish to GVR with directions to consider *Unitherm* as well. But the more appropriate course would be to review and reverse the Ninth Circuit’s patently erroneous decision to review the sufficiency of the evidence based on the denial of a Rule 50(a) motion.

I. THE NINTH CIRCUIT’S DEPARTURE FROM THE REQUIREMENTS OF RULE 50 WARRANTS REVIEW

Walmart concedes it did not appeal the district court’s order denying its Rule 50(b) motion. Indeed, it disclaimed any challenge to that order. The Ninth Circuit nonetheless reviewed the sufficiency of the evidence *de novo*, by purporting to review the denial of Walmart’s pre-verdict Rule 50(a) motion. That approach conflicts with every other circuit. It contravenes this Court’s decision in *Unitherm*. And it thwarts Rule 50’s careful, step-by-step process for challenging the factual sufficiency of jury verdicts. Review—if not summary reversal—is warranted.

A. The Decision Below Conflicts with Decisions from Every Other Circuit

The Ninth Circuit reviewed the sufficiency of the evidence underlying the jury’s verdict—and reversed on *de novo* review—even though Walmart did not appeal or challenge the denial of its Rule 50(b) motion. That decision conflicts with decisions from *every* other circuit.

1. Ten circuits—the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, plus the Federal Circuit applying regional circuit law—have held they cannot review the sufficiency of the evidence under-

lying a jury verdict *at all* if the appellant does not challenge the denial of a Rule 50(b) motion, even if the appellant seeks to challenge the denial of a Rule 50(a) motion.

Those circuits are clear: “On appeal, a party may *not* challenge the sufficiency of evidence based on the district court’s denial of a Rule 50(a) motion alone.” *Ayers v. City of Cleveland*, 773 F.3d 161, 168 (6th Cir. 2014) (emphasis added). A “district court’s denial of a Rule 50(a) motion ‘cannot form the basis of [a sufficiency-of-the-evidence] appeal’” because “the denial does not decide anything; it just puts off resolution of the sufficiency-of-the-evidence question until after the verdict.” *Kelley v. City of Albuquerque*, 542 F.3d 802, 817 (10th Cir. 2008) (emphasis added). “Without a district court Rule 50(b) ruling to review,” those circuits hold, “an appellate court [is] ‘without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.’” *Ayers*, 773 F.3d at 168 (quoting *Unitherm*, 546 U.S. at 400-401) (emphasis added). A litigant’s failure to present a Rule 50(b) order on appeal leaves its sufficiency-of-the-evidence challenge “dead in the water.” *Climent-Garcia v. Autoridad de Transporte Maritimo y Las Islas Municipio*, 754 F.3d 17, 20 (1st Cir. 2014).

Circuit after circuit agrees that appellate courts cannot consider sufficiency challenges absent an appeal from a Rule 50(b) denial. See, e.g., *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 475 (3d Cir. 1990); *Delaware & Hudson Ry. Co. v. Knoedler Mfrs., Inc.*, 805 F. App’x 149, 154 n.5 (3d Cir. 2020); *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 369-370 (4th Cir. 2008); *McLendon v. Big Lots Stores, Inc.*, 749 F.3d 373, 374-375 (5th Cir. 2014); *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 996 F.3d 354, 369 (7th Cir. 2021); *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1205 (8th

Cir. 2015); *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235, 1245 (11th Cir. 2021); *Nordock, Inc. v. System Inc.*, 803 F.3d 1344, 1358 (Fed. Cir. 2015), vacated on other grounds, 580 U.S. 1028 (2016).

