No. 25-352

IN THE

Supreme Court of the United States

JASMINE YOUNGE,

Petitioner,

v.

FULTON JUDICIAL CIRCUIT DISTRICT ATTORNEY'S OFFICE, GEORGIA,

Respondent.

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

BRIEF FOR PETITIONER

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

MATTHEW C. BILLIPS
BENJAMIN A. STARK
BARRETT & FARAHANY
2921 Piedmont Road
Atlanta, GA 30305
(404) 214-0120

Counsel for Petitioner

132165

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QUESTION PRESENTED

Rule 8(c)(1) of the Federal Rules of Civil Procedure provides that a party "must" affirmatively plead any affirmative defense. The question presented is:

> Where a defendant has filed an answer without pleading an affirmative defense, may the defendant nonetheless assert that affirmative defense as the basis for a summary judgment motion, without amending or seeking to amend its answer to plead that affirmative defense, and may a defendant do so even if an amendment adding that affirmative defense would be barred by Rule 16(b)(4)?

PARTIES

The parties are Dr. Jasmine Younge and the Fulton Judicial Circuit District Attorney's Office, Georgia.

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The April 1, 2025, opinion of the court of appeals, which is unofficially reported at 2025 WL 974309, is set out at pp. 1a-30a of the Petition Appendix. The March 29, 2023, order of the district court, which is unofficially reported at 2023 WL 3213871, is set out at pp. 31a-63a of the Petition Appendix. The December 12, 2022, Final Report and Recommendation of the district court magistrate judge, which is not reported, is set out at pp. 66a-109a of the Petition Appendix.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

RULES AND STATUTORY PROVISIONS INVOLVED

The rules and statutory provisions involved are set out in the Appendix to the petition.

STATEMENT OF THE CASE

Legal Background

(1) Rule 8(b)(1) provides that "[i]n response to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it...." Rule 8(c)(1), headed "Affirmative Defenses," provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." Rule 12(b) provides that "[e]very defense to a claim for relief in any

pleading must be asserted in the responsive pleading if one is required."

If a defendant has failed to assert an affirmative defense in its original answer, a proposal to amend the answer to add that affirmative defense is governed by Rule 15(a). Subject to limited exceptions, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Although courts "should freely give leave when justice so requires," there are a number of circumstances in which permission to amend can and should be denied, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment...." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Amendments to pleadings may be further limited by Rule 16(b). Rule 16(b)(1) provides, with certain exceptions not relevant here, that "the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order." Rule 16(b)(3) provides that "[t]he scheduling order must: limit the time to...amend the pleadings." Rule 16(b)(4) states that a schedule may be "modified only for good cause and with the judge's consent."

(2) Title VII of the Civil Rights Act of 1964 protects most employees from discrimination on the basis of race, color, religion, sex or national origin. Several categories of employees, however, are excluded from the protections of Title VII. Among those so excluded are persons chosen by an elected official "to be on such officer's personal staff." 42 U.S.C. § 2000e(f).

Several categories of employees excluded from the protections of Title VII by section 2000e(f) are protected instead by the Government Employees Rights Act ("GERA"), which also forbids discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-16b(a). GERA applies, *inter alia*, to individuals chosen by an elected official "to be a member of the elected official's personal staff." 42 U.S.C. § 2000e-16c(a)(1). GERA incorporates by reference the Title VII anti-discrimination provisions applicable to federal employees. 42 U.S.C. §§ 2000e-16, 2000e-16b(a)(1).

Although the prohibitions of Title VII and GERA are similar, they are enforced in different ways. An employee covered by Title VII must exhaust the Title VII administrative process by first filing a charge with the Equal Employment Opportunity Commission. If the EEOC is unable to resolve the charge, and in certain other circumstances, the EEOC issues a right-to-sue letter to the charging party. The employee then has 90 days in which to file suit in federal or state court. Claims under GERA, on the other hand, are adjudicated by the EEOC, subject to limited judicial review by the Federal Circuit. *See* 42 U.S.C. § 2000e-16c.

Factual Background

Plaintiff Younge worked as the Deputy Chief of Staff and Director of Policy and Programs in the Fulton County District Attorney's Office. On July 1, 2019, Younge notified the district attorney that she was pregnant. The complaint asserts that the district attorney responded angrily, yelling at Younge and demanding "What is this supposed to mean" and "Is this a threat?" Pet. 4. The district

attorney immediately began to reassign Younge's duties to other employees, and to exclude her from meetings. Younge's personnel file contained no disciplinary actions, reprimands, or complaints, even immediately after her termination. Pet. App. 108a. The district attorney's chief of staff testified that she was not aware of any discussion of terminating Younge prior to the time that Younge announced she was pregnant. Pet. App. 109a. Nevertheless, the district attorney fired Younge on July 15, 2019, only two weeks after learning of her pregnancy. Pet. App. 5a.

Proceedings Below

Younge commenced this action in 2019. The complaint alleged, inter alia, that the plaintiff had been dismissed because of her pregnancy, in violation of Title VII of the Civil Rights Act of 1964. The defendant ultimately filed its answer on March 24, 2021. That answer asserted several affirmative defenses, but not the affirmative defense at issue here.

On April 27, 2021, the district court issued a Scheduling Order pursuant to Rule 16(b). That Order provided that any amendments to the pleadings must comply with the time limits for amendments set out in the local rules. Under the local rules the deadline for amendments to pleadings was May 26, 2021. Pet. 5. That deadline passed without the defendant seeking to amend its answer. Discovery closed on January 5, 2022, although a few disputed matters continued after that date.

At a March 14, 2022, hearing on such a discovery matter, the defendant indicated for the first time that it contemplated raising the affirmative defense at issue here, that the plaintiff was be excluded from coverage by Title VII under section 2000e(f) because her responsibilities made her a member of the personal staff of an elected official. The defendant did not, however, seek to amend its answer to plead that proposed affirmative defense. Instead, on May 16, 2022, the defendant simply moved for summary judgment, asserting that affirmative defense as a basis for that motion.

The summary judgment motion was first considered by a magistrate judge. The plaintiff objected to consideration of the affirmative defense under these circumstances. But the magistrate judge reasoned that under Eleventh Circuit precedent in *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988), the defendant could base its summary judgment motion on the unpled affirmative defense. Pet. App. 72a-80a. The magistrate judge held that the plaintiff's claim was barred by the section 2000e(f) affirmative defense. Pet. App. 91a-106a.

The district judge upheld the magistrate's recommendation. The district court held that under *Hassan* the defendant could assert the unpled affirmative defense in a motion for summary judgment, because the defendant's failure to raise that defense by a timely motion to amend had not prejudiced the plaintiff. Pet. App. 45a-51a. The district judge held that there was sufficient evidence that the defendant had acted with the alleged discriminatory motive, but upheld dismissal of her claims under the section 2000e(f) affirmative defense. Pet. App. 51a-62a.

On appeal the Eleventh Circuit agreed that under *Hassan* the defendant could assert the unpled affirmative defense as the basis of its summary judgment motion. Pet. App.9a-13a. It concluded that plaintiff's Title VII claim was barred by the section 2000e(f) affirmative defense. Pet. App.14a-29a.

SUMMARY OF ARGUMENT

Rules 8(b)(1)(A), 8(c)(1), and 12(b) of the Federal Rules of Civil Procedure, all provide that a defendant "must" plead its affirmative defenses. Rule 8(c)(1) emphasizes that a defendant must plead "any" affirmative defense. Rule 12(b) directs that a directs that a defendant plead "every" affirmative defense. The Eleventh Circuit impermissibly disregards the plain language of those rules when, as in the instant case, it permits a defendant to base a summary judgment motion on an unpled affirmative defense.

The Eleventh Circuit does not suggest that summary judgment based on an unpled affirmative defense is consistent with the text of these rules. Rather, the court of appeals dismisses the actual requirements of these rules as a mere "hypertechnicalit[ies]." Rather than requiring compliance with their unambiguous text, the court of appeals has long chosen to "focus, instead, on enforcing the actual purpose of the rule[s]." *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988). But the federal courts may not ignore in that manner the requirements of a federal rule, just as they could not disregard the plain language of a statute, in favor of a purpose-based standard of the court's own design.

Although the Eleventh Circuit holds that defendants seeking to assert unpled affirmative defenses often need not comply with Rules 8(b)(1)(A), 8(c)(1), and 12(b), that court of appeals requires strict compliance with those rules by plaintiffs who wish to assert unpled claims in response to a summary judgment motion. In decisions demanding compliance with those rules by plaintiffs, the Eleventh Circuit holds that the rules of liberal pleading do not apply once discovery has begun. Yet the same court of appeals points to those very liberal pleading rules to explain why defense summary judgment motions, invariably filed after the commencement of discovery, need not comply with the Federal Rules.

