

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 RESPONDENT FULTON
JUDICIAL CIRCUIT DISTRICT ATTORNEY'S
OFFICE, GEORGIA**

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QUESTION PRESENTED

Whether a district court can consider an unpleaded affirmative defense raised in a summary-judgment motion, where the defendant's delay in raising the defense has caused no prejudice to the plaintiff.

PARTIES TO THE PROCEEDING

Petitioner is Jasmine Younge, who was the plaintiff-appellant in the court of appeals. Respondent is the Fulton Judicial Circuit District Attorney's Office, which was the defendant-appellee in the court of appeals.

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INTRODUCTION

The correct outcome on the merits here is not up for debate. Petitioner Jasmine Younge cannot sue Respondent Fulton Judicial Circuit District Attorney's Office under Title VII because she was personal staff to an elected official. *See* 42 U.S.C. § 2000e(f). The facts are undisputable. The law is uncontested. That should be the end of it.

Younge tries to circumvent this clear resolution by appealing to a “hypertechnical, code-pleading” style of argument. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In her view, the DA's Office could not assert the plain text of Title VII at summary judgment because it supports an affirmative defense, and the DA's Office inadvertently failed to plead that defense in its answer, as required by Federal Rule of Civil Procedure 8(c).

Younge's argument has two fatal problems. For one, the Federal Rules—and this Court—have long since abandoned hypertechnical procedural formalism in favor of “facilitat[ing] a proper decision on the merits.” *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (citation omitted). More importantly, Younge gets the hypertechnical answer *wrong*.

Defendants *can* raise an unpleaded affirmative defense at summary judgment, where there is no prejudice to the plaintiff. Rule 8 requires litigants to plead affirmative defenses, but it “does not specify” the “consequences” of failure to comply. *Dolan v. United States*, 560 U.S. 605, 610 (2010). Younge breezes over this point, but the correct legal outcome is not per se waiver—it is a prejudice analysis, where a court should ask whether the plaintiff could have done

anything materially differently had she been on notice of the defense from the pleading stage.

The text, structure, and history of the Federal Rules confirm as much. Rule 61 declares that errors that do not affect “substantial rights” must be ignored. And while the Federal Rules are replete with express admonitions of *actual* waiver, *see, e.g.*, Rules 12(h), 71.1, they pointedly do not provide that a litigant waives an unpleaded affirmative defense. Indeed, Rule 12 *used to* provide that a defendant waives all unpleaded defenses but no longer does. Structurally, the Rules impose limits on amending pleadings to import new factual issues, *e.g.*, Fed. R. Civ. P. 15, but not on raising legal arguments like the one the DA’s Office raised here. And of course, a prejudice test vindicates the Federal Rules’ historic (and current) focus on “function over form.” *Parrish v. United States*, 605 U.S. 376, 389 (2025). Where Younge could not have litigated her claim materially differently, declining to address the text of Title VII would be the ultimate in elevating form over function.

Separately, a defendant can raise an unpleaded affirmative defense at summary judgment, where there is no prejudice to the plaintiff, because background principles allow courts to address new legal arguments much later in litigation—even as late as appeal. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Rule 8 does not command that courts depart from these background principles. Here, too, a prejudice test is sufficient because it ensures a defendant is actually raising a purely legal argument. After all, a court could only find no prejudice where, among other things, no amount of further “factual development” by the plaintiff would “change the district court’s

answer,” confirming that an argument is “purely legal” in nature. *Dupree v. Younger*, 598 U.S. 729, 737 (2023). There is no reason to reject the usual judicial power to address purely legal arguments, even when raised (slightly) late.

Ultimately, Younge asks this Court to reject a dispositive merits argument based on an immaterial procedural mistake. That gotcha-style argument might have carried the day in the 19th century, when courts were “citadels of technicality.” *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (citation omitted). But the Federal Rules emphatically reject that style of proceeding. Ignoring an indisputable merits defense because of a procedural mistake *that harmed no one* would be legally erroneous and plainly unjust.

This Court should affirm.

STATEMENT OF THE CASE

1. In April 2019, the then-District Attorney for Fulton Judicial Circuit, Paul Howard, an elected official, hired Petitioner Jasmine Younge. Pet.App.3a. Younge became Howard’s Deputy Chief of Staff and Director of Policy and Programs, ranking third-in-command after Howard and his chief of staff. *Id.* at 3a-4a. Younge supervised more than thirty employees across seven departments and oversaw the office’s policy initiatives, projects, and programs, as well as “strategic communications, and responsive constituent services.” *Id.* at 4a, 34a.

As Younge would later explain, Howard “relied extensively on” her as “his ‘go to’ person.” D.Ct. Dkt. 31 ¶12. “[A]ny and every project that had to do with the DA’s office, I was in that meeting.” D.Ct. Dkt. 93

at 35. “Any dignitaries or anybody -- any visitors that came to the office and had meetings with the DA, I was in.” *Id.* As Younge put it, “pretty much the schedule that DA Paul Howard had, was my schedule.” *Id.*

Younge was in constant communication with Howard. “All day every day. . . . Even sometimes he would send me messages on the weekends.” *Id.* at 44. Younge was one of the “small group” of “executive staff” that were “always in and out of his office.” *Id.* at 47-48. Younge was “probably one of the few on staff that was just able to just walk into his office at any time.” *Id.* at 69. Howard was Younge’s “only supervisor,” and he closely monitored her because “voters would judge him” based on her work. Pet.App.4a-5a.

2. In July of that year, Howard fired Younge, who then sued Respondent Fulton Judicial Circuit District Attorney’s Office, asserting a variety of civil rights violations, including pregnancy discrimination under Title VII. Pet.App.5a & n.4.

Title VII does not authorize suits by an elected state official or “personal staff” to that official. 42 U.S.C. § 2000e(f). And in her complaint, Younge alleged that she was “part of Howard’s executive staff.” D.Ct. Dkt. 31 ¶33. Likewise, in its answer, the DA’s Office admitted that Younge was a “member of the District Attorney’s executive and/or personal staff.” D.Ct. Dkt. 53 at 10. But the answer did not plead further details supporting an affirmative defense to that effect. At the time, counsel for the DA’s Office “did not ‘realize’” the personal-staff exemption “‘was an issue.’” Pet.App.2a (brackets omitted).

Counsel for the DA's Office first learned of Title VII's personal-staff exemption when he "began drafting the summary judgment motion." Pet.App.2a, 72a. Soon after, in a hearing on an unrelated discovery issue, the DA's Office notified the district court and Younge of its intent to raise the personal-staff exemption at summary judgment. *Id.* at 42a.

Soon after, the DA's Office moved for summary judgment and argued that Younge was not an "employee" within the meaning of Title VII, because she fell within two of the statutory exemptions: (1) she was a member of Howard's "personal staff," and (2) she was a "policymaking appointee." *Id.* at 70a; *see* 42 U.S.C. § 2000e(f). Younge objected, arguing that both the personal-staff exemption and the policymaking-appointee exemption were affirmative defenses and that it was too late for the DA's Office to raise new affirmative defenses. D.Ct. Dkt. 109 at 4-5.

The magistrate judge held a hearing to determine whether the DA's Office could assert these arguments. D.Ct. Dkt. 143. With respect to the personal-staff exemption, the magistrate judge explained that it "seems like [the exemption] was almost written for this plaintiff." *Id.* at 3. The "facts screamed it," and it was "a slam dunk" that Younge was "a person who the law is designed to exclude from coverage." *Id.* at 3, 7.

The magistrate judge ultimately recommended summary judgment in favor of the DA's Office. Pet.App.109a. Although the magistrate judge concluded that the personal-staff exemption was an affirmative defense, counsel's late raising of the defense did not prejudice Younge in any way. *Id.* at 15-16. Applying the Eleventh Circuit's multi-factor test

for determining personal staff, the record “so overwhelmingly favor[ed] finding that Younge was a member of Howard’s personal staff” that additional discovery would have been insignificant. *Id.* at 15. Undisputed evidence—including Younge’s own consistent testimony—established that Younge “was personally accountable only to Howard”; that she was high up in the “chain of command” and “represented Howard to the public”; that Howard “exercised considerable control” over Younge’s position; and that Howard and Younge had a “close working relationship.” *Id.* at 100a-104a.