Courts apply that principle in cases indistinguishable from this one. In *Washington v. Gilmore*, for example, the appellant (a *pro se* prisoner) moved for JMOL under “Fed. R. Civ. P. 50(b),” but “filed his notices of appeal before the District Court ruled” and “did not file a new or amended notice of appeal” after his Rule 50(b) motion was denied. No. 22-2309, 2023 WL 4363113, at *1 (3d Cir. July 6, 2023). That was fatal: Absent an appeal from a Rule 50(b) denial, the Third Circuit held, “we cannot review a challenge to the sufficiency of the evidence.” *Ibid.* (citing *Unitherm*, 546 U.S. at 405). Here, Walmart committed the same omission as the appellant in *Washington*—yet achieved the opposite result.

The Eighth Circuit’s decision in *Hairston v. Wormuth*, 107 F.4th 867 (8th Cir. 2024), is similarly instructive. There, as here, a litigant appealed “‘from the final judgment’” entered on an adverse verdict, but never “amended the notice of appeal” “[a]fter the district court ruled on her post-trial motions.” *Id.* at 869-870. The Eighth Circuit held that failure barred it from considering the issues in her post-trial motions, including “her sufficiency of the evidence challenge.” *Id.* at 871.⁷ Yet the Ninth Circuit held the opposite here.

2. The Second and D.C. Circuits recognize that the absence of a Rule 50(b) order on appeal generally bars an evidentiary-sufficiency challenge on appeal. Those courts

⁷ While *Hairston*’s *pro se* motion was styled as one under Rule 59(e), it challenged the “evidence” as “insufficient,” *à la* Rule 50(b). Dkt. 82 in No. 5:18-cv-96 (E.D. Ark. June 6, 2022).

have suggested that, despite that rule, “very narrow” plain-error review may be possible in “‘extraordinary circumstances’” to “‘prevent a manifest injustice.’” *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 199-200 (2d Cir. 2004); see *Ortiz v. City of New York*, 706 F. App’x 54, 55-56 (2d Cir. 2017) (applying *Jacques*); *Fredrick v. District of Columbia*, 254 F.3d 156, 160-162 (D.C. Cir. 2001) (allowing “limited” review to prevent “manifest miscarriage of justice”).

Neither circuit, however, has ever ordered JMOL for a verdict loser under that standard. Other circuits explicitly reject such an exception to Rule 50(b). See, e.g., *Fed. Ins. Co. v. HPSC, Inc.*, 480 F.3d 26, 32 (1st Cir. 2007); *Hertz v. Woodbury County*, 566 F.3d 775, 780-781 (8th Cir. 2009); *Johnson v. Guerrieri Mgmt., Inc.*, 437 F. App’x 853, 857 (11th Cir. 2011). And others acknowledge conflicting decisions over the availability of plain-error review. E.g., *McLendon*, 749 F.3d at 374-375 & n.2 (collecting and rejecting decisions allowing “plain error review for unreserved sufficiency challenges”).

3. The decision below conflicts with *all* those cases—and reflects deeper confusion about Rule 50’s commands.

The Ninth Circuit recognized that Walmart did not appeal (and disclaimed any challenge to) the denial of its Rule 50(b) motion. App., *infra*, 3a n.1. But the court held it could review the sufficiency of the evidence nonetheless, by reviewing the denial of Walmart’s Rule 50(a) motion. *Id.* at 3a & n.1. That conflicts with the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, which hold the absence of an appeal from a Rule 50(b) order forecloses sufficiency review on appeal, even if the appellant seeks to challenge the denial of a Rule 50(a) motion. The Ninth Circuit then conducted “de novo” review of the evidence, found it insufficient (over a dissent), and ordered JMOL for Walmart. *Id.* at 3a, 4a-10a.

That conflicts with the Second and D.C. Circuits, which at most allow only limited plain-error review to prevent manifest injustice—something the Ninth Circuit did not (and could not credibly) find here.