By permitting summary judgment motions based on an unpled affirmative defense, the court of appeals enables defendants to circumvent the requirements of other provisions of the Federal Rules. Rules 15(a)(2) establishes the standard a litigant must meet if it wishes to amend a pleading. That standard incorporates a wide range of factors, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment...." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Eleventh Circuit uses a narrower and less demanding standard, typically requiring only that the defendant show a lack of prejudice. Many affirmative defenses do not involve disputed issues of fact, and as to those defenses prejudice will rarely be present.

The Eleventh Circuit standard is also far narrower than the standard under Rule 16(b)(4), which applies in this case. Rule 16 requires a district court to issue a

scheduling order that sets a time limit for motions to amend pleadings. A request to modify such a scheduling order can only be granted for "good cause." Good cause requires a demonstration that the moving party could not meet the scheduling order deadline despite due diligence. Such diligence is not required by any variant of the Eleventh Circuit standards for summary judgment motions based on unpled affirmative defenses.

In a series of district court decisions in the Eleventh Circuit, after the trial court had rejected under Rules 15(a)(1) or 16(b)(4) a defendant's motion to amend its answer to assert an affirmative defense, the defendant successfully asserted the rejected affirmative defense by the simple expedient of filing a motion for summary judgment based on that defense. Those cases are a compelling illustration of the manner in which summary judgment motions based on unpled affirmative defenses can be utilized to circumvent Rules 15(a)(2) and 16(b)(4).

The courts which permit summary judgment motions based on unpled affirmative defenses disagree about when such motions are permissible. The appellate decisions differ regarding how many prerequisites must be satisfied to assert an unpled affirmative defense in that manner, regarding what the prerequisite or prerequisites are, and regarding what role a prerequisite plays in the decision whether to permit consideration of an unpled defense in a given case. Differing standards can be found in decisions in the same circuit, and even within a single opinion. A decision by this Court permitting defendants to assert unpled affirmative defenses through summary judgment motions will not bring clarity to this area of the law. Rather it will require the lower courts—subject

in time to review by this Court—to resolve each of those subsidiary issues. It would be far preferable for this Court instead to hold that defendants which wish to raise unpled affirmative defenses must proceed under the familiar and well-established standards and procedures of Rules 15(a)(2) and 16(b)(4).

ARGUMENT

Several circuits hold that a defendant cannot assert an affirmative defense unless the defendant has pled that defense in its original or amended answer. The Eleventh Circuit, on the other hand, holds that a defendant often need not plead an affirmative defense, articulating varying standards as to when such pleading is not required. That Eleventh Circuit rule stems from its opinion in *Hassan v. U.S. Postal Service*, 842 F.2d 260 (11th Cir. 1988). The specific issue in this case is whether a defendant must plead an affirmative defense in order to assert that defense as the basis of a summary judgment motion.

I. SUMMARY JUDGMENT BASED ON AN UNPLED AFFIRMATIVE DEFENSE IS INCONSISTENT WITH THE REQUIREMENT OF RULES 8(b)(1)(A), 8(c)(1), AND 12(b) THAT A DEFENDANT PLEAD EVERY AFFIRMATIVE DEFENSE

The interpretation of the Federal Rules of Civil Procedure, like the interpretation of a statute, a regulation, a treaty, and the Constitution, begins with its text. In this instance the interpretation of the Federal Rules "pretty much ends...with the text...." *Lomax v. Ortiz-Marquez*, 590 U.S. 595, 601 (2020). This outcome turns on the

meaning and interrelationship of five provisions of the Federal Rules: Rule 8(b)(1)(A), Rule 8(c)(1), Rule 12(b), Rule 15(a), and Rule 16(b)(4). Read separately and in conjunction, these provisions all point unambiguously to the same conclusion: a summary judgment motion cannot be based on an unpled affirmative defense.

Rule 8(b)(1)(A) states that "[i]n responding to a pleading, a party *must*: (A) state in short and plain terms its defense to each claim asserted against it...." (Emphasis added). "There is nothing malleable about 'must...'" *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 522 U.S. 576, 587 (2008). "[T]hat language is 'mandatory.'... [T]he... text suggests no limits...." *Ross v. Blake*, 578 U.S. 632, 638 (2016). The text provides for no express or implied exceptions; it says simply "must,"—not for example "must ordinarily" or "must when in the interest of justice" State and federal courts unsurprisingly have consistently held that "must" means must.[1]

Rule 8(c)(1) provides that [i]n responding to a pleading, a party must affirmatively state *any* avoidance or affirmative defense...." (Emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' Webster's Third New International Dictionary 97 (1976). [The framers of Rule 8(c)(1)] did not add any language limiting the breadth of that word." *United States v.*

1. *Reinschmidt v. Exigence LLC (Del.)*, 2014 WL 2047700 at *3 (W.D.N.Y. May 19, 2014); *City of Cent. Falls v. Cent. Falls Fire Fighters, Loc. 1485, I.A.F.F.*, 2002 WL 31324121, at *4 (R.I. Super. Oct. 3, 2002); *In re Conservatorship of V.A.H.*, 802 So. 2d 1099, 1100 n.1 (Ala. Civ. App. 2001); *Curry v. Pope*, 266 Or. 327, 330, 513 P. 2d 792, 794 (1973).

Gonzales, 520 U.S. 1, 5, (1997). That expansive language precludes reading any exceptions into the requirement of the rule. "On its face and on its logic, Rule 8(c) requires that a party actually plead its affirmative defenses, not that it plead them only in those cases where failure to plead would result in prejudice to the opposing party." *Harris v. Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997). Multiple courts of appeals have correctly concluded that "any" indeed means any.[2]

Rule 12(b) provides that "[*e*]*very* defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." (Emphasis added). "When the law says 'every,' there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word 'some' for the word 'every.'" *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 345 (1897). The term "every," used in Rule 12(b) without limitation, is inconsistent with the existence of any exception. Federal and state courts have consistently held that "every" of course means every.[3]

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2. *Moats v. Nat'l Credit Union Admin. Bd.,* 153 F.4th 449, 455 (5th Cir. 2025); *Strategic Hous. Fin. Corp. of Travis Cnty v. United States*, 608 F.3d 1317, 1326 (Fed. Cir. 2010); *Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010); *Manning v. United States*, 546 F.3d 430, 436 (7th Cir. 2008); *Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998); *United States v. Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996).

3. *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1089 (7th Cir. 1999); *In re Carbaugh*, 299 B.R. 395, 398 (Bankr. N.D. Tex. 2003); *In re HydroAction, Inc.*, 266 B.R. 638, 645 (Bankr. E.D. Tex 2001); *State ex. Rel Pierce v. Kundert*, 4 Wis. 2d 392, 395, 90 N.W. 2d 628, 630 (1958); *Commonwealth ex rel. Diefenderfer v. Wehr*, 17 Pa. D. & C. 689, 695 (Com. Pl. 1932).

There is nothing the least bit ambiguous in the wording of Rules 8(b)(1)(A), 8(c)(1) or 12(b). Each of them in language of crystalline clarity requires without exception that a party wishing to assert an affirmative defense must plead that defense. "Th[e] text [of the rules] is patently clear." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). Each of these rules "means what it says" and should not "be limited to some subset of [affirmative defenses or circumstances].... Given that [the drafters] attached no modifiers to the [terms "must," "any," and "every"], the plain language of the [rules] [applies here]." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). As the District of Columbia Circuit correctly observed in *Harris v. Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997), "Rule 8(c) means what it says: a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion." 126 F.3d at 345. These are binding Rules, not—like the Chicago Manual of Style—mere drafting suggestions. They "*govern* the procedure in all civil actions and proceedings in the United States district courts...." Fed. R. Civ. P. 1 (emphasis added).