Moreover, the magistrate judge found that Younge had been unable to identify any additional, material discovery she would have pursued had the defense been raised earlier. *Id.* at 77a-79a. Younge asserted she would have sought additional discovery on “three topics,” but they comprised “information that should be known” to Younge herself, “a mere fishing expedition,” and facts “insignificant” to the personal-staff inquiry. *Id.*

By contrast, the magistrate judge found that Younge *would* be prejudiced by the late assertion of the policymaking-appointee exemption. Younge had “had no ability to explore the policymaking appointee defense” in discovery. *Id.* at 68a, 80a. Accordingly, the magistrate judge declined to reach the merits of the policymaking-appointee exemption.

On the merits of the personal-staff exemption, the magistrate judge concluded there was no genuine issue of material fact. *Id.* at 105a. The magistrate judge “easily” determined, “largely based on Younge’s own testimony,” that Younge was “a member of

Howard’s personal staff” and thus “precisely the type of individual that Title VII was not designed to cover.” *Id.* at 94a, 100a.

The district court agreed that the personal-staff argument did not prejudice Younge. *Id.* at 50a. And “[a]fter conducting a de novo review . . . , the Court agree[d] with the Magistrate Judge that no genuine dispute of material fact exists as to whether [Younge] was a part of Howard’s ‘personal staff.’” *Id.* at 62a.

Younge appealed to the Eleventh Circuit, which affirmed. The court assumed without deciding that the personal-staff exemption is an affirmative defense, while reaffirming that defendants can raise legal arguments in support of unpleaded affirmative defenses where it does not prejudice the plaintiff. Pet.App.7a-12a. The court next affirmed the district court’s finding of no prejudice because Younge could not identify any additional discovery that would have potentially affected the outcome. *Id.* at 12a-13a & n.7. And the Eleventh Circuit affirmed on the merits as well. There was no genuine issue of material fact with respect to whether Younge was personal staff—indeed, Younge conceded or herself testified to most of the relevant points. *Id.* at 14a-29a.

Younge then sought certiorari in this Court, which granted the petition.

SUMMARY OF ARGUMENT

District courts can consider newly raised affirmative defenses at summary judgment, so long as there is no prejudice to the plaintiff from the delay. If there is one core principle behind the Federal Rules of Civil Procedure, it is that courts “reject the approach that pleading is a game of skill in which one misstep

by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (citation omitted). To reject the correct outcome on the merits in service of empty formalism would be error on its own. But such a holding would be absurd where strictly applying the rules arrives at the same result.

I. First, the Federal Rules themselves direct that a prejudice test, not waiver, is the consequence for failing to include an affirmative defense in the answer. No doubt, Rule 8 requires defendants to include affirmative defenses in their answers, but it does not prescribe the *consequences* for a “violation of that rule.” *State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 580 U.S. 26, 34 (2016). To determine what those consequences should be, the Court “has looked to statutory language, to the relevant context, and to what they reveal about the purposes that” a rule is designed to serve. *Dolan*, 560 U.S. at 609-10. Here, the text, context, and structure are unusually clear: if there is no prejudice to the plaintiff, the court should address the defense.

A. The text of the Federal Rules demonstrates that a prejudice test, not per se waiver, applies. Rule 61 provides the default rule that, at “every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.” A prejudice test ensures that no party’s “substantial rights” are affected by the error. In this context, if the plaintiff could have potentially developed facts that would undermine an affirmative defense, there is prejudice and the court should decline to address the defense. But if the facts are not

only undisputed but *undisputable*, meaning the plaintiff could not have uncovered anything else material in discovery or otherwise litigated the claim with any relevant differences, there is no prejudice. Nothing would have been any different had the defendant included the defense in its answer, so addressing the defense at summary judgment does no harm to anyone’s “substantial rights.”

The rest of the text confirms that per se waiver is not the consequence for failure to comply with Rule 8. Numerous textual provisions in the Federal Rules, like Rules 12(h) and Rule 71.1, expressly provide for waiver; the absence of any parallel language respecting failure to plead an affirmative defense makes clear that a defendant does not waive an affirmative defense by failing to plead it in the answer. Indeed, Rule 12(h) *used to* provide waiver for failure to include an affirmative defense but was specifically modified to limit waiver only to four specified defenses. *Cf.* Fed. R. Civ. P. 12(h) (1963).

B. The structure of the Federal Rules likewise confirms that a prejudice test, rather than per se waiver, applies. The Federal Rules treat factual disputes and legal disputes differently. *Dupree*, 598 U.S. at 736-37. Pleadings (governed by Rule 8) are for identifying and organizing litigation over factual issues. *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014) (per curiam). Amending a pleading is therefore a potentially enormous disruption to the litigation, because it opens up whole new avenues for discovery and trial—hence Rule 15 and Rule 16’s limitations on amendment. Separately, the Federal Rules create a series of points where parties can file motions seeking dismissal or judgment as a matter of

law—including via Rule 12, Rule 56, and Rule 50—distinct from the investigation and trial of factual disputes. And because legal arguments do not impose any meaningful costs on the parties, the Rules do not generally limit when new legal arguments can be raised.

It makes perfect sense of the Rules’ structure, then, that courts apply a prejudice test, not per se waiver, to a late-raised affirmative defense. A prejudice test guarantees that no further “factual development” by the plaintiff could “change the district court’s answer.” *Dupree*, 598 U.S. at 737. So none of the concerns about amended pleadings apply because no one is expanding the universe of triable factual issues.

The Rules’ structure also makes quick work of Younger’s primary argument, that addressing an unpleaded affirmative defense somehow “circumvent[s]” the limits on amendment in Rules 15 and 16. Pet.Br.32. For one, it is simply not true that raising a legal argument by motion “can achieve the practical effect of an amendment.” *Id.* Amending a pleading opens up a *host* of resources that merely raising a legal argument does not, including expanded discovery. Fed. R. Civ. P. 26(b)(1). Moreover, a prejudice test *vindicates* Rules 15 and 16. Precisely because Rules 15 and 16 limit pleading amendments, courts apply a prejudice test to ensure that a new argument can go forward only where the facts are undisputable: if the defendant’s new argument *would* raise or materially expand factual issues, the defendant has to go through Rules 15 and 16. Far from “circumventing” those Rules, a prejudice test ensures that defendants *comply* with Rules 15 and 16

when raising new factual issues that would materially depart from the pleadings.

C. The “historical development” of federal civil procedure confirms that a prejudice test should apply. *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 611 (2019). Repeatedly, federal rule makers both legislative and judicial have moved away from results based on “mere technicalities,” in favor of reaching a decision on the merits. *Parrish*, 605 U.S. at 388 (citation omitted). The Federal Rules borrowed from, e.g., past Rules of Equity to avoid traps for the unwary, not set them.

A prejudice test screens out *every circumstance* where the plaintiff’s rights were impinged upon. So in those circumstances where the plaintiff was not affected by the delay in raising the argument, applying a per se waiver rule would send courts back to the days of deciding cases based on purely technical, immaterial errors. Nothing in the Federal Rules permits, much less requires, such an outcome.

D. This Court’s precedents point the same way. In fact, the cases cited in Younge’s own brief make clear that failure to raise an affirmative defense does not result in per se waiver. Pet.Br.12-13. An inadvertent failure to plead an affirmative defense results (at worst) in correctable forfeiture. *See, e.g., Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012). So where there is no prejudice to the plaintiff, courts should consider the argument.

E. Finally, adopting Younge’s formalistic rule would fly in the face of core tenets of civil procedure. The ordinary assumption is that technical errors *can* be fixed or ignored. There is “little value and significant

harm” in imposing liability on a defendant for no reason other than an immaterial, technical error. *Parrish*, 605 U.S. at 385. This Court has never held otherwise, and it should not start now.

II. Second, as a matter of background principles, courts can almost always address purely legal arguments. Rule 8 does not purport to undermine that general rule. By failing to plead, a litigant loses the right to affirmatively raise new factual material, but *law* remains available. So if an affirmative defense is “purely legal,” in the sense that it can be “resolved without reference to any disputed facts,” *Dupree*, 598 U.S. at 735, courts should still address it at summary judgment. And here, a prejudice determination ensures that a new argument is purely legal.

A. In general, a party can raise new legal arguments at summary judgment and, for that matter, at many further points in litigation. Courts can even address a new legal argument for the first time on appeal. *See Singleton*, 428 U.S. at 121. Although it becomes more difficult to raise new legal arguments as litigation progresses, the general rule is that courts at least have discretion to consider late-raised, purely legal arguments, unlike new factual arguments.