Even within the Ninth Circuit, there is intolerable confusion about Rule 50's requirements. In *Reighard v. Longo*, 669 F. App'x 356 (9th Cir. 2016), that court faced indistinguishable facts—yet reached the opposite result. There, a *pro se* litigant (Natalie Reighard) had “filed a motion for judgment as a matter of law under Rule 50(a),” which the “district court denied.” *Id.* at 356-357. After trial, Reighard “filed a Rule 50(b) motion” for JMOL. *Id.* at 357. She then “appeal[ed] *pro se* from the entry of judgment against her,” but “limited her appeal to the denial of the Rule 50(a) motion.” *Id.* at 356-357 (emphasis added). The Ninth Circuit held that, “[b]ecause Reighard did not appeal the district court’s denial of her Rule 50(b) motion,” the court of appeals was “limited to examining whether or not the district court erred in denying her pre-trial Rule 50(a) motion.” *Id.* at 357 (emphasis added). Under *Unitherm*, however, the “denial of a Rule 50(a) motion is ‘not error,’” and “‘cannot form the basis of [an] appeal.’” *Ibid.* (quoting 546 U.S. at 406). The Ninth Circuit thus held it was obligated to “affirm the district court’s denial of Reighard’s Rule 50(a) motion.” *Ibid.*; see also *Niteco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007) (refusing review where appellant failed to file Rule 50(b) motion). Like Reighard, Walmart appealed only the denial of its Rule 50(a) motion, not the denial of its Rule 50(b) motion. Yet rather than summarily affirm as in *Reighard*, the Ninth Circuit reversed and

ordered JMOL for Walmart. Those irreconcilable results underscore the need for this Court’s intervention.⁸

Nor is the confusion limited to the Ninth Circuit. While Eleventh Circuit precedent bars sufficiency-of-the-evidence challenges absent an appeal from a Rule 50(b) denial, see *St. Louis Condo.*, 5 F.4th at 1245, that court has also taken the approach the Ninth Circuit adopted below. See *Merard v. Magic Burgers, LLC*, No. 21-12037, 2022 WL 3023213, at *2-3 & n.4 (11th Cir. Aug. 1, 2022) (reviewing “denial of [defendant’s] Rule 50(a) motions” where “Rule 50(b)” denial was “not before [the court] on appeal”). Unlike the Ninth Circuit here, however, the *Merard* court affirmed. *Id.* at *4.

In short, the Ninth Circuit split from decisions of every circuit (including itself) by reviewing and reversing the denial of Walmart’s Rule 50(a) motion. The conflict is manifest.

B. The Decision Below Is Wrong

The decision below defies this Court’s precedent.

1. The Ninth Circuit reviewed the sufficiency of the evidence by purporting to “review the district court’s denial” of Walmart’s Rule 50(a) “mo[tion] for judgment as a matter of law at trial.” App., *infra*, 3a. This Court squarely rejected that approach in *Unitherm*.

In *Unitherm*, the defendant (ConAgra) moved at trial for JMOL “under Rule 50(a) based on legal insufficiency of the evidence.” 546 U.S. at 398. The district court denied that motion, and the jury returned a verdict for the plaintiff (Unitherm). *Ibid.* ConAgra appealed, but failed

⁸ *Reighard* alternatively found no error even “assuming” Reighard appealed the Rule 50(b) denial. 669 F. App’x at 357. Here, however, all agree Walmart did *not* appeal or challenge the Rule 50(b) denial.

to renew its motion for JMOL under Rule 50(b) or appeal the denial of such a motion. *Ibid.* The court of appeals held it could nonetheless “examine the sufficiency of the evidence” based on ConAgra’s “Rule 50(a) motion.” *Id.* at 399. It found the evidence insufficient and granted ConAgra “a new trial.” *Ibid.*

This Court reversed, holding that a litigant “may *not* challenge the sufficiency of the evidence on appeal on the basis of the District Court’s denial of its Rule 50(a) motion.” *Unitherm*, 546 U.S. at 405 (emphasis added). Relying on decades of precedent, the Court explained that the only permissible “basis for review of [a] sufficiency of the evidence challenge in the Court of Appeals” is review of an order denying “a postverdict motion under Rule 50(b).” *Id.* at 402, 407 (emphasis added); see *id.* at 400-404 (collecting authorities).