The consequence of a failure to plead an affirmative defense is well established. "Ordinarily, under the...Civil Rules, a defense is lost if it is not included in the answer or amended answer." *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004). "It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule of Civil Procedure 8(c) results in the waiver of that defense and its exclusion from the case." 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1278, pp. 694-95 (4th ed.) (footnote omitted). "Under the

accepted interpretation of Rule 8(c) of the Federal Rules of Civil Procedure, any matter 'constituting an avoidance or affirmative defense' to the matters raised in the plaintiff's complaint must be pleaded in a timely manner or it is deemed to be waived." *Taylor v. United States*, 485 U.S. 992, 992 (1988) (White, J. dissenting). "Ordinarily in civil litigation, [an affirmative defense such as] a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Day v. McDonough*, 547 U.S. 198, 202 (2006); *see Wood v. Maynard*, 566 U.S. 463, 470 (2012). The court of appeals below acknowledged that "the general rule is that, when a party fails to raise an affirmative defense in the pleadings, that party waives its right to raise the issue at trial." Pet. App. 9a (quoting *Hassan*, 842 F.2d at 263).

The Federal Rules themselves do provide for one exception to the usual consequence of a pleading omission. Under Rule 15(b)(2), if at trial "an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings.... [F]ailure to amend does not affect the result of the trial of that issue." Fed. R. Civ. P. 15(b)(2). The existence of such an express exception weighs heavily against judicial fashioning of additional exceptions. The drafters of the Federal Rules clearly knew how to create an exception to Rules 8 and 12, and chose not to do so here.

The importance of adhering to the text of Rules 8 and 12 is confirmed by the detailed provisions in Rules 15 and 16, which establish the steps that a defendant must take to raise an affirmative defense if it has failed to include that defense in its initial answer. Rule 15 provides that such a defendant must correct that omission

by amending its answer; unless it acts within 21 days of its initial filing, the defendant is required to meet the standard in Rule 15(a)(2) and to obtain the approval of the court. The provisions of Rule 16(b) regarding scheduling orders provide for establishing a time limit for seeking judicial approval of any amendment to the pleadings, subject to modification of that time limit under the good cause standard of Rule 16(b)(4). Those procedures and standards would be largely meaningless if a defendant which had failed to include an affirmative defense in its initial pleading could nonetheless invoke that defense without bothering to amend its answer at all.

The Eleventh Circuit has advanced several reasons for permitting a defendant to assert an unpled affirmative defense. But the court of appeals "made no attempt to ground its analysis in the...language [of the Federal Rules.]" *Ross v. Blake*, 578 U.S. 632, 638 (2016). None of the arguments offered by the court of appeals is sufficient to overcome the express language of Rules 8(b)(1)(A), 8(c)(1) or 12(b).

The Eleventh Circuit has repeatedly invoked the purpose of Rule 8(c) as justifying its practice of permitting the assertion of unpled affirmative defenses through summary judgment motions. Considerations of purpose may in appropriate circumstances play a role in interpreting an ambiguous provision of the Federal Rules, as they do in construing imprecise statutes. But the Court of Appeals has not suggested that the text of Rules 8(c)(1), 8(b)(2)(A) or 12(b) is in any way ambiguous.

This Court has consistently admonished that appeals to purpose cannot override the plain text of a statute.

> This court has repeatedly cautioned against using appeals to purpose when the text of a statute is clear. Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto). As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text. The Court may not "replace the actual text with speculation as to Congress' intent."

Oklahoma v. Castro-Huerta, 597 U.S. 597, 629 (2022) (quoting *Magwood v. Patterson*, 561 U.S. 320, 334 (2010); *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S 1, 6 (2000). "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law[.]" *Bostock v. Clayton Cty.*, 590 U.S. 644, 654 (2020).

Although those decisions concerned the interpretation of statutes, their holdings are equally applicable to the interpretation of the Federal Rules. When "the plain text suffices" to establish the meaning of the Rules, the Court has "no warrant to elevate vague invocations of...purpose over the words [the drafters] wrote." *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 463 (2022). Where the text of a rule is clear, arguments about purpose, however cogent, may not be invoked to "revise th[e] [framer's] choice." *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 583 U.S. 416, 433 (2018).

But what the Eleventh Circuit has done is significantly worse than invoking arguments about purpose to read into Rules 8 and 12 an interpretation at odds with their text. The court of appeals insists that a judicial determination of the purpose of a rule can and should provide the rationale for a legal standard avowedly different from, and more important than, the standard in the text of the rule itself. The unusual manner in which Eleventh Circuit utilizes the asserted purpose of Rule 8(c) derives from that circuit's seminal opinion in *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988)

> We must avoid hypertechnicality in pleading requirements and *focus, instead, on enforcing the actual purpose of the rule.* The purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it.... When a plaintiff has notice that an affirmative defense will be raised at trial, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice. And, when the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue.

842 F.2d at 263 (emphasis added).

Under the Eleventh Circuit's analysis, the primary task of a federal court is not to implement the text of Rules 8 or 12, but to "enforce[e] the actual purpose of the rule[s]." Enforcing such a judicially-identified purpose of a rule takes precedence over application of the actual terms of the

rules themselves; a court must "*avoid* hypertechnicality in pleading requirements and focus, *instead* [on enforcing the rules' purpose]." (Emphasis added). On the court of appeals' view, the central interpretative responsibility of a court is thus to determine, not the meaning of the text of a rule, but the underlying purpose of that rule. The purpose of a rule is not a tool for interpreting ambiguous text; rather, that purpose is as the rationale for fashioning a distinct legal standard which takes priority over the text of the rule itself.

In this instance, because the Eleventh Circuit concluded that the purpose of Rule 8(c) is (only) "to guarantee that the opposing party has notice of any additional issue," the court of appeals held that the obligation to "enforce[e] th[at] purpose" is satisfied, and consideration of an unpled affirmative defense is proper, whenever "a plaintiff has notice that an affirmative defense will be raised." *Hassan*, 842 F.2d at 263. Relying on this purpose argument, the Eleventh Circuit has repeatedly held that whether a defendant complied with literal requirements of Rule 8(c) is beside the point "if a plaintiff receives notice of an affirmative defense by some means other than the pleadings." *Navarro v. Santos Furniture Custom Design,* 372 Fed.Appx. 24, 27 (11th Cir. 2010); *Grant v. Preferred Research, Inc.,* 885 F.2d 795, 797-98 (11th Cir. 1989). That holding effectively rewrites Rule 8(c)(1) to provide "In responding to a pleading, a party must affirmative state any avoidance or affirmative defense, *unless the party by some other means notifies the opposing party of its intent to raise that avoidance or affirmative defense.*"

The Eleventh Circuit does not suggest that requiring a defendant to actually amend its answer to assert an affirmative defense would somehow interfere with providing notice to the plaintiff. The gravamen of the Eleventh Circuit's argument is that once a plaintiff has by some other means been given notice, no further action is needed to satisfy the purpose of Rule 8(c). But the text of a rule, like the text of a statute, may often be broader than would have been necessary to satisfy its original purpose. *Bostock v. Clayton Cty.*, 590 U.S. 644, 677-78 (2020). In that circumstance, the text of the rule, not its purpose, controls.

And the Eleventh Circuit's analysis of the relevant purpose is also fatally deficient. This Court has repeatedly admonished that the interpretation of a particular provision must consider the statute as a whole. *Fisher v. U.S.*, 603 U.S. 480, 486 (2024). That is equally true of the interpretation of a particular provision of the Federal Rules of Civil Procedure, and it applies as well to the assessment of purpose. A basic purpose of all pleading under Rule 8 is indeed to provide the opposing party with notice of the claims or defenses at issue. But related provisions to the Federal Rules have additional, no less important purposes. The purpose of Rule 15(a)(2) is to establish a standard governing when a pleading can be amended. The purpose of Rule 16(b) is to establish a deadline for motions to amend pleadings, and a standard for altering that deadline. The purpose of both Rules 15(a)(2) and 16(b)(4) is to mandate that a judge determine whether the standards in those rules has been satisfied. And a purpose of all of these provisions is to provide an incentive for a defendant to use due diligence to promptly identify, through legal research or factual inquiry, any

new affirmative defense or claim that it may want to raise. None of those other purposes is satisfied by permitting a defendant to merely notify a plaintiff, by some other means, and at a time of its choosing, that it intends to raise an affirmative defense.

Several Eleventh Circuit opinions contend that permitting summary judgment motions based on unpled affirmative defense is justified by the liberal rules of pleading. "[T]he liberal pleading rules established by the Federal Rules of Civil Procedure apply to the pleading of affirmative defenses...." Pet. App. 9a-10a (quoting *Hassan,* 842 F.2d at 263); *see Hewitt v. Mobile Research Technology, Inc.*, 285 Fed.Appx. 694, 696 (11th Cir. 2008); *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539, 544 (11th Cir. 1991).