And there is nothing unique about a purely legal argument supporting an “affirmative defense.” *See, e.g., Jones v. Bock*, 549 U.S. 199, 215 (2007). An affirmative defense is a combination of “facts and arguments that, if true, will defeat the plaintiff’s . . . claim.” *Defense*, Black’s Law Dictionary (12th ed. 2024). If the facts are undisputed, all that is left are the legal “arguments.” That is why defendants can, for instance, raise affirmative defenses even in a

motion to dismiss, if the legal argument is available based on allegations on the face of the complaint, *Bock*, 549 U.S. at 215, though of course the defense is unpleaded because the defendant has not even filed an answer yet.

Rule 8 does not purport to displace these ordinary rules. So the sensible holding is that Rule 8 fits within the usual scheme: failure to plead an affirmative defense means that courts will not address new factual issues, but courts can still address new legal arguments.

B. Of course, not every affirmative defense raised for the first time at summary judgment will present a pure question of law, but a prejudice test once again provides the necessary assurance. “Another way” to say an argument is “purely legal” is to say that reaching the new argument “should not prejudice the [opposing] party.” *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of Health & Human Servs.*, 946 F.3d 1100, 1110-11 (9th Cir. 2020). That is because purely legal arguments depend on “law books,” *Dupree*, 598 U.S. at 737, not facts that a plaintiff might have been able to develop if they had the chance.

Using this case as an illustration, the district court allowed the DA’s Office to assert the personal-staff exemption (because it was a legal argument based on undisputable facts) even as it did not allow the DA’s Office to raise the policymaking-appointee exemption (because the facts were not undisputable). Pet.App.80a. With respect to the latter, the court found that Younge could have potentially sought or developed further relevant information in discovery.

Id. But with respect to the personal-staff exemption, the factual issues are beyond dispute: Younge’s own testimony put the question to bed. Pet.App.52a, 94a. The litigation would have been materially identical even if the DA’s Office had pleaded the defense in its answer, so there was no prejudice and the court correctly dispensed with the “mere technicalit[y]” that the DA’s Office should have raised the personal-staff exemption earlier. *Parrish*, 605 U.S. at 388 (citation omitted).

III. Younge’s remaining arguments focus on policy, and they are also wrong. No defendant would seek to sandbag a plaintiff by deliberately sitting on a meritorious affirmative defense. The risk would be enormous, for no conceivable advantage, raising costs for the defendant, risking a finding of bad faith, and all to achieve nothing—a defendant has every incentive to raise meritorious arguments as early as possible to be done with the litigation. Likewise, there is no “double standard” where neither plaintiffs nor defendants can raise new factual issues at summary judgment. Pet.Br.20. Younge’s concern about “skewed briefing,” Pet.Br.34, is also a non-starter; litigants dispute forfeiture and waiver all the time, in ordinary briefing arrangements, including in this Court. Finally, Younge’s declaration that lower courts are confused about the appropriate standard, Pet.Br.40, is both overstated (the circuits generally differ in “nomenclature” rather than “result,” *Glob. Tech. & Trading, Inc. v. Tech Mahindra Ltd.*, 789 F.3d 730, 733 (7th Cir. 2015)), and irrelevant. Once this Court decides, the lower courts will all apply the same standard: defendants can raise unpleaded affirmative

defenses at summary judgment where there is no prejudice due to the delay.

To the extent policy matters, it should be the policy embedded in the Federal Rules: “function over form.” *Parrish*, 605 U.S. at 389. Here, the lower courts found that the DA’s Office made a technical error that affected *nothing*. To subject the DA’s Office to potential liability on the basis of that immaterial procedural mistake would fly in the face of a century of understanding of the Federal Rules. This Court has never held that an immaterial procedural mistake can flip the outcome on the merits, and it should not do so here. The Court should affirm.

ARGUMENT

Failing to raise an affirmative defense in the answer is a mistake, but for two separate reasons, the consequence for that mistake is the application of a prejudice test, not per se waiver. *First*, the Federal Rules themselves direct a prejudice test, not waiver, for this type of error. *Second*, the ordinary background rule is that courts can address purely legal arguments throughout litigation, even if raised late, and a prejudice test ensures that a late-raised argument is in fact a legal argument. Following either path, where there is no prejudice to the plaintiff, courts should address an unpleaded affirmative defense at summary judgment.

I. The Federal Rules establish that a defendant can raise an unpleaded affirmative defense at summary judgment where there is no prejudice to the plaintiff due to the delay.

Rule 8, the lynchpin of Younge’s argument, provides that “a party must affirmatively state any ...

affirmative defense.” Fed. R. Civ. P. 8(c). “Must” means “must,” says Younge, so failure to plead (or amend a pleading to add) an affirmative defense results in waiver under Rule 8. Pet.Br.10-11; *see also id.* (pointing to Rule 8(b) and Rule 12(b) for similar statements). But the conclusion does not follow from the premise. Whether one has violated a rule is a distinct question from what the *consequences* for violating the rule are.

This Court has repeatedly recognized that when a statute says a party *must* or *shall* do something but “does not specify a consequence for noncompliance,” failure to comply does not necessarily result in per se waiver. *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993). To the contrary, that a statute “creates a mandatory rule” “says nothing . . . about the remedy for a violation of that rule.” *State Farm*, 580 U.S. at 34; *United States v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990).

Because Rule 8 does not specify any particular consequence for failure to comply, “the question before [the Court] concerns the consequences” of a violation. *Dolan*, 560 U.S. at 609-10. Courts look to surrounding text, context, and structure to determine what the consequences are. *See id.*; *State Farm*, 580 U.S. at 34. And here, every way of looking at the Federal Rules confirms that failure to plead an affirmative defense leads to a prejudice analysis, not per se waiver.

A. The text of the Federal Rules supports a prejudice test.

Although Younge claims the support of the text, she implicitly acknowledges that the text does not support her argument that failure to comply with Rule 8

results in waiver. As soon as Younge begins to discuss the *consequences* for failure to comply, her citations of the Rules themselves dry up. Pet.Br.12-13. That is unsurprising, because the text confirms that the prescribed consequence is a prejudice analysis, not waiver.

1. Waiver is the “intentional relinquishment or abandonment of a known right.” *United States v. Olano*, 507 U.S. 725, 733 (1993). And a waived right is permanently “extinguish[ed].” *Id.*; see *Puckett v. United States*, 556 U.S. 129, 138 (2009). But waiver is not the default consequence for inadvertent failure to comply with the Federal Rules.

Rather, Rule 61 provides the default consequence for a party’s failure to comply with a Federal Rule: “At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.” Fed. R. Civ. P. 61. “Rule 61” supplies a “rule of prejudicial error applicable in ordinary civil litigation.” *FDA v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 588-89 (2025); see *Olano*, 507 U.S. at 734 (explaining that “in most cases,” to “affec[t] substantial rights . . . means that the error must have been prejudicial”). “Rule 61 teaches that the proceedings are not to be disturbed because of an error that prejudiced no one.” Wright & Miller, 11 Fed. Prac. & Proc. § 2883 (3d ed.).

Despite Rule 61’s express mandate, Younge does not even cite the Rule, much less explain why it should not apply. Rule 8 requires the pleading of claims and defenses so that parties can investigate or rebut the “factual basis” of the claim or defense. *Johnson*, 574 U.S. at 12. Normally, a defendant cannot raise an

unpleaded defense at summary judgment because the plaintiff was not on notice and could not adequately develop facts to contest the defense. *Cf., e.g., Day v. McDonough*, 547 U.S. 198, 217 (2006) (Scalia, J., dissenting) (“Ordinary civil practice does not allow a forfeited affirmative defense whose *underlying facts were not developed below* to be raised for the first time on appeal.” (emphasis added)). But in the scenario where the relevant facts are not only undisputed but undisputable—that is, the plaintiff could not have done anything materially differently had she known of the defense earlier—there is no prejudice, there is no harm, and courts should address the defense.

Here, assuming the personal-staff exemption is an affirmative defense, the DA’s Office erred by failing to raise the defense in its answer, but that error caused no prejudice. Under Rule 61, therefore, the district court not only could but was “directed to” disregard that error. *Parrish*, 605 U.S. at 388. Rule 61’s text alone is sufficient reason to reject the idea that failure to plead an affirmative defense results in per se waiver. Instead, the court should ask whether that error was prejudicial.

2. If the text of Rule 8 or 12 (or any other Rule) displaced Rule 61 by specifying waiver as the consequence for a party’s failure to plead an affirmative defense, matters would be different. But here, the text and context of the relevant Rules confirm, rather than undermine, the point: failure to plead an affirmative defense does not result in waiver.