Challenging the denial of a Rule 50(a) motion does not suffice, the Court explained, “because the denial of that motion [*i*]s not error.” *Unitherm*, 546 U.S. at 406 (emphasis added). A district court is “not required” to grant JMOL under Rule 50(a) even where “the evidence is legally insufficient.” *Id.* at 405. The denial of a Rule 50(a) motion is not a final determination of evidentiary sufficiency, but “merely an exercise of the District Court’s discretion, in accordance with the text of the Rule and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence.” *Id.* at 406. Consequently, “the District Court’s denial of [a Rule 50(a)] preverdict motion *cannot form the basis of [a litigant’s] appeal.*” *Ibid.* (emphasis added).

Unitherm thus expressly rejected the notion that an appellant can challenge the sufficiency of the evidence by challenging the denial of a Rule 50(a) motion. The Ninth Circuit here held precisely the opposite—without ever

mentioning *Unitherm*. Cf. C.A. Dkt. 25 at 15-17, C.A. Dkt. 31 at 25, C.A. Dkt. 51 at 1, C.A. Dkt. 52 at 12-14 (Russell's submissions discussing *Unitherm*). The conflict with this Court's precedent is inescapable. If anything, the error is even more stark than in *Unitherm*: There, the court of appeals merely granted ConAgra "a new trial," 546 U.S. at 399, 406 n.6; here, the Ninth Circuit granted Walmart *judgment as a matter of law*.

2. The Ninth Circuit made no effort to reconcile its decision with *Unitherm*. Nor could it. Although the Ninth Circuit purported to "review the district court's denial" of Walmart's Rule 50(a) motion, App., *infra*, 3a, *Unitherm* is explicit that denial of a Rule 50(a) motion is "not error," 546 U.S. at 406. Any "review" of that denial thus could result only in affirmance, not (as here) reversal.

The Ninth Circuit also observed that Walmart appealed the "final judgment" entered on the "jury's verdict." App., *infra*, 2a-3a. But so did ConAgra in *Unitherm*. That is insufficient because, as Chief Judge Sutton has explained, "appellate courts do not directly review the actions of juries; they review *a trial judge's assessment* of the work of the jury *through a motion for judgment as a matter of law*." *Maxwell v. Dodd*, 662 F.3d 418, 420-421 (6th Cir. 2011) (emphasis added); see *Unitherm*, 546 U.S. at 403 n.4 (discussing *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 658 (1935)).

Finally, the Ninth Circuit insisted "Walmart's failure to appeal the district court's order denying the 50(b) motion" did not matter "because Walmart does not challenge the 50(b) order." App., *infra*, 3a n.1. But *Unitherm* instructs that challenging a district court's Rule 50(b) order is the *only* permissible "basis for review of [a] sufficiency of the evidence challenge in the Court of Appeals." 546 U.S. at

407. Failure to challenge a Rule 50(b) order does not salvage a sufficiency-of-the-evidence challenge—it dooms it.

3. Walmart (but not the Ninth Circuit) posited that “the requirements of *Unitherm* were met” because Walmart “filed a timely Rule 50(b) motion,” even though it did not *appeal* or *challenge* the denial of that motion. C.A. Dkt. 26 at 5 (emphasis added); see C.A. Dkt. 37 at 16. That makes no sense. *Unitherm* requires the filing of a Rule 50(b) motion *because* an order denying that motion is the only permissible “basis for review of [a] sufficiency of the evidence challenge” on appeal. 546 U.S. at 407. The court of appeals may “direct the entry of judgment” only by “*revers[ing]* the district court’s denial of a Rule 50(b) motion.” *Id.* at 401 n.3 (emphasis added); see *id.* at 400-406. Absent an appeal from the Rule 50(b) denial, there is nothing reviewable to reverse.