But the liberal rules of pleading have no application here. Those rules concern two quite distinct situations. First, those rules preclude the courts from fashioning additional pleading requirements over and above the express requirements in the Federal Rules themselves. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). But the issue here is whether the courts should devise an exception to the express pleading requirements of the Rules. Second, those rules weigh in favor of a broad interpretation of the pleadings filed by the parties, particularly when filed by pro se litigants. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *see* Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."). But in the court of appeals respondent acknowledged that it had not pled the affirmative defense at issue. Response Brief of Appellee, 11.

II. PERMITTING SUMMARY JUDGMENT BASED ON AN UNPLED AFFIRMATIVE DEFENSE IS INCONSISTENT WITH THE REFUSING TO PERMIT PLAINTIFFS TO ASSERT UNPLED CLAIMS

Although the Eleventh Circuit often does not require a defendant to comply with the terms of the Federal Rules when the defendant asserts an unpled affirmative defense in support of a motion for summary judgment, that court of appeals insists on strict compliance with those rules by a plaintiff which wishes to assert an unpled claim in opposing a summary judgment motion. That inconsistency highlights the degree to which the court of appeals' indulgent treatment of unpled affirmative defenses departs from the normal strictures of pleading, and exacerbates the double standard already inherent in that practice.

For a plaintiff the need to raise an unpled claim may arise if a defendant's motion for summary judgment identifies a serious defect in the claims set out in the complaint; sometimes the objections advanced in that motion would not apply to a different, as-yet unpled claim. The Eleventh Circuit has repeatedly and emphatically insisted that such an unpled claim cannot be asserted to defeat the summary judgment motion unless the plaintiff first successfully moves to amend its complaint. The key Eleventh Circuit precedent imposing that requirement is *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312 (11th Cir. 2004), which has been applied scores of times

in that circuit, including by every member of the panel in the instant case and by the district judge.[4]

Under *Gilmour*, "[a]t the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment." 382 F.3d at 1315.[5] In the Eleventh Circuit, for plaintiffs, a formal motion to amend is "the proper procedure" for seeking to raise an unpled claim, but for defendants such a formal amendment to add an unpled affirmative defense is a pointless "hypertechnicality." "[A]rgument in a brief"—sternly disapproved when such an argument is used to raise an unpled claim—is precisely how a defendant raises an unpled affirmative defense in support of a motion for summary judgment. And that is exactly what the defendant—with the Eleventh Circuit's approval—did in the instant case.

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4. *James v. Marriott Vacations Worldwide Corp.*, 2024 WL 1954158, at *1 n.1 (11th Cir. May 3, 2024) (opinion joined by Luck, J .); *Continental 332 Fund, LLC v. Albertelli*, 2021 WL 3184586, at *3 (11th Cir July 28, 2021) (opinion joined by Branch, J. and Lagoa, J.); *Moore v. McBryar*, 2025 WL 4057449, at *9 n.10 (N.D. Ga. Aug. 28, 2025) (opinion by Ray, J.).

5. If a plaintiff could raise an unpled claim by including it in the plaintiff's brief, the Eleventh Circuit objects, the plaintiff could add that claim "unilaterally," without the judicial approval required for a motion to amend under Rule 15(a)(2). MSP *Recovery Claims, Series LLC v. United Automobile Insurance Company*, 60 F.4th 1314, 1320 (11th Cir. 2023). But that is exactly what the Eleventh Circuit permits a defendant to do by moving for summary judgment on the basis of an unpled affirmative defense.

A plaintiff seeking to raise an unpled claim cannot invoke the traditional liberal pleading standard. *Gilmour* holds that "[e]fficiency and judicial economy require that the liberal pleading standards under *Swierkiewicz* [*v. Sorema N.A.*, 534 U.S. 506 (2002)] and Rule 8(a) are inapplicable after discovery has commenced." 382 F.3d at 1314. It is difficult to understand how considerations of "efficiency and judicial economy" would yield a different result under Rule 8(b) or Rule 8(c) (regarding affirmative defenses) than under Rule 8(a) (regarding claims). A more recent Eleventh Circuit decision omits this limiting reference to Rule 8(a) and *Swierkiewicz*, insisting more broadly (in language that would apply to an unpled affirmative defense) that "[e]fficiency and judicial economy required that the liberal pleading standards... are inapplicable after discovery has commenced." *Plair v. Interactive Communications International, Inc.*, 2024 WL 1480406, at *4 (11th Cir. April 5, 2024) (ellipsis in original). Yet when defendants seek to assert an unpled affirmative defense, invariably doing so after discovery has commenced, the Eleventh Circuit regularly invokes that very liberal pleading standard, as it did in the instant case. Pet. App. 9a; *see supra* p.19.

Because in the Eleventh Circuit a plaintiff seeking to raise an unpled claim can only do so by amending its complaint, a plaintiff who—as directed by *Gilmour*—seeks to raise such a claim after the scheduling order deadline for amendments must meet the stringent "good cause" standard in Rule 16(b)(4).[6] But, as the Eleventh

6. *E.g., Volkmann v. New Fitzco, LLC*, 2021 WL 2582826, at * 13 n.34 (N.D. Ga. April 30, 2021); *Porto Venezia Condominium Association, Inc. v. W B Fort Lauderdale, LLC*, 2012 WL

Circuit explained in this case, a defendant seeking to raise an unpled affirmative defense after a scheduling order deadline need not meet that "good cause" standard, because the defendant does not have to move to amend at all. Pet. App.13a n.8.

That double standard could play out within a single case. Suppose, for example, that after the initial pleadings, but before any significant discovery had occurred, the defendant sent an email to plaintiff announcing its intent to eventually assert the affirmative defense of fraud, and the plaintiff sent the defendant an email announcing its intent to eventually raise a claim of fraud. If neither party ever filed a motion to amend, the defendant under the Eleventh Circuit precedent in *Hassan* could assert the unpled affirmative defense, but the plaintiff under Eleventh Circuit precedent in *Gilmour* could not assert the unpled claim. In the instant case, had Younge wished to assert an unpled claim in response to the summary judgment motion, such as raising a federal or state anti-discrimination prohibition not subject to the personal-staff exception, she would had to successfully move to amend her pleading, a task made difficult (for plaintiff, but not defendant) by the fact that the summary judgment motion itself was filed long after the expiration of the scheduling order deadline for amendments.

Plaintiffs and defendants who wish to assert unpled matters in the Eleventh Circuit are thus subject to fundamentally different standards and procedures. Plaintiffs must satisfy the requirements of Rules 15 and 16,

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12840923, at *3 n.2 (S.D. Fla. Oct 22, 2012); *In re Mirant Securities Litigation*, 2008 WL 11334395, at *10 n.17 (N.D. Ga. Aug. 5, 2008).

and must obtain judicial approval before raising an unpled claim; defendants can often ignore the requirements in those rules, and proceed directly to file a motion invoking an unpled affirmative defense. That disparity is all the more indefensible because defendants filing the summary judgment motions based on unpled affirmative defenses are typically represented by skilled counsel, who are quite familiar with the provisions of the Federal Rules of Civil Procedure, and who could understand and follow a requirement that they amend their answer before invoking an unpled affirmative defense. On the other hand, many of the plaintiffs whose attempts to raise unpled claims are rejected under *Gilmour* are pro se litigants, who have never heard of Rules 15 or 16, and who almost certainly would be unaware of *Gilmour*'s demand that they seek to amend their complaints before asserting unpled claims.