To start, Rule 8 simply does not *say* a defendant waives unpleaded defenses, which is critical, because the Federal Rules are otherwise replete with explicit

waiver provisions. *See, e.g.*, Fed. R. Civ. P. 5.2(h); Fed. R. Civ. P. 26(a)(3)(B); Fed. R. Civ. P. 32(d); Fed. R. Civ. P. 33(b)(4); Fed. R. Civ. P. 38(d). The drafters of the Federal Rules knew exactly how to say that failure to do something results in waiver, and they did not say that failure to plead an affirmative defense results in waiver. The “use of ‘explicit language’ in one provision ‘cautions against inferring’ the same limitation in another provision.” *State Farm*, 580 U.S. at 34 (citation omitted).

A particularly powerful textual clue is Rule 71.1, which provides special procedures for “proceedings to condemn real and personal property by eminent domain.” Fed. R. Civ. P. 71.1(a). Among other things, Rule 71.1 governs the requirements for complaints and answers in such proceedings. Like Rule 8 for other civil cases, Rule 71.1(e)(2) provides that a defendant’s answer “must . . . state all the defendant’s objections and defenses to the taking,” but it then provides that a “defendant waives all objections and defenses not stated in its answer.” Fed. R. Civ. P. 71.1(e)(3). This Rule proves that the drafters knew how to write a rule that “waives all . . . defenses not stated in [the] answer.” *Id.* That is exactly what Younger wants Rule 8 to say, *but it doesn’t*. It is hard to imagine a clearer comparison to illuminate the absence of a waiver rule in Rule 8.

Rule 12(h) also confirms there is no waiver. Rule 12(h)(1) provides that four specific defenses—lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process—are waived if they are not included in the defendant’s Rule 12 motion or in the defendant’s responsive pleading (or an amendment as of right to that pleading). So for

those four defenses, failure to raise the defense at the appropriate time results in waiver. *See* Fed. R. Civ. P. 12(h). Applying ordinary canons of construction, failure to plead defenses other than the four specifically listed in Rule 12(h)(1) does *not* result in waiver. *See* Scalia & Garner, *READING LAW* 107 (2012) (the “expression of one thing implies the exclusion of others”).

Rule 12(h)’s “statutory history” (as it were) “reinforces that textual analysis.” *Snyder v. United States*, 603 U.S. 1, 12 (2024). Before the 1966 amendments to the Federal Rules, Rule 12(h) provided that, with a few exceptions, a “party waives all defenses and objections” that were not raised in a Rule 12 motion or the answer. Fed. R. Civ. P. 12(h) (1963). The 1966 amendments removed the phrase “all defenses and objections” and replaced it with Rule 12(h)(1)’s list of four specific defenses that are waived if not properly raised. Fed. R. Civ. P. 12(h) (1966). In other words, the drafters know how to say that a party “waives all defenses and objections” not raised, because they have used that language before—but the Rules do not say that today.

In sum, the Rules refer to waiver repeatedly; they used to include a waiver rule for all defenses not raised; they currently include a waiver rule for only certain defenses not raised; and they include a waiver rule for all defenses not raised in condemnation proceedings; *and yet* there is no such rule for affirmative defenses in ordinary cases. This is conclusive textual proof that a prejudice test should apply, not a per se waiver rule.

B. The structure of the Federal Rules supports a prejudice test.

A prejudice test also makes sense of the structure of the Federal Rules. Under Rule 8, pleadings set forth factual claims to organize litigation, discovery, and ultimately trial. *Johnson*, 574 U.S. at 12; see *Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 479 (7th Cir. 2019) (“Pleadings shape the litigation, including the scope and cost of discovery.”). And allegations in a pleading open up a world of resources for the pleader—discovery chief among them. Those resources provide a concomitant burden on the opposing party, which is why the Federal Rules limit amendments to pleadings via Rule 15 (and Rule 16). But raising an affirmative defense where the facts are *undisputable* does not implicate any of those concerns. Indeed, the structure of the Federal Rules not only supports a prejudice analysis, it also makes quick work of Younge’s primary argument, that the correct rule somehow “circumvent[s]” Rules 15 and 16. Pet.Br.32.

1. Under Rule 8, pleadings are concerned with defining the issues to be investigated and tried and therefore need not articulate a specific “legal theory.” *Johnson*, 574 U.S. at 11. In *Johnson*, for instance, the plaintiff police officers alleged “that they were fired by the city’s board of aldermen, . . . because they brought to light criminal activities of one of the aldermen.” *Id.* at 10. The district court granted summary judgment against the plaintiffs because they failed to invoke 42 U.S.C. § 1983 in their complaint. 574 U.S. at 11. This Court reversed: under “Rule 8(a)(2),” having “informed the city of the factual basis for their complaint,” the plaintiffs “were required to do no more.” *Id.* at 11-12. As this Court explained, the “federal rules effectively

abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff’s claim for relief.” *Id.* (citation omitted); *see also Skinner v. Switzer*, 562 U.S. 521, 530 (2011) (“[U]nder the Federal Rules of Civil Procedure, a complaint need not pin plaintiff’s claim for relief to a precise legal theory.”); *Padovani v. Bruchhausen*, 293 F.2d 546, 549 (2d Cir. 1961) (“[I]f there is any characteristic of the federal rules . . . which is well settled, it is that a plaintiff pleads facts and not law and that the law is to be applied by the court.”).

The same principles apply to a defendant’s answer, which responds to and defines the factual issues to be tried. That is why answers must admit or deny factual allegations, but legal conclusions generally require no response. *See, e.g., Thompson v. DeWine*, 976 F.3d 610, 616 n.5 (6th Cir. 2020) (per curiam) (“[A] defendant’s failure to deny conclusions of law does not constitute an admission of those conclusions.”) (quoting Wright & Miller, 5 Fed. Prac. & Proc. § 1279 (3d ed.)). Courts “are not bound to accept as true a legal conclusion couched as a factual allegation.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). The pleadings are not the place where legal arguments are hashed out.

And after the pleading stage, litigants must amend their pleadings to introduce new factual issues into the case. Rule 15 governs how and when parties can amend their pleadings, with different provisions for pre-trial amendments as a matter of course, *see* Fed. R. Civ. P. 15(a)(1), pre-trial amendments by leave of court, *id.* 15(a)(2), and amendments during and after trial, *id.* 15(b). Rule 15’s text is explicitly concerned with raising new, triable, factual “issues.” *E.g., id.*

15(b)(1) (amendment rule for when “evidence is not within the issues raised in the pleadings”); *id.* 15(b)(2) (amendment rule for when “an issue not raised by the pleadings *is tried* by the parties’ express or implied consent”) (emphasis added); see *Rosen v. Dick*, 639 F.2d 82, 94 (2d Cir. 1980) (“[T]he word ‘issue’ . . . in the Federal Rules of Civil Procedure . . . clearly refers to the disputed conclusions which can be drawn from the evidence uncovered during discovery” and “does not refer to purely legal questions.”).

By contrast, the Federal Rules create a series of junctures where parties can file motions seeking dismissal or judgment as a matter of law—including Rule 12, Rule 56, and Rule 50—separate from trial and the organization of factual disputes. See *Dupree*, 598 U.S. at 731. Motions made under those and other rules—not pleading amendments under Rule 15—are the proper vehicle for raising legal arguments. That is why *Johnson* explained that petitioners, on remand, could “add to their complaint a citation to § 1983” to “ward off further insistence on a punctiliously stated ‘theory of the pleadings’”—but made it clear that it was “unnecessary.” 574 U.S. at 12 (citation omitted). As another example, a plaintiff asserting a facial challenge need not amend her complaint to assert an as-applied challenge. See *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Likewise, a defendant can raise a legal argument supporting an affirmative defense in a motion to dismiss, *Bock*, 549 U.S. at 215, even before there *is* a responsive pleading. And a party can raise failure to state a claim—a quintessentially pure legal argument—for the first time even “at trial.” Fed. R. Civ. P. 12(h)(2). All of those examples confirm that

legal arguments and factual arguments generally follow different tracks.