“Appellate review, by its nature, requires a lower court decision to review.” *Dupree v. Younger*, 598 U.S. 729, 734 (2023). And “[t]o secure appellate review of a judgment or order, a party must file a notice of appeal *from that judgment or order.*” *Manrique v. United States*, 581 U.S. 116, 120 (2017) (emphasis added). Where no Rule 50(b) order is before the court of appeals—whether because no motion was made or because its denial was not appealed—the court of appeals has no decision to review and is “powerless” to examine the sufficiency of the evidence, much less direct JMOL. *Unitherm*, 546 U.S. at 405.

Nor can Walmart plausibly contend it “satisfied the policy reasons behind” *Unitherm*. C.A. Dkt. 26 at 7. *Unitherm* makes clear a Rule 50(b) motion “is not an idle motion” or mere box to check. 546 U.S. at 401. By confining review to denial of a Rule 50(b) motion, *Unitherm* ensures the appellate court has “the benefit of postverdict input from the district court” “judge who saw and heard

the witnesses.’” *Id.* at 401 & n.3. Because Walmart never presented the district court’s Rule 50(b) decision for review, however, the Ninth Circuit never considered it. Nor did Walmart meaningfully engage with that decision. Indeed, the district court held Walmart “waived” its “challenges to the secondary liability theories” by not raising them until its Rule 50(b) “Reply.” App., *infra*, 44a. Yet Walmart’s opening brief never mentioned that ruling. C.A. Dkt. 19.

4. Some circuits may conduct “very narrow” sufficiency review, even absent an appeal from a Rule 50(b) denial, to avoid “manifest injustice.” *Jacques*, 386 F.3d at 199; see pp. 22-23, *supra*. That practice is hard to square with *Unitherm*, which rejected a “manifest injustice” exception proposed by the dissent. 546 U.S. at 408 (Stevens, J., dissenting); see *id.* at 402 n.4 (majority opinion). Regardless, the Ninth Circuit did not invoke that practice; it applied “de novo” review. App., *infra*, 3a. Nor would declining to entertain Walmart’s sufficiency challenge work any conceivable “injustice.” Two of the four judges below found the evidence amply sufficient. And the Ninth Circuit clerk *told* Walmart it “must file an amended notice of appeal” if it wanted to “challenge the district court’s ruling on” its Rule 50(b) motion. App., *infra*, 66a. Justice counsels holding Walmart to the rules—not excusing its delinquency.

C. The Issue Is Important and Warrants Review

Clarity and uniformity of procedural rules are paramount to the orderly administration of justice. That is especially true where those rules concern review of jury verdicts. Rule 50 accords respect to juries—and the district courts “who saw and heard the witnesses’”—by establishing a careful, precise process for challenging the sufficiency of the evidence underlying jury verdicts.

Unitherm, 546 U.S. at 399-406 & nn.3-4. Appellate Rule 4 establishes a similarly precise process for appealing denials of post-verdict Rule 50(b) motions. See p. 6, *supra*. It is essential that litigants navigating that process know with clarity the rules that they (and their opponents) must follow. And it is vital that all litigants be held to the *same* standards. The Rules' application should not vary by geography or whim.

This Court thus has repeatedly granted review to resolve conflicts over the proper application of Rule 50 and other procedural rules. *E.g.*, *Unitherm*, 546 U.S. 394 (Rule 50); *Ortiz v. Jordan*, 562 U.S. 180 (2011) (Rules 50 and 56); *Dupree*, 598 U.S. 729 (Rules 50 and 56); *Coney Island Auto Parts Unlimited, Inc. v. Burton*, 608 U.S. 155 (2026) (Rule 60(b)(4)); *BLOM Bank SAL v. Honickman*, 605 U.S. 204 (2025) (Rule 60(b)(6)); *Waetzig v. Halliburton Energy Servs., Inc.*, 604 U.S. 305 (2025) (Rules 41(a) and 60(b)); *Manrique*, 581 U.S. 116 (Appellate Rule 4(b)); *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991) (Appellate Rule 4(a)(2)). Review is likewise warranted here.