The Tenth Circuit, taking a far preferable approach, addresses these recurring situations in a manner that conforms to the literal requirements of the Federal Rules while avoiding the double standard of the Eleventh Circuit. The Tenth Circuit, which treats a summary judgment motion based on an unpled affirmative defenses as a motion to amend the answer to add that defense, similarly treats a brief in opposition to summary judgment which raises an unpled claim as a motion to amend the complaint to add that claim *E.g.*, *Rowley v. Morant,* 631 Fed.Appx. 651 (10th Cir. 2015) (opinion joined by Gorsuch, J.) ("Rowley first mentioned his *Miranda* claim in his response to Defendants' summary-judgment motion. The district court properly treated this new allegation as a request to amend the complaint.").[7]

7. *See Adams v. C3 Pipeline Construction Inc.*, 30 F.4th 943, 970 (10th Cir. 2021) (quoting *Martinez*); *Martinez v. Potter*, 347

III. SUMMARY JUDGMENT MOTIONS BASED ON UNPLED AFFIRMATIVE DEFENSES PERMIT CIRCUMVENTION OF THE REQUIREMENTS OF RULES 15(a)(2) AND 16(b)(4)

What standard a defendant must meet to assert an as-yet unpled affirmative defense (and thus frequently whether it can do so at all) turns on whether the defendant has to move to amend its answer, or can merely file a

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F.3d 1208, 1211 (10th Cir. 2003) ("our cases interpret the inclusion of new allegations in a response to a motion for summary judgment, as a potential request to amend the complaint"); *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 790 n.9 (10th Cir. 1998) ("[i] ssues raised for the first time in a plaintiff's response to a motion for summary judgment may be considered a request to amend the complaint pursuant to Fed. R. Civ. P. 15."); *id.* at 797 n.26; *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090-91 (10th Cir. 1991) ("As a general rule, a plaintiff should not be prevented from pursuing a valid claim just because she did not set forth in the complaint a theory on which she could recover, 'provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits.' 5 C. Wright & A. Miller, Federal Practice & Procedure § 1219 at 194 (1990).... The purpose of 'fact pleading,' as provided by Fed. R. Civ. P. 8(a)(2), is to give the defendant fair notice of the claims against him without requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is filed and the parties have opportunity for discovery"); *cf. Schmees v. HC1.Com, Inc.*, 77 F.4th 483, 489 (7th Cir. 2023) ("We hold that district courts retain discretion to interpret new factual allegations or claims presented in a plaintiff's briefs as a constructive motion to amend"); *Hanson v. Hoffman*, 628 F.2d 42, 53 n.11 (D.C. Cir. 1980) ("A court may deny a motion to dismiss or for summary judgment...on the basis of a legal theory never embraced by the plaintiff, as long as that theory is supported by the facts alleged and as long as the defendant is not prejudiced on the merits.").

summary judgment motion based on that affirmative defense. If a defendant is required to amend its answer, the defendant must satisfy the standard in Rule 15(a)(2)—and in some cases the standard in Rule 16(b)(4)—for obtaining judicial approval for such an amendment. But if a defendant can instead proceed by filing a motion for summary judgment based on an unpled affirmative defense, it will only need to satisfy (some variant of) the far less demanding Eleventh Circuit standard regarding motions based on unpled affirmative defenses.

This question of which standard should be applied is at the heart of the dispute in this case. In the courts below, plaintiff objected that the defendant was not being held to the standard set in the Federal Rules, pointing out in particular that the defendant was not being required to meet the standard in Rule 16(b)(4).[8] Defendant argued that it should not be required to meet the standards in the Federal Rules, objecting that "Younge demands that the precedent [in *Hassan*] be ignored and the rule for amendments of pleadings be substituted in its place." Response Brief of Appellee, 13. The district court rejected plaintiff's contention that the defendant should be required to meet the "good cause" standard in Rule 16(b)(4), holding instead that "the 'prejudice' standard [in *Hassan*] is the correct one to apply." Pet. App. 48a.

Similarly, the court of appeals held that whether the defendant could raise the affirmative defense at issue was governed by the prejudice standard in *Hassan* and a similar decision in *Grant v. Preferred Research, Inc.*, 885 F.2d 795 (11th Cir. 1989), not by the more demanding

8. *See* Pet. App. 13a-14a n.8, 45a-47a.

standard in the Federal Rules. In pivotal footnote 8 of its opinion, the court of appeals explained and invoked the difference between those standards.

> In opposition to this conclusion, Younge cites Federal Rules of Civil Procedure 15 and 16 and a separate line of our cases applying a good-cause standard to late motions to amend pleadings, and she argues that the good-cause and prejudice standards conflict in this case. We find no such conflict: *we simply treat unpleaded affirmative defenses differently* from late motions to amend pleadings. The former requires a showing of no prejudice, while the latter requires a showing of good cause. *Compare, e.g., Grant*, 885 F.2d at 797-98 ("When there is no prejudice, the trial court does not err by hearing evidence on [an unpleaded affirmative defense]."), *with, e.g., Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418-19 (11th Cir. 1998) ("[B]ecause Sosa's motion to amend was filed after the scheduling order's deadline, she must first demonstrate good cause under Rule 16(b) before we will consider whether amendment is proper under Rule 15(a).").

Pet. App. 13 n.8 (emphasis added).

The court of appeals made clear that a defendant wishing to raise an unpled affirmative defense can choose between two tactics; it can move to amend its answer under the standards in the Federal Rules, or it can skip that potentially risky step and simply move for summary judgment.

> Each of the cases Younge cites in which we applied the good-cause standard were late-amendment cases governed by Rules 15 and 16, not unpleaded-affirmative-defense cases. In other words, in each of the cited cases, a party affirmatively moved to amend a pleading *instead of*—as the DA's Office did here—raising an affirmative defense without amendment.... As discussed, under the [*Hassan*] rule that squarely governs this case, Younge suffered no prejudice.

Pet. App. 13a-14a n.8 (emphasis added). In the instant case, the defendant understandably opted to move for summary judgment, thus avoiding the need to satisfy the more demanding standards under Rules 15 and 16.

There is no question that the Eleventh Circuit's standard for summary judgment motions raising an unpled affirmative defense is different from and far less demanding than the standards in Rule 15 and 16. That is why defendants often opt to move for summary judgment rather than seek to amend their answers, and why the circuit conflict at issue here has arisen and matters. The version of that Eleventh Circuit standard applied by the district court in this case—whether permitting the defendant to raise an unpled affirmative defense would prejudice the plaintiff (Pet. App. 9a-11a)—is among the most common, and it illustrates the difference between such standards and the requirements of Rules 15(a)(2) and 16(b)(4).

(2) In resolving a motion to amend under Rule 15(a)(2), a court must consider multiple factors including

"undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (U.S. 1962). In *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010), the Court specifically pointed out that "a court may consider a movant's 'undue delay' or 'dilatory motive' in deciding whether to grant leave to amend under Rule 15(a)." 560 U.S. at 553. But in the Eleventh Circuit, the showing needed for summary judgment motion based on an unpled affirmative defense is far more limited and less demanding, often (as in the instant case) only a showing of a lack of prejudice. Undue delay alone could lead to the denial of a motion to amend under Rule 15(a)(2), but not (absent a showing of prejudice) under the Eleventh Circuit standard to a refusal to consider the unpled affirmative defense.

The District of Columbia Circuit in *Harris* recognized the difference between these standards. "Automatically permitting late raising of affirmative defenses where no prejudice has occurred reduces the multifarious reasons for denying leave to amend envisioned by the Court in *Foman* to the single, non-exhaustive factor of prejudice." *Harris*, 126 F.3d at 345. The Tenth Circuit similarly pointed out that under Rule 15(a)(2) "absence of prejudice to the opposing party is not the only proper consideration in determining whether to permit an amended answer;[but] a motion to amend may also be denied on ground such as 'undue delay, bad, faith or dilatory motive..., or repeated failure to cure deficiencies by amendments previously allowed." *Ahmad*, 435 F.3d at 1201-02 (quoting *Harris*, 126 F.3d at 345 (quoting *Foman*, 371 U.S. at 182)).

That manifest difference between the Rule 15(a) standard and the Eleventh Circuit prejudice standard clearly matters in practice. The Tenth Circuit treats summary judgment motions based on unpled affirmative defenses as motions to amend to add that defense; motions thus construed are subject to Rule 15 standards and can be denied for undue delay.[9] In the Eleventh Circuit, on the other hand, such delay by itself is insufficient; the plaintiff must go further and show the delay resulted in prejudice.

The difference between the Rule 15(a)(2) standard and the Eleventh Circuit standard is particularly great because the court of appeals' requirement of a lack of prejudice will often be toothless. Many types of affirmative defenses are unlikely to involve disputes of fact,[10] and discovery will be largely if not entirely irrelevant. In the absence of such disputes, a defendant's failure to plead the affirmative defense is unlikely to give rise to a plausible claim of a prejudicial lack of discovery. Prejudice is also inherently unlikely when the relevant facts are both undisputed and within the personal knowledge of the plaintiff.

(3) The difference between the Eleventh Circuit prejudice standard and the standard in Rule 16(b)(4) is

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9. *Hart v. Oklahoma Dept. of Transportation*, 2023 WL 2905580, at *6-*7 (W.D. Okl. March 28, 2023) ("[D]enial of leave to amend is appropriate 'when the party filing the motion has no adequate explanation for the delay.'... ODOT has not articulated any reason for waiting until this stage of the litigation to present its preclusion defense.") (quoting *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1206 (10th Cir. 2006)).