This “two-track system,” *Dupree*, 598 U.S. at 736, makes sense because factual disputes are orders of magnitude more resource-intensive than legal disputes. By amending a pleading, a litigant opens up extensive new resources (and extensive new costs). A litigant can raise new disputes of material fact, which allows for discovery and eventual trial on those issues; without an amended pleading, no discovery on those issues would be “relevant.” Fed. R. Civ. P. 26(b)(1). Amending a pleading also permits the party to claw back factual judicial admissions made in the original pleading. *See, e.g., W. Run Student Hous. Assocs., LLC v. Huntington Nat’l Bank*, 712 F.3d 165, 171 (3d Cir. 2013); *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996). Amending a pleading can revive an otherwise-waived right to demand a jury trial. *See, e.g., Rosen*, 639 F.2d at 94. These are just a few of the resources that amendment provides to the amending litigant, usually at significant burden to the opposing party and the court.

Legal arguments based on undisputed facts involve none of these additional resources and no concomitant costs. A mistake that results in the opposing party having to, for instance, prepare for a wholly new trial issue, conduct a dozen new depositions, review thousands of new documents, or otherwise dive into factual investigation *after* Rules 15 and 16 would have allowed, is no mere “technicalit[y].” *Parrish*, 605 U.S. at 388 (citation omitted). But when a defendant asserts only a new legal argument requiring no factual development, none of those concerns apply. That is

presumably why there is no Rule 15 discussion of new legal arguments.¹

A prejudice test for unpleaded affirmative defenses makes sense of this structure because it ensures that a newly raised defense does not implicate disputable, triable facts that should have been pleaded and tested through discovery and potentially trial. This protects a litigant's rights because none of the burdens and costs associated with new factual development apply. Put another way, a prejudice test ensures that no further "factual development" by the plaintiff could "change the district court's answer." *Dupree*, 598 U.S. at 737. In such a case, even though the defendant technically should have raised the defense in its answer, the failure is harmless, because the delay does not undermine the function of the pleadings or undermine the plaintiff's position in any way.

2. The Rules' structure also precludes Young's assertion that allowing unpleaded affirmative defenses would mean that defendants can "circumvent" the limitations on amendment in Rules 15 and 16. Pet.Br.32. To the contrary, a motion under Rule 56 and a motion under Rules 15 and 16 achieve very different things. Far from circumventing Rules 15 and 16, a prejudice test for unpleaded affirmative defenses raised at summary judgment is necessary precisely because of them.

To start, Young's contention that "a defendant can achieve the practical effect of an amendment" by

¹ Young's assertion that Rule 15(b)(2) supports an *expressio unius* argument, *see* Pet.Br.13, is a non-starter for this reason—Rule 15 governs amending the pleadings, not asserting legal arguments.

raising a legal argument in a motion, Pet.Br.32, is just wrong. A defendant who raises a new legal defense at summary judgment does not obtain any of the benefits of amending a pleading under Rules 15 and 16. No new discovery, no retraction of admissions, no adding a claim for a jury trial, no new parties—nothing. All the defendant can do is ask the court to decide a legal question based on undisputable facts. There is no circumvention of the amendment rules because there is no amendment.

Moreover, far from diminishing Rules 15 and 16, a prejudice test is necessary only because of them. A defendant will fail the prejudice test if the new defense requires more than legal argument based on undisputable facts. So the test ensures that a defendant is *not* seeking to add new factual issues and thereby de facto amend the pleadings. But if Rules 15 and 16 did not impose limitations on amendment, there would be no need to inquire into prejudice when a litigant raises a new defense: whether the defendant was raising a new legal argument or new facts would not matter because no Rule would limit amendment. Thus, a prejudice test ensures that defendants *do not* circumvent Rules 15 and 16 because the test distinguishes between, on the one hand, new legal theories, and on the other, new factual issues that would effectively amend the pleadings.

And not that it should matter, but a prejudice test at the summary judgment stage is *more* demanding, not “less demanding,” Pet.Br.28, than the Rule 15 standard. The scope of a prejudice inquiry depends on the “context.” *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017). And here, a plaintiff could establish prejudice and preclude a late-raised defense by

showing that there was any potential for further material factfinding. By contrast, objecting to amendment under the liberal standard of Rule 15 requires more for an objection to succeed. Courts should “freely give leave [to amend] when justice so requires,” Fed. R. Civ. P. 15(a)(2). And prejudice alone is not a reason to deny amendment, but rather, “*undue* prejudice.” *Foman*, 371 U.S. at 182 (emphasis added). “Any amendment to an original pleading necessarily involves some additional expense to the opposing party.” *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1257 (11th Cir. 1998) (emphasis omitted). “The issue thus is not whether allowing the amendment would have been prejudicial—it would have been—but whether it would have been unfairly so.” *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 13 (1st Cir. 2004); *see also, e.g., Nwachukwu v. Karl*, 222 F.R.D. 208, 212 (D.D.C. 2004) (“[u]ndue prejudice is not mere harm to the non-movant but a denial of the opportunity to present facts or evidence”) (citation omitted). So where a defendant raises a new argument at summary judgment and there is *no* prejudice to the plaintiff due to the delay, the defendant has hurdled a higher standard than Rule 15.²

² The Rule 16 standard for “good cause” is not inherently more restrictive either, Pet.Br.28, it is merely different. A litigant can, for instance, establish good cause even where it *would* prejudice the opponent. *Cf. Steir*, 383 F.3d at 12.

C. The history of the Federal Rules supports a prejudice test.

A key interpretive aid is the “historical development” of a statute or rule. *Parker Drilling*, 587 U.S. at 611. And here, the historical development of the Federal Rules demonstrates they should be interpreted to allow for play in the joints. Federal procedure has consistently, purposefully moved from labyrinthine, technical forms to simplified rules designed to efficiently reach the merits. That self-conscious departure is further reason to interpret the Rules to apply a prejudice test here.

“At early common law the pleading practice was surrounded by such rigid formalism that so unimportant a detail as the mis-spelling of the name of the town wherein the cause accrued could be a fatal defect.” Peter Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. CAL. L. REV. 529, 529 (1964). “On occasion, the result was quite harsh,” as in “the mid-nineteenth century Illinois decision in *Spangler v. Pugh*, in which a judgment for plaintiff was reversed when it was noted that he had alleged a debt in his favor in the amount of \$2,579.57 but had proved an obligation for \$2,579.57-1/2 at trial.” Wright & Miller, 6 Fed. Prac. & Proc. § 1471 (3d ed.) (citation omitted).

It is common knowledge that the Federal Rules reflect a deliberate move away from these older models. As this Court has noted on numerous occasions, the Federal Rules “were designed in large part to get away from some of the old procedural booby traps.” *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363,

373 (1966); *see also, e.g., Foman*, 371 U.S. at 181-82; Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L.J. 387, 391-93, 409-10 (1935).

Even before the Federal Rules, though, federal courts and lawmakers tried to diminish the importance of technical pleading forms. For instance, in 1912, this Court promulgated a set of Equity Rules, which became an “important precursor of the Federal Rules of Civil Procedure,” although their reforms applied only to suits in equity. Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 374 (2003). The Equity Rules “simplified pleading” and were a “model followed twenty-six years later in the Federal Rules of Civil Procedure.” *Id.* at 387-88. Charles Clark, the principal drafter of the Federal Rules, praised the Equity Rules as “an embodiment” of “best practice” and a “substantial model for the new Federal procedure of the future,” in so far as they “abolish[ed]” the “formal vestiges” of code pleading. Clark & Moore, 44 YALE L.J. at 434-35. The “underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law,” and “the Federal Rules went beyond equity’s flexibility and permissiveness in pleading, joinder, and discovery.” Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

Likewise, in 1919, Congress passed a harmless error statute (formerly 28 U.S.C. § 391) declaring that reviewing courts should ignore “technical errors, defects, or exceptions which do not affect the

substantial rights of the parties.” *Kotteakos v. United States*, 328 U.S. 750, 757 (1946). This statute came “after long agitation,” where the “widespread and deep conviction” had become that reviewing courts were “impregnable citadels of technicality.” *Id.* at 758-59.

Rule 61 illustrates this transformation from a bygone era. Rule 61’s harmless error rule is a direct descendant of Rule 19 of the Federal Equity Rules of 1912, as well as the 1919 harmless error statute. *See* Fed. R. Civ. P. 61 advisory committee’s note to 1937 adoption. Equity Rule 19 held that the “court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” Fed. Equity R. 19 (1912). Just before the introduction of the modern Federal Rules, this Court cited Equity Rule 19 to support the notion that “at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not.” *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 34 (1933) (citing Fed. Equity R. 19). Rule 61 (and other Rules) took these key innovations of the Federal Equity Rules and applied them to all suits in law and in equity.

This history points only one way. Younger’s proposed waiver rule would have fit well in the distant past, but the goal of the Federal Rules was to put an end to the era of pointlessly harsh technicality. This Court should not resurrect it here.