The issue is recurring. Whether an appellant must challenge the denial of a Rule 50(b) motion, or whether it need only challenge the denial of a Rule 50(a) motion, affects *every* case where a disappointed litigant seeks to challenge the sufficiency of the evidence underlying a jury verdict. That is why *every* circuit has weighed in—and reached decisions contrary to the Ninth Circuit below. See pp. 20-25, *supra*.

The need for review is amplified by the magnitude of the error. The Ninth Circuit's decision below is irreconcilable with this Court's decision in *Unitherm*. See pp. 25-29, *supra*. Absent review, it will distort review of jury verdicts in the Nation's largest circuit. The distortion is

profound. Rule 50(b) is designed to secure “the benefit of *postverdict* input from the district court,” which “‘has the feel of the case which no appellate printed transcript can impart.’” *Unitherm*, 546 U.S. at 401 & n.3 (emphasis added). That input often comes, as it did here, through thoughtful written opinions following trial. See App., *infra*, 29a-45a. Reviewing only the district court’s Rule 50(a) decision—here, a two-sentence, pre-verdict bench ruling, App., *infra*, 19a—short-circuits that process. It renders Rule 50(b) meaningless. And it allows litigants to circumvent inconvenient Rule 50(b) rulings (as Walmart did with the district court’s Rule 50(b) waiver ruling, p. 29, *supra*).

Nor can reconciliation be left to the court of appeals. Russell repeatedly explained below that assessing the sufficiency of the evidence by reviewing the denial of a Rule 50(a) motion would conflict not only with *Unitherm*, but also with the Ninth Circuit’s own prior decisions. See C.A. Dkt. 25 at 15-16; C.A. Dkt. 31 at 25; pp. 15, 18, *supra*. Yet the Ninth Circuit did so anyway—without mentioning *Unitherm* or its past cases. Russell asked the Ninth Circuit to resolve the conflict on rehearing. C.A. Dkt. 52 at 1-2, 12-14. It declined. App., *infra*, 66a. Russell even took the extraordinary step of asking the court to publish its decision, so that litigants would at least have clear notice of the rules going forward. C.A. Dkt. 51 at 1. The Ninth Circuit refused that request, too—leaving future litigants to wonder what rules future panels might apply to *them*. App., *infra*, 68a.

That raises serious fairness concerns—as the Ninth Circuit’s own decisions starkly illustrate. When the *pro se* appellant in *Reighard* failed to appeal the denial of her Rule 50(b) motion and limited her appeal to the denial of her Rule 50(a) motion, the Ninth Circuit applied *Uni-*

therm, held the denial of a Rule 50(a) motion is never error, and summarily affirmed. 669 F. App'x at 356-357; see p. 24, *supra*. But when Walmart failed to appeal the denial of its Rule 50(b) motion and limited its appeal to the denial of its Rule 50(a) motion, the Ninth Circuit reviewed the sufficiency of the evidence de novo, reversed the Rule 50(a) denial, and granted Walmart judgment as a matter of law. The Ninth Circuit never explained the disparity. And because it refused to publish its decision, future litigants can only speculate whether they will be treated like Reighard or like Walmart.

That state of affairs is untenable. This Court should grant review—and reverse.

D. Summary Reversal Is Appropriate

Given the Rule 50 issue's importance and the clear circuit conflict, plenary review is amply warranted. But the Ninth Circuit's decision is so plainly contrary to this Court's precedent that the Court may wish to consider summary reversal.

The Ninth Circuit held it could review the sufficiency of the evidence by reviewing the district court's denial of Walmart's Rule 50(a) motion. App., *infra*, 3a. But *Unitherm* forbids that approach, holding in no uncertain terms that an appellant “may *not* challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion.” 546 U.S. at 405; see pp. 25-29, *supra*.