10. *E.g.*, statute of frauds, statute of limitations, res judicata, and arbitration and award.

obvious. Under that rule, a scheduling order can only be modified "for good cause." That standard requires the moving party to establish that it was unable to meet the scheduling order deadline despite diligent effort. The courts of appeals are in agreement that a showing of diligence is necessary to establish good cause under Rule 16(b)(4).[11]

The Second Circuit endorsed that diligence standard in *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 340 (2d Cir. 2000) (opinion by Sotomayor, J.). Then Judge Jackson applied a diligence standard in *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 29 F.R.D. 142, 144 (D. D.C. 2013), and in *Whiteru v. Washington Metropolitan Area Transit Authority*, 2018 WL 6605427, at *4 (D. D.C., Dec. 17, 2018).

(4) As the Tenth Circuit has correctly observed, special treatment of summary judgment motions based on unpled affirmative defenses permits a defendant to

11. *Miceli v. JetBlue Airways Corp.*, 914 F.3d 73, 86 (1st Cir. 2019) ("In the decisional calculus, the moving party's diligence or lack of diligence serves as the "dominant criterion.") (quoting *O'Connell v. Hyatt Hotels of P.R.*, 357 F.3d 152, 155 (1st Cir. 2004)); *Callahan v. County of Suffolk*, 96 F.4th 362, 370 (2d Cir. 2024) ("Whether good cause exists turns on the 'diligence of the moving party.'") (quoting *Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009) (quoting *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003))); *Sosa v. Airprint Systems Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) ("the Court's good cause inquiry must focus on defendant's reason for the delay, not the anticipated results of granting the motion.... Here, defendant has not shown that it acted diligently; thus, the Court's inquiry must end, regardless of whether the amendment will assist the factfinder or result in prejudice to the plaintiff").

avoid compliance with requirements of the Federal Rules regarding amendments to pleadings. "[C]ourts should not permit a party to circumvent these...restrictions on amendments simply by filing a dispositive motion rather than a motion to amend...." *Ahmad v. Furlong*, 435 F.3d 1196, 1201-02 (10th Cir. 2006). This Court has repeatedly refused to interpret a statute in a manner that would permit circumvention of its express provisions.[12] The Court should decline to embrace a practice, not rooted in any language of the Federal Rules themselves, that invites such circumvention of the standards and procedures in Rules 15(a)(2) and 16(b)(4). "[T]he language of [the Rules] does not require such a crippling interpretation...." *U.S. v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 118 (1978).

Permitting the use of a summary judgment motion to circumvent the Rule 15(a) standards is particularly inappropriate in light of the broad language of that rule. Rule 15(a)(1) permits amendment as a matter of course under limited circumstances. Under Rule 15(a)(2), "[i]n *all* other cases, a party may amend its pleading *only* with the opposing party's written consent or the court's leave." (Emphasis added). By instead filing a summary judgment motion based on an unpled affirmative defense (an "other case[]"), a defendant can achieve the practical effect of an amendment without the need to meet the Rule 15(a)(2) standard or to obtain the opposing party's written consent or the court's leave.

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12. *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166, 189 (2023); *U.S. v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011); *Schweiker v. Gray Panthers*, 453 U.S. 34, 49 n.20 (1981); *U.S. v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 118 (1978); *U.S. v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *U.S. v. Hoy*, 330 U.S. 724, 734 (1947).

The difference between the Eleventh Circuit standard and the standards under Rules 15(a)(2) and 16(b)(4) is strikingly illustrated by a series of cases in which the district court applying those rules first rejected a motion to amend to add an unpled affirmative defense, and then—applying the Eleventh Circuit precedent at issue here—permitted the defendant to assert that very rejected affirmative defense simply by filing a motion for summary judgment.[13] It is difficult to imagine a more

13. *Compare Pierce v. National Specialty Insurance Co.*, 2023 WL 11054067, at *2 (M.D. Fla. Nov. 21, 2023) ("Defendant has not explained why it did not move to amend...before the close of the deadline to amend. Defendant has failed to make any showing of diligence in its attempts to meet the deadline to amend.") *with* 2024 WL 3224726, at *1-*2 (M.D. Fla. June 12, 2024) (granting summary judgment on basis of the unpled affirmative defense) and 2025 WL 985350, at*2 (11th Cir. 2025) ("The magistrate judge's order denying the motion to amend NSIC's affirmative defenses was decided under Federal Rule of Civil Procedure 16(b)(4).... However, the district court's allowance of the affirmative defense was pursuant to our caselaw interpreting Federal Rule of Civil Procedure 8(c), which supports a liberal approach to waiver where the failure to raise an affirmative defense has not prejudiced the plaintiff.").

Pinares v. United Technologies Corp., 2018 WL 10502427, at *2-*3 (S.D. Fla. Dec. 6, 2018) (denying motion to amend because "[d]efendant has not met the Rule 16(b) good cause standard," but nonetheless permitting the defendant to raise that affirmative defense under Eleventh Circuit decisions applying *Hassan*); *Nolasco v. AKS Cartage Corp.*, 2018 WL 2322599, at *1 and *6-*7 (S.D. Fla. May 22, 2018) (denying motion to amend because the defendant's failure to comply with Rule 16 scheduling order "is not excusable," but nonetheless permitting the defendant under *Hassan* to raise that affirmative defense through a motion for summary judgment); *Sanders v. M & M Waste, Inc.*, 2010 WL 1143249, at *1 and *3 (N.D. Ga. Sept. 27, 2010) (denying motion

transparent—and indefensible--method of circumventing the requirements of the Federal Rules.

IV. SUMMARY JUDGMENT MOTIONS BASED ON UNPLED AFFIRMATIVE DEFENSES RESULT IN SKEWED BRIEFING

By permitting a defendant to base a summary judgment motion on an unpled affirmative defense, the Eleventh Circuit not only enables circumvention of the standards in the Federal Rules, it also fundamentally alters the procedure followed in resolving disputes about whether an unpled affirmative defense can be raised at all.

When a defendant seeking to assert an unpled affirmative defense does so by filing a motion to amend under Rule 15(a)(2), the briefing proceeds in the traditional manner. Because whether the defendant can satisfy the Rule 15(a)(2) standard is the question at issue, the defendant's opening brief invariably sets out its arguments that the standard is satisfied, pointing to relevant portions of the record and procedural history, and citing cases supportive of its position. In framing its opposition brief, the plaintiff is thus in a position to respond to the various factual and legal arguments in the defendant's opening brief, as well as to advance other contentions in opposition to the motion. The defendant's reply brief would respond to the arguments in the plaintiff's opposition brief, but usually would not—and should not—advance new arguments.

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to amend under Rule 16 because there is "no explanation of [the defendant's] failure to meet the scheduling order," but nonetheless permitting the defendant under *Hassan* to raise that affirmative defense through a motion for summary judgment).

But by holding that a defendant can raise an unpled affirmative defense by means of a summary judgment motion, the Eleventh Circuit not only alters the controlling standard (from the Rule 15(a)(2) and Rule 16(b)(4) to that Eleventh Circuit standard), but also converts the controlling standard from the basis of the motion (for leave to amend), to a basis of the plaintiff's opposition to summary judgment, the ground that, in that circuit's terminology, the affirmative defense has been waived. As a consequence, when a defendant seeks summary judgment based on an unpled affirmative defense, the briefing is in a critical respect different from the briefing of a motion to amend. The defendant in its opening brief typically addresses only whether on the merits it is entitled to summary judgment based on that affirmative defense, ignoring the threshold question of whether the case satisfies the Eleventh Circuit standard for asserting an unpled affirmative defense in this manner at all. The plaintiff's opposition brief does address that underlying question, arguing that the standard is not met; but the plaintiff must advance its arguments without knowing what contentions regarding that issue defense counsel will advance. Not until its reply brief does the defendant for the first time set out arguments (e.g., that there was no prejudice, or no surprise) that it can satisfy that Eleventh Circuit standard.