D. Precedent supports the view that a prejudice test, not per se waiver, should apply.

This Court's cases also support interpreting the Federal Rules in favor of a prejudice test. Indeed, Younge herself cites cases that, far from establishing a waiver rule, Pet.Br.12-13, establish the opposite: inadvertently failing to raise a defense results in, at worst, correctable forfeiture, not waiver.³

In *Wood v. Milyard*, for instance, the Court specifically acknowledged the difference between “waived” defenses and merely “forfeited” defenses. 566 U.S. at 471 n.5. In *Wood*, the court of appeals had *sua sponte* addressed a statute of limitations defense for the first time on appeal, and this Court held that a court *could* ordinarily do so, even where the defendant had forfeited the argument, but not where the defendant had affirmatively waived the defense. That is, *Wood* held that failure to raise an affirmative defense results in waiver only if the defendant actually intelligently waived it. *See id.* at 470-71.

Similarly, in *Day v. McDonough*, the Court held that a district court could apply a time bar that the defendant had failed to raise. 547 U.S. at 202. Because the defendant had simply miscalculated the

³ The same is true of Wright & Miller. Younge asserts that the well-known treatise supports a waiver rule, quoting that “a failure to plead an affirmative defense . . . results in the waiver of that defense.” Pet.Br.12 (quoting Wright & Miller, 5 Fed. Prac. & Proc. § 1278 (4th ed.)). But the treatise goes on to explain that “unpleaded . . . affirmative defenses may be asserted by pretrial motions, particularly in the absence of any showing of prejudice to the opposing party and assuming it has had an opportunity to respond.” Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1278 (4th ed.). That is, the treatise supports precisely the correct rule.

days, he had not “intelligent[ly] waive[d]” the defense, leaving him on the side of correctable “forfeit[ure],” instead. *Id.* at 202. Again, the Court necessarily held that failure to plead an affirmative defense does not result in per se waiver.

In *Kontrick v. Ryan*, 540 U.S. 443 (2004), a party in a bankruptcy proceeding attempted to raise a defense for the first time *after* the court ruled against him on the merits, and the Court said that was too late—particularly where the defendant “did not ask” for relief even at “summary judgment.” *Id.* at 459-60. *Kontrick* makes the axiomatic point that a party can “wait[] too long to raise” an argument—and waiting until after one has “lost the case on the merits” is generally “too long.” *Id.* at 456, 459-60; *see also Puckett*, 556 U.S. at 140 (litigant cannot “game” the system” by waiting until after a decision and then “seeking a second bite at the apple” if the decision is unfavorable) (citation omitted). At the same time, *Kontrick* specifically noted that “[t]he issue in this case is more accurately described as one of forfeiture rather than waiver.” 540 U.S. at 458 n.13 (quotation omitted).

As these cases and others confirm, a “waived . . . defense is one that a party has knowingly and intelligently relinquished.” *Wood*, 566 U.S. at 470 & n.4. By contrast, if the defendant’s failure to plead an affirmative defense was an “inadvertent error,” the defense is, at worst, “forfeited,” not waived. *Day*, 547 U.S. at 202, 211; *Granberry v. Greer*, 481 U.S. 129, 133 (1987). The key difference is that “a federal court has the authority to resurrect . . . forfeited defenses.” *Wood*, 566 U.S. at 471 n.5.

Far from undermining the text, structure, and history of the Federal Rules, this Court's precedents arrive at the same place. Failing to plead an affirmative defense does not per se waive that defense, and courts should address it where it does not prejudice the plaintiff's "substantial rights." Fed. R. Civ. P. 61.

E. The Federal Rules' presumption of function over form confirms that a prejudice test, not waiver, applies.

Although there should be no doubt, to the extent the Court has any remaining uncertainty, fundamental principles of civil procedure tilt the balance. As this Court recently reaffirmed, "the spirit of the Federal Rules" is that "decisions on the merits should not be avoided on the basis of . . . mere technicalities." *Parrish*, 605 U.S. at 388 (brackets and citation omitted); *Foman*, 371 U.S. at 181. A prejudice test ensures that harmless "technical" violations are excused.

"Rule 61," and other "harmless error rules adopted by this Court and Congress[,] embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error.'" *McDonough Power*, 464 U.S. at 553-54. Applying that principle, for example, this Court has declined to invalidate a trial because of a juror's "mistaken, though honest response to a question" in voir dire that did not "affect the fairness of [the] trial." *Id.* at 555-56. In *Parrish*, this Court sidestepped the "technical defect" of a premature notice of appeal where there was no prejudice to the appellee. 605 U.S. at 379, 382-3 (citation omitted).

In similar contexts this Court has made similar holdings. For instance, Federal Criminal Procedure Rule 52(a), which provides that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded,” is a “restatement” of former 28 U.S.C. § 391—the same statute that evolved into Civil Procedure Rule 61. Fed. R. Crim. P. 52(a) advisory committee’s note to 1944 adoption; Fed. R. Civ. P. 61 advisory committee’s note to 1937 adoption. Interpreting Rule 52(a)’s harmless error rule, this Court explained that Congress’s intent in enacting the influential statutory harmless error rule “was simple: To substitute judgment for automatic application of rules.” *United States v. Lane*, 474 U.S. 438, 448 (1986) (citation omitted). The Court in *Lane* “flatly rejected *per se* rules regarding particular errors”—such as a rule that “misjoinder is prejudicial *per se*.” *Id.* at 443, 448 (citation omitted); see *O’Neal v. McAninch*, 513 U.S. 432, 441-42 (1995) (ordinarily, “civil and criminal harmless-error standards do not differ”).

To be sure, some procedural rules, some of the time, have harsh results, but this case does not include rules of that kind. Some rules, like an “appeal filing deadline prescribed by statute,” are “jurisdictional”—meaning failure to comply “necessitates dismissal.” *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 19 (2017). Strict enforcement of jurisdictional rules is necessary not only to ensure federal courts stay within their authority but also to provide “clarity” for litigants—for instance, “compliance with the statutory time limits” for an appeal is important because a prevailing party needs to know with finality whether the case is over. *Bowles v. Russell*, 551 U.S.

205, 214 (2007); see *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436 (2011). But no one believes that Rule 8’s pleading requirements are jurisdictional or in any way serve the same functions as rules like the deadline for appeal. Rule 8 helps organize the issues for litigation. Where a defendant makes a merely technical, non-prejudicial mistake, declaring a defendant liable anyway is not just pointless, it is unjust.

Younge protests that the “purpose” of the Federal Rules cannot override their “plain text,” Pet.Br.14-17, which is true enough but misses the point. As already explained, nothing in the text supports Younge’s proposed waiver rule, and the “spirit of the Federal Rules” is not some untethered, judge-created concept. It is found in the text of rules themselves, including the very first Rule, which “provides that the Rules ‘should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.’” *Parrish*, 605 U.S. at 388 (quoting Fed. R. Civ. P. 1).

It is “the Rules’ own emphasis on function over form,” *Parrish*, 605 U.S. at 389, not some nebulous purposivism, that provides the underlying presumption. Though there should be no doubt here, if there were, the Court should err on the side of *not* deciding liability on the basis of an immaterial, non-prejudicial mistake.

II. A defendant can raise an unpleaded affirmative defense at summary judgment, where the delay in raising the argument causes no prejudice to the plaintiff, because it is a purely legal argument.

There is another, independent reason that the proper response to a failure to comply with Rule 8 is a prejudice analysis. An affirmative defense is, at bottom, a combination of facts and legal argument. If the facts are undisputable, an affirmative defense raises a “purely legal” question. *Dupree*, 598 U.S. at 735. And courts can, in general, address purely legal arguments at nearly any time. Failing to comply with Rule 8 means that the ordinary rule should apply: a defendant loses the ability to raise new facts but not necessarily purely legal arguments.

A. Courts may consider new, purely legal arguments in favor of an affirmative defense at summary judgment.

The ordinary rule is that courts can address purely legal arguments (as opposed to factual arguments) almost any time—and certainly at summary judgment. Affirmative defenses are no different. If the facts are undisputable, affirmative defenses, too, pose purely legal questions and courts can address them even if litigants were late in raising them. Rule 8 says nothing to suggest the ordinary rule does not apply.

1. Courts may consider new legal arguments at nearly any time.

On a motion for summary judgment, a defendant can raise “purely legal” arguments—that is, arguments that do not depend on “any disputed facts.”