Russell repeatedly brought *Unitherm* to the Ninth Circuit's attention. See p. 31, *supra*. But the Ninth Circuit never even mentioned *Unitherm*, much less reconciled its decision with that precedent. Where a decision so clearly disregards and contravenes this Court's precedent, summary reversal is appropriate. It would be especially

appropriate here, given the need to return the case to the Ninth Circuit in any event. See pp. 33-35, *infra*.

II. ALTERNATIVELY, THE COURT SHOULD HOLD THIS PETITION FOR COX, THEN GVR

At minimum, the Court should hold this petition pending its decision in *Cox Communications Inc. v. Sony Music Entertainment*, No. 24-171, then GVR for further consideration in light of that decision—and *Unitherm* too.

Cox concerns the standards for secondary copyright-infringement liability involving online services. See Brief for Petitioners 1-3 in No. 24-171; Brief for Respondents 28-38 in No. 24-171; Gov’t Merits Brief 2-3, 10-20 in No. 24-171. The same issue is implicated here. Describing Walmart as the operator of an “online platform” to which a third party (Sunsea) “uploaded the infringing content,” the Ninth Circuit held Russell “did not present adequate evidence for the jury to find Walmart secondarily liable for Sunsea’s infringement of the photographs.” App., *infra*, 4a-6a. In doing so, the Ninth Circuit applied its precedents in *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723 (9th Cir. 2019), and *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657 (9th Cir. 2017). *Ibid.* Those decisions were identified as part of the split in *Cox*, see Pet. 20-21 in No. 24-171, and discussed in merits briefing, see Brief for Petitioners 42 in No. 24-171.

Given that overlap, the Court should (at minimum) hold this petition until *Cox* is decided, then GVR for further consideration under the proper legal standard. Clarification of the governing standard plainly could produce a different outcome. The district judge who saw the trial firsthand found ample evidence to support secondary liability. App., *infra*, 40a-44a. And Judge Desai in dissent believed the evidence of Walmart’s involvement and control over the infringing listings was enough for *direct* liability; a

fortiori, that involvement could support at least secondary liability. *Id.* at 7a-10a.

A GVR would be appropriate even if the defendant prevails in *Cox*. In *Cox*, the defendant is an internet service provider a jury found liable for infringing content that its subscribers downloaded. Brief for Petitioners 7-12 in No. 24-171. Here, Walmart is an online retailer a jury found liable for infringing photographs in product listings on Walmart's own website, that Walmart had final say over, and that were used to sell infringing products Walmart represented as "Sold & shipped by Walmart." Whatever the result in *Cox*, the case for secondary liability against Walmart is significantly stronger. That amply justifies a hold and GVR for *Cox*.

That *Cox* would necessitate returning this case to the Ninth Circuit, moreover, underscores why review is warranted on the Rule 50 issue. Further consideration in light of *Cox* is necessary only insofar as the Ninth Circuit could consider Walmart's challenge to the sufficiency of the evidence supporting Walmart's liability. As discussed above (pp. 25-29), Walmart's failure to challenge the denial of its Rule 50(b) motion foreclosed the court of appeals from doing so.

Rather than remand for the Ninth Circuit to conduct a sufficiency review that Rule 50 forbids, this Court can reverse the Ninth Circuit's erroneous Rule 50 ruling, whether summarily or on plenary review. Or the Court could GVR and direct the Ninth Circuit to consider *Unitherm* as well as *Cox*. Cf. *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006) (*per curiam*) (GVR'ing where lower court did not address Supreme Court precedent cited to it); *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*) (GVR may "fla[g] a particular issue [the

lower court] does not appear to have fully considered”). In all events, the decision below cannot stand.

CONCLUSION

The Court should grant plenary review or summarily reverse on the first question presented. Alternatively, the Court should hold this petition for *Cox*, then GVR.

Respectfully submitted.

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