That is precisely what occurred here. In its opening brief in support of summary judgment, defendant said nothing at all about whether it met the Eleventh Circuit standard for when an unpled affirmative defense can be asserted in a summary judgment motion. Rather, defendant in that opening brief argued only that it had shown that Younge was a personal assistant covered

by the statutory exception. Defendant's Motion for Summary Judgment, 4-15. Plaintiff's brief in response to the summary judgment motion was the first to address whether defendant could assert the affirmative defense at all. Not until its reply brief did the defendant set out arguments that it met the Eleventh Circuit standard. Defendant's Reply to Plaintiff's Response in Opposition to The Motion For Summary Judgment, 2-8. That reply brief pointed to numerous portions of the record to which the opening brief had not referred, and cited Eleventh Circuit cases the opening brief had not mentioned. The district judge understandably treated the issue of whether the defendant could assert the unpled affirmative defense at all as the critical threshold issue. Pet. App. 45a-51a. The magistrate judge relied on portions of the record and cases cited in that reply brief.[14]

The manner in which the Eleventh Circuit standard is thus implemented creates a situation which the federal courts have long condemned, one in which summary judgment is sought and granted on the basis of arguments only made in a reply brief. In this situation a defendant's reply brief contentions regarding satisfaction of the Eleventh Circuit standard are not merely a new argument; they are the *only* arguments the defendant advances on that issue.

But "it is improper to raise new arguments in a reply brief because the opposing party is deprived of an opportunity to respond." *Eruchalu v. U.S. Bank,*

14. Compare Defendant's Reply to Plaintiff's Response in Opposition to The Motion For Summary Judgment, 2-8. with Pet. App. 73a-80a.

National Association, 2014 WL 12776845, at *2 (D. Neb. Sept. 30, 2014). "[W]hen a party raises new arguments... for the first time in a reply brief, the district court must either give the other party an opportunity to respond or decline to rely on the new arguments...." *Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corp.*, 99 F.4th 770, 774 (5th Cir. 2024). "[D]istrict courts must 'allow the nonmoving party to respond' when 'the moving party submits in a reply brief new reasons and evidence in support of its motion for summary judgment.'" *Atlantic Specialty Insurance Company v. Digit Dirt Worx, Inc.*, 793 Fed.Appx. 896, 901-02 (11th Cir. 2019) (quoting *Seay v. Tennessee Valley Authority*, 339 F.3d 454, 481-82 (6th Cir. 2003)). "There is cause for concern where a movant presents new arguments...for the first time in a summary judgment reply brief, particularly if the District Court intends to rely upon that new information in granting summary judgment to the movant." *Alston v. Forsyth,* 379 Fed.Appx. 126, 129 (3d Cir. 2010). Some district court local rules seek to address this problem by specifically prohibiting moving parties from raising new arguments in a reply brief. *See McGhee v. Pottawattamie County*, 5114 F.3d 739, 745 (8th Cir. 2008).

A district court decision granting summary judgment based on arguments first raised in a reply brief would be inconsistent with Rule 56(f)(2). A court can only grant summary judgment "on grounds not raised by a party" "[a]fter giving notice and a reasonable time to respond." "Grounds not raised by a party" necessarily refers to grounds advanced in the summary judgment motion itself, or in an accompanying opening brief; a new ground first raised in a reply brief would by its very nature be one regarding which the opposing party lacked notice and

time to respond. Rule 7(b)(1)(B) requires that any motion must "state with particularity the grounds for seeking the order." That requirement would not be satisfied if neither the motion for summary judgment nor the accompanying brief advanced any grounds at all for concluding that the Eleventh Circuit standard had been met.

Arguments not made until a reply brief put the non-moving party in an untenable position. At the time when the non-moving party files its only brief, it is has little or no idea what arguments the moving party will be later making, and thus no opportunity to address those arguments in the district court. Where a defendant seeks summary judgment based on an unpled affirmative defense, but does not address in its opening brief how doing so might meet the Eleventh Circuit standard, the plaintiff can only guess what position the defendant is later going to take. Perhaps it will deny the defense was an affirmative defense at all. Or assert that the affirmative defense was impliedly pled in some non-specific answer language? Or argue that there was no prejudice, or no surprise, or that the plaintiff somehow had notice that the defense was going to be raised? And the moving party is in a position to advance in its reply brief arguments to which the non-moving party cannot respond, at least in the district court.

A district court decision resting on new arguments made in a reply brief creates for the appellate courts a situation that they consistently try to avoid. The courts of appeals repeatedly decline to consider arguments not made in the court below, reasoning that the district judge should have an opportunity to consider all contentions in the first instance. Requiring that arguments be made

below also assures that the appellate court will have the benefit of the district judge's assessment of those arguments. But when a moving party's contention is first raised in a district court reply brief, the opposing party has no right and usually often no real opportunity to offer an argument in response. Appellate courts do not, of course, fault a non-moving party for having failed in the district court to respond to new arguments only made in a reply brief. But that means that the first time any court will hear the non-moving party's response to those reply-brief arguments will be in the court of appeals.

The problem created by the procedure inherent in the Eleventh Circuit practice has no ready solution. When a moving party raises a new argument in its reply brief, the most common judicial response is simply to refuse to consider that argument. But if district courts did that, it would be fatal to all summary judgment motions in which the moving party's only argument that it satisfied the Eleventh Circuit standard was in a reply brief (and thus by definition new). The lower courts sometimes address the problem of new arguments in a reply brief by striking those portions of the reply brief; but doing so in this situation would leave unrebutted the plaintiff's objections to consideration of the unpled affirmative defense.

It would make little sense to insist that a plaintiff faced with arguments first raised in a reply brief must attempt to file a sur-reply. That would place on the plaintiff responsibility for fixing an inherently unsound judicial procedure. The effect of such insistence would be unpredictable, and likely to vary from court to court. Sur-reply briefs are strongly disfavored in many circuits, and often are not provided for in the local rules. At best this

would substitute, for a plaintiff's ability as of right under Rules 15 and 16 to respond to a defendant's arguments for leave to amend, the mere possibility that a district judge will exercise his or her discretion to permit such a sur-reply regarding a motion for summary judgment.

A structural solution to the procedural problem inherent in permitting summary judgment based on unpled affirmative defenses would be to require the moving party to simultaneously submit with such a summary judgment motion a second motion, and accompanying brief, asserting that it satisfies the Eleventh Circuit standard for raising an unpled affirmative defense. In responding to such an additional motion, the plaintiff would have notice of the defendant's contentions, and thus an opportunity to respond to them. But the courts should not undertake to create such a process when the underlying standard that would be applied is itself inconsistent with Rules 15 and 16.

V. COURTS WHICH PERMIT SUMMARY JUDGMENT MOTIONS BASED ON UNPLED AFFIRMATIVE DEFENSES DO NOT AGREE ON WHEN SUCH MOTIONS ARE PERMISSIBLE

Although the Eleventh Circuit has long held that defendants can base a summary judgment motion on an unpled affirmative defense, decisions in that circuit set out varying standards regarding when such summary judgment motions are permissible. Decisions in other circuits permitting such motions diverge from the Eleventh Circuit standards. These appellate decisions differ regarding how many prerequisites must be satisfied to assert an unpled affirmative defense, regarding what the prerequisite (or prerequisites) is (or are), and

regarding what role a prerequisite plays in the decision whether to permit consideration of the defense at issue.

(1) Decisions permitting a defendant to assert an unpled affirmative defense differ regarding whether there are two prerequisites or only one. The Eleventh Circuit holds there is only a single prerequisite, such as a showing of no prejudice. But the First, Sixth and Seventh Circuit standards have two prerequisites.

The First Circuit permits a defendant to assert an unpled defense, but only if two requirements are met. "[A]n an affirmative defense...is deemed waived unless raised in the answer.... There are certain exceptions to the Rule 8(c) bar which might be invoked, inter alia, ...where...the defendant asserts it without *undue delay* and the plaintiff is not unfairly prejudiced by any delay...." *Davignon v. Clemmey*, 322 F.3d 1, 15 (1st Cir. 2003) (emphasis added); *see Lawless v. Town of Freetown*, 63 F.4th 61, 65 (1st Cir. 2023) (quoting *Davignon*, 322 F.3d at 15); *O'Brien v. Town of Bellingham*, 943 F.3d 514, 518 (1st Cir. 2019) (same).

The Sixth Circuit generally permits a judge to consider an affirmative defense raised for the first time in a summary judgment motion if there is no resulting surprise or prejudice. *Rogers v. I.R.S.*, 822 F.3d 854, 856-57 (6th Cir. 2016). But rejection of such a summary judgment motion is also warranted, "even without a showing of prejudice, [if the district court] finds that a defendant has failed to show 'that it made a *good faith effort* to comply with the standard procedure for raising affirmative defenses...."' *Henricks v. Pickaway Correctional Institute*, 782 F.3d 744, 750-51 (6th Cir. 2015) (emphasis added) (*quoting U.S. Fire Ins. Co. v. City of Warren*, 87 Fed.Appx. 485, 491 (6th Cir. 2003)).