Dupree, 598 U.S. at 735. Indeed, all *successful* summary judgment arguments are “purely legal” because it would be error to grant summary judgment where there is a genuine dispute of material fact. *See* Fed. R. Civ. P. 56(a).

A defendant can raise new legal arguments at summary judgment and, for that matter, at many points further along in the litigation. Because legal arguments depend on “law books” and not “trial exhibits,” *Dupree*, 598 U.S. at 737, litigants have far greater flexibility in raising them. Legal arguments do not create potential problems like sandbagging or surprise, and they don’t require reopening discovery or (even worse) a new trial. *See, e.g., Montemuro v. Jim Thorpe Area Sch. Dist.*, 99 F.4th 639, 646 n.5 (3d Cir. 2024) (when a party raises a “pure question of law” for the first time on appeal, “there can be no ‘unfair surprise’” to the opposing party “in addressing the issue”); *Citizens for a Better St. Clair Cnty. v. James*, 648 F.2d 246, 252 (5th Cir. 1981) (if a “question plainly is one of law,” then “discovery [is] unnecessary to its resolution”). Unsurprisingly, then, courts are comparatively lenient in addressing new legal arguments.

For instance, a defendant can ordinarily make a new legal argument in its motion for summary judgment that it did not make in its motion to dismiss. The notion that “a party forfeits an argument at summary judgment if it does not make the argument as part of a motion to dismiss” “does not pass the straight-face test.” *Senne v. Vill. of Palatine*, 6 F. Supp. 3d 786, 790 (N.D. Ill. 2013), *aff’d sub nom. Senne v. Vill. of Palatine, Illinois*, 784 F.3d 444 (7th Cir. 2015); *cf. Behrens v. Pelletier*, 516 U.S. 299, 306, 309 (1996)

(defendant can raise qualified immunity arguments at both motion-to-dismiss and summary-judgment phases); *Miller v. Lamanna*, 169 F.4th 118, 130-31 (2d Cir. 2026) (a defendant can raise a “legal issue with the plaintiff’s complaint at any time, including after discovery and in connection with a summary judgment motion”).

Likewise, a defendant can ordinarily make a legal argument at trial that it did not make earlier. “There is nothing unusual about a defendant concentrating on limited aspects of a case in a motion for summary judgment, without waiving its right to contest other elements later, if the motion does not end the case.” *Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1061 (9th Cir. 2005). That “a party *must* move for summary judgment on an issue or else that party will be deemed to have waived the issue” is “totally incorrect.” *Britt v. Mississippi Farm Bureau Cas. Ins. Co.*, 2022 WL 17443734, at *2 (5th Cir. Dec. 6, 2022) (per curiam).

Showcasing the breadth of the principle, a defendant can even raise a new legal argument for the first time on appeal. *Singleton*, 428 U.S. at 121 (appellate courts have “discretion” to consider forfeited legal arguments); *see also* Brief of Amicus Curiae Washington Legal Foundation in Support of Neither Party at 9 (collecting cases).

To be sure, the further along litigation proceeds, the more likely a court will decline to entertain a new legal argument. Raising a new argument on appeal, for instance, is no guarantee. *See, e.g., Morrow v. Jones*, 140 F.4th 257, 261 (5th Cir. 2025); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 950 (1st Cir.

1991). Raising a new argument *after* a trial or decision on the merits is also fraught, as it implicates interests in finality and concerns about gamesmanship. See, e.g., *Puckett*, 556 U.S. at 134; *Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541, 547 (2019) (party could not raise an argument for the first time after “an entire round of appeals all the way to the Supreme Court” (citation omitted)). But courts retain the *discretion* to address new legal arguments well down the timeline of litigation.

Contrast this with the ordinary rule for raising new factual arguments, where litigants generally *cannot* raise new factual issues later in litigation. Raising new factual issues is virtually impossible on appeal, after trial, and even sometimes before trial. It is “essential” that litigants “not be surprised on appeal by final decision there of issues upon which they have had no opportunity to *introduce evidence*.” *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (emphasis added). Courts “do not permit plaintiffs to wait until the last minute” to assert new factual theories, which would “unfairly surprise defendants, requiring the court to grant further time for discovery or continuances.” *Green Country Food Mkt., Inc. v. Bottling Grp., LLC*, 371 F.3d 1275, 1279 (10th Cir. 2004). Facts and law are different, so courts treat them differently.

2. A purely legal argument in support of an affirmative defense is not materially different than any other kind of purely legal argument.

There is nothing that would exclude a purely legal argument supporting an affirmative defense from the ordinary rule that courts can address new legal

arguments even if late. After all, an “affirmative defense” is just a combination of “facts and arguments that, if true, will defeat the plaintiff’s . . . claim.” *Defense*, Black’s Law Dictionary (12th ed. 2024). Thus, when the facts relevant to an affirmative defense are in the record and are undisputable, the affirmative defense presents a “purely legal issue[]—that is, [an] issue[] that can be resolved without reference to any disputed facts.” *Dupree*, 598 U.S. at 735.

In *Jones v. Bock*, this Court recognized that a defendant can raise an affirmative defense even in a motion to dismiss—a procedural stage at which defendants have not yet filed an answer with which to plead the affirmative defense. “If the allegations [in the complaint] . . . show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal,” and “that does not make the statute of limitations any less an affirmative defense.” 549 U.S. at 215.

In other words, there is nothing talismanic about a legal argument that happens to support an affirmative defense. If the facts are available and undisputed, it is a purely legal argument. At summary judgment the district court “evaluate[s]” the legal argument “in light of . . . the discovery record,” *Dupree*, 598 U.S. at 731–32, rather than, for instance, the allegations in the complaint, *Bock*, 549 U.S. at 215. Either way, where the facts establishing an affirmative defense are not in dispute, a court can, in general, consider a new legal argument.

3. Rule 8 does not displace the background principle that courts have discretion to address purely legal arguments.

Again, Rule 8 does not identify any consequences for failure to comply. *See supra* Part I. It certainly does not purport to depart from the ordinary rule that courts may consider late-raised legal arguments. The correct understanding, then, is that failure to comply with Rule 8 (or amend to do so) proceeds according to the ordinary rules for argument.

Thus, failing to comply with Rule 8 means that, because the defendant has not placed the relevant factual material at issue, he has lost the right to do so moving forward unless he amends his answer. That aligns with the ordinary rule that courts will not address late-raised factual issues. *See, e.g., Hormel*, 312 U.S. at 556.

But law is different than evidence. *See, e.g., U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993). The ordinary rule is that courts *can* address a purely legal argument, and there is every reason to hold that courts *should* do so here. Summary judgment is an early stage of litigation. Only the pleading stage provides an earlier opportunity to raise an argument, and summary judgment will usually be the first time a litigant can raise arguments based on undisputable facts beyond the pleadings. Summary judgment is before trial or a decision on the merits, meaning there are no concerns of undermining finality or allowing a litigant to sneak a peek at the merits before raising a new argument. *See, e.g., Puckett*, 556 U.S. at 134; *Granberry*, 481 U.S.

at 132. And summary judgment is the ordinary vehicle for arguments made on undisputed facts—the only difference here is that the facts are not only undisputed but *undisputable*, meaning no amount of additional factfinding could alter the outcome.

In sum, the ordinary rule is that the court can address a purely legal question that a party failed to raise earlier. Rule 8 does not provide otherwise, so the ordinary rule should apply.

B. A prejudice test ensures that a new argument in favor of an affirmative defense is purely legal.

Of course, not every argument in favor of an unpleaded affirmative defense is a purely legal argument. That’s why a prejudice test is (again) important: it necessarily filters out everything *but* the genuinely legal arguments.

By definition, if there is no prejudice to the plaintiff—i.e., nothing material would have been different had the defendant raised the argument earlier—there cannot be material factual disputes with respect to a winning argument, because all successful summary judgment arguments are purely legal. Fed. R. Civ. P. 56; *Dupree*, 598 U.S. at 735 (a “purely legal” argument is one without “any disputed facts”). Many courts have recognized that imposing a prejudice test necessarily limits arguments to the “purely legal.” “A purely legal issue is one for which the factual record is so fully developed as to render any further development irrelevant,” and “a litigant could not have tried his case differently.” *Planned Parenthood*, 946 F.3d at 1111 (citation omitted). “Another way” to describe that is to say that reaching

the new argument “should not prejudice the [opposing] party.” *Id.* When “a new argument presents a question of pure law, neither party has been denied the opportunity to offer relevant evidence in making its case.” *United States v. Hamm*, 952 F.3d 728, 743 (6th Cir. 2020) (citation omitted).