The Seventh Circuit holds that courts may and should reject a summary judgment motion which is based on an unpled affirmative defense when the motion and defense were only raised after unexcused delay. "[I]f Rule 8(c) is not to become a nullity, we must not countenance attempts to invoke [affirmative] defenses at the eleventh hour, *without excuse* and without adequate notice to the plaintiff." *Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997) (emphasis added). Where a defendant's failure to raise an affirmative defense is unexcused, district courts in the Seventh Circuit have repeatedly rejected attempts to assert an unpled affirmative defense, without requiring an additional showing of prejudice.[15]

The First Circuit's "without delay" requirement, the Sixth Circuit's "good faith effort" requirement, and the Seventh Circuit's "[delay] without excuse" requirement are related but not the same. All of these two-part requirements differ from the standard in the Eleventh Circuit, which imposes only a single requirement.

(2) The Eleventh Circuit and other courts of appeals which impose only a single prerequisite offer varying articulations of what the requirement is; differing

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15. *Bancorp Bank v. Metropolitan Diagnostic Imaging, Inc.*, 2023 WL 180082, at *10 (N.D. Ill. Feb. 7, 2023); *Lyon Financial Services, Inc. v. Illinois Paper and Copier Company*, 2016 WL 147654, at *18 (N.D. Ill. Jan 13, 2016); *Phipps v. Sheriff of Cook County*, 681 F.Supp.2d 899, 906 (N.D. Ill. 2009); *Canadian Pacific Railway Co. v. Williams-Hayward Protective Castings, Inc.*, 2005 WL 782698, at *17 (N.D. Ill. April 6, 2005); *Sterling v. Riddle*, 2000 WL 198440, at *4 (N.D. Ill. Feb. 11, 2000); *see Illinois Extension Pipeline Company, L.L.C. v. Summann*, 2016 WL 630022, at *4 (S.D. Ill. Feb. 17, 2016).

standards can often be found in the same circuit, sometimes in the same opinion.

The requirement most often applied by the Eleventh Circuit is a showing that the plaintiff was not prejudiced by the defendant's failure to amend its answer. App. 9a ("A district court may consider a defendant's unpleaded affirmative defense at summary judgment if there is no prejudice to the plaintiff") (bold omitted); *Tenor Capital Partners, LLC v. Gunbroker.com, LLC*, 2026 WL 972981, at *6 (11th Cir. 2026); *First National Bank of Oneida, N.A. v. Brandt*, 851 Fed.Appx. 904, 907 (11th Cir. 2021); *Grant v. Preferred Rsch., Inc.*, 885 F.2d 795, 797 (11th Cir. 1989); *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988)). That was the standard proposed by defendant in the court of appeals. Response Brief of Appellee, 11-12. Some cases applying this requirement hold that a need for additional discovery created by consideration of an unpled defense would constitute prejudice.[16] Other cases hold that a need for more discovery would not constitute prejudice, because the court could simply reopen discovery or extend the time for it.[17] Yet another case concludes that reopening discovery to "cure" the prejudice would be improper.[18]

Another line of decisions holds that an unpled defense can be asserted if the plaintiff had notice. That was the

16. *E.g., Jackson v. Jackson*, 2023 WL 8351611, at *3 (N.D. Ga. Oct 24, 2023).

17. *E.g., Canon, Inc. v. Color Imaging, Inc.*, 2014 WL 12802902, at *2 (N.D. Ga. April 9, 2014).

18. *Sadowski v. Red Hills Journalism Foundation, Inc.*, 2024 WL 3551932, at *4 (N.D. Fla. June 10, 2024).

standard advanced by the defendant in the district court. "Plaintiff argues that the personal staff exception...was raised too late. This argument lacks merit and has been rejected by the Eleventh Circuit where the party has notice that the issue is being litigated." Defendant's Reply to Plaintiff's Response in Opposition to the Motion for Summary Judgment, 2. It is unclear whether this requirement refers to the plaintiff being "given notice" (*id.* at 4 n.1) i.e., a fairly specific reference to the affirmative defense), or to a plaintiff being "on notice" (*id.* at 3), such as because the defense counsel had asked deposition questions that were related to the unpled affirmative defense.

Notice is not the same as a lack of prejudice. In the instant case, the magistrate judge concluded that there had not been notice (Pet. App. 72a-74a), but nonetheless permitted the summary judgment motion because she found that there had been no been prejudice. Pet. App. 74a-75a. It is difficult to reconcile that outcome with the Eleventh Circuit's explanation that the specific reason an actual amendment is not needed is that any form of notice is sufficient to satisfy the purpose of Rule 8. *See supra*, pp.14-18.

A third line of decisions holds that an unpled affirmative defense can be raised so long as there is no "surprise." *Edwards v. Fulton County, Georgia*, 509 Fed. Appx. 882, 887 (11th Cir. 2013); *Hassan v. U.S. Postal Service*, 842 F.2d at 263; Response Brief of Appellee, 20 (quoting *Hassan*). The standard of surprise might be objective or subjective. A suspicious plaintiff's counsel might figure out the intent behind certain defense deposition questions, and thus not be surprised by the

subsequent assertion of an affirmative defense, whereas a more naïve counsel would not have foreseen what would later occur. Even in the absence any type of notice, a plaintiff might not be surprised; plaintiff's counsel might early on have spotted a potential affirmative defense in a case, and have correctly anticipated that defense counsel would eventually see it as well.

3. There are also differing views regarding the significance of the required factor in the actual determination of whether a defendant can assert an unpled affirmative defense.

Some cases hold that the presence of the required factor, e.g. notice or the absence of prejudice, is sufficient without more to establish that the defendant is entitled to rely on that unpled affirmative defense (that the defense is not "waived"). "We have recognized...that a defendant does not waive an affirmative defense in the earlier omission from responsive pleadings does not prejudice the plaintiff...." *Edwards v. Fulton County, Georgia*, 509 Fed.Appx. 882, 887 (11th Cir. 2013). So if, for example, there was notice, the failure of a district court to consider the unpled affirmative defense would be reversible error. "[B]ecause the record shows that the [plaintiff], in fact, had ample notice of the defense, the district court erred in excluding evidence of [the affirmative defense]." *Proctor v. Flour Enterprises, Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007).

Other decisions hold that the presence of the required factor is always sufficient to permit consideration of the unpled affirmative defense, but leave unclear whether (and if so when) a district court (unlike under *Ewards* and *Proctor*) could nonetheless decline to consider the

unpled affirmative defense. "When there is no prejudice, the trial court does not err by hearing evidence on the issue." *Hassan*, 842 F.2d at 26. "Since *Hassan*, we have repeatedly reaffirmed that a district court *may* receive evidence of an unpleaded affirmative defense if the plaintiff was not 'prejudiced' by the defendant's failure to plead the defense in its answer." Pet. App 10a (emphasis added); *see* Response Brief of Appellee, 11-12, 18 (quoting *Hassan*).

A third line of decisions concludes that if the required factor is present, whether to consider the unpled affirmative defense would be a matter within the discretion of the district judge. "[C]ourts have discretion to excuse waiver when there has been no prejudice due to the omission [to plead the defense]." *First National Bank of Oneida, N.A. v. Brandt*, 851 Fed.Appx. 904, 907 (11th Cir. 2021); *see Tenor Capital Partners, LLC v. Gunbroker.Com LLC,* 2026 WL 972981, at *6 (11th Cir. April 10, 2026). "We review a district court's ruling on waiver of an affirmative defense for abuse of discretion." Pet. App. 11a "The standard of review for a district court's decision to permit an affirmative defense to be raised after the answer is an abuse of discretion." Response Brief of Appellee, 10. But the holding in *Edwards* and *Proctor*, that a district court in the absence of prejudice must consider an unpled affirmative defense, is inconsistent with the decisions in *First National*, *Tenor* and the court of appeals below that the determination of whether the defense was waived is a matter of discretion.

As these divergent lines of cases demonstrate, a decision by this Court permitting defendants to assert unpled affirmative defenses through summary judgment

motions will not bring clarity to this area of the law; rather, it will require the lower courts—subject in time to review by this Court—to resolve each of these subsidiary issues. It would be far preferable for this Court instead to hold that defendants which wish to raise unpled affirmative defenses must proceed under the familiar and well-established standards and procedures of Rules 15 and 16.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be vacated, and the case remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

MATTHEW C. BILLIPS
BENJAMIN A. STARK
BARRETT & FARAHANY
2921 Piedmont Road
Atlanta, GA 30305
(404) 214-0120

Counsel for Petitioner