Far from being “toothless,” Pet.Br.30, the prejudice test again provides the critical dividing line. If there are factual issues to be added, litigants must amend their pleadings. But if there are no factual issues to resolve, all that is left is the legal argument: the very purpose of a summary judgment motion.⁴

The district court illustrated the importance and bite of the prejudice test in this very case. The DA’s Office tried to raise two unpleaded affirmative defenses in its summary-judgment motion: the personal-staff exemption and the policymaking-appointee exemption. Pet.App.70a. After review, the court concluded that Younge “did not suffer any prejudice arising from the DA’s Office’s late reliance on the personal-staff exemption.” *Id.* at 11a. But the court *also* concluded that the “failure to raise the ‘policymaking appointee’ exemption earlier ha[d] been prejudicial,” and therefore declined to consider the

⁴ While a lack of prejudice in this context establishes that a new argument is purely legal, the reverse is not necessarily true: proving an argument is purely legal does not necessarily mean there is no prejudice. As just one example, raising a purely legal argument could still prejudice the opponent, if the opposing party stipulated to certain facts because it was not on notice that those facts would be relevant to a legal argument that had not been raised. *Universe Tankships, Inc. v. United States*, 528 F.2d 73, 75-76 (3d Cir. 1975); *cf. Weaver*, 582 U.S. at 300. This emphasizes that a plaintiff is well-protected by a prejudice test: it ensures the new argument is purely legal *and* that nothing else about the late assertion harms the plaintiff’s rights.

policymaking-appointee exemption on the merits. *Id.* at 74a-75a, 80a. That is, Younger herself prevailed on a different argument below, under the prejudice test.

The reason that Younger lost on the personal-staff exemption is not because the prejudice test is toothless, but because it is hard to imagine a more obvious case of no prejudice. As the magistrate judge put it, the “facts screamed” the personal-staff exemption. D.Ct. Dkt. 143 at 4. Nothing, anywhere, suggested that additional evidence would do anything to contravene the “overwhelming[]” evidence that Younger was personal staff to an elected official. Pet.App.79a. Younger herself could not identify any additional material discovery she would have sought, which is why the magistrate judge, the district court, and the court of appeals all easily determined that there was no prejudice here. *See id.* at 11a-13a & n.7; 49a-51a; 74a-75a.

As the lower courts found, Younger would not have—*could not have*—done anything differently if the DA’s Office had raised the text of Title VII earlier. Literally nothing would have changed. Without any conceivable prejudice, Younger should not be allowed to avoid Title VII’s clear text based solely on the “mere technicalit[y]” that the DA’s Office should have raised a legal argument earlier. *Parrish*, 605 U.S. at 388 (citation omitted).

III. Younger’s remaining policy arguments are meritless.

Younger asserts a grab bag of other arguments, all resting on various policy concerns. None succeeds.

1. First, Younger suggests that, if the Court adopts the harmless error rule, defendants will “tactic[ally]”

choose to sit on an affirmative defense and spring it on the plaintiff in a motion for summary judgment. Pet.Br.27. This concern is unfounded.

To start, strategically declining to raise a defense is very likely waiver. It would mean the party has “intelligently relinquished” its rights. *Wood*, 566 U.S. at 470 & n.4. Waiver, unlike inadvertent forfeiture, is not generally subject to a prejudice analysis, *id.* at 466, so the defense would be permanently lost.

Even if it were not waiver, no one would deliberately risk losing a meritorious affirmative defense by omitting it from the pleadings with the goal of surprising the plaintiff (and the court) at summary judgment. That stupendously irresponsible maneuver lacks any upside. *Cf.* Fed. R. Civ. P. 16 advisory committee’s note to 1983 amendment (“Counsel naturally are cautious and often try to preserve as many options as possible.”). Any tactical advantage gained would ensure the defendant loses under the prejudice analysis. Not to mention that a defendant will want to be able to obtain discovery needed to *support* a defense, which she cannot do if she has not pleaded it. And no party would want to sit on a meritorious defense, anyway. If a party has a winning defense, there is every reason to assert it immediately—to save on costs if nothing else.

Finally, courts could sanction a manipulative litigant for acting in bad faith. Federal courts have “inherent power . . . to sanction a litigant for bad-faith conduct.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991). *Contra* Pet.Br.7. There is no reason to be concerned about pointless, sanctionable legerdemain.

2. Younge’s concern about a “double standard,” Pet.Br.20-24, is similarly misplaced. As an initial matter, plaintiffs and defendants are not always similarly situated, so it would not be surprising if the rules applied mildly differently. For instance, the plaintiff is the party affirmatively seeking the court’s intervention while a defendant is reactive and trying to limit a court’s intervention. The Rules themselves sometimes treat claims and defenses differently. *See, e.g.,* Wright & Miller, 5 Fed. Prac. & Proc. § 1274 (4th ed. 2026) (Rule 8(a) requires that the plaintiff “show[]” that it is entitled to relief while Rule 8(c) requires only that a defendant “state” an affirmative defense).

Regardless, Younge identifies no meaningful asymmetry. If a plaintiff wishes to add a new claim—that is, a new set of “factual allegations” that “give rise to an entitlement to relief,” *Iqbal*, 556 U.S. at 679—then yes, the plaintiff needs to amend the complaint. But the same is true on the other side: if a defendant wishes to raise a new affirmative defense that relies on new “factual allegations,” then the defendant likewise needs to amend the answer. Younge’s hypothetical about fraud, Pet.Br.23, only illustrates the point—neither a plaintiff nor a defendant could raise a new set of factual allegations merely by noting it for the other side in an email.

To the extent that any lower courts are forcing plaintiffs to amend their complaints to assert new, purely legal arguments that prejudice no one, those courts are misapplying this Court’s well-established precedent. *See Johnson*, 574 U.S. at 12 (it is “unnecessary” to amend the complaint to “set out a legal theory” (citation omitted)); *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (parties can

make new *legal arguments* in support of issues already raised). There is also little evidence courts are making this error rather than precluding new claims at summary judgment that would introduce new facts or otherwise prejudice the defendant. *See, e.g., Ahmad v. Furlong*, 435 F.3d 1196, 1201-02 (10th Cir. 2006) (a “plaintiff should not be prevented from pursuing a claim simply because of a failure to set forth in the complaint a [legal] theory” (citation omitted)); *Padovani*, 293 F.2d at 549; *cf. Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam) (declining to address new *contract* claim where plaintiff had pleaded facts supporting *tort* claims).

Younge’s actual concern with asymmetry appears to be that unpleaded affirmative defenses are less likely to require factual development than unpleaded claims, and so they are more likely to be raisable at summary judgment. Pet.Br.30. Not all affirmative defenses are inherently less fact intensive. *Cf. Day*, 547 U.S. at 207 n.6 (“information essential” to a statute of limitations defense is “often absent” unless the defendant presents it). But even if certain affirmative defenses are less likely to require extensive factual development, it is not unfair that some arguments tend to be more legal than factual.

3. Younge also argues that summary judgment motions based on unpleaded affirmative defenses result in skewed briefing, *see* Pet.Br.34-40, an argument that is difficult to understand. Younge seems to object that the defendant will make “new arguments” about forfeiture or waiver in its reply brief. *Id.* at 39. But responding to the arguments in an opposition brief is not the same thing as raising

new arguments—it is what a reply brief is *for*. See Sup. Ct. R. 15(6). Litigants regularly raise forfeiture or waiver in their opposition brief, only for the other party to then respond in reply. See, e.g., *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996). There is nothing unfair or unwieldy about this common procedure.

4. Finally, Younge argues that the circuits are divided as to whether and under what circumstances a defendant can raise an unpleaded affirmative defense at summary judgment. Pet.Br.40-47. Younge overstates any disagreement, which is often semantic. See *Glob. Tech.*, 789 F.3d at 733. But anyway, there will be uniformity when this Court affirms the correct rule. A defendant can raise an affirmative defense at summary judgment where there is no prejudice due to the delay—that is, the plaintiff could not have litigated the claim materially differently if on earlier notice. That rule is correct and far superior to the pointless rule that litigants should face potentially ruinous liability based on harmless procedural mistakes.

* * *

The Federal Rules’ express goal is to “secure the just, speedy, and inexpensive determination of every action,” Fed. R. Civ. P. 1, that is, to “facilitate a proper decision on the merits,” *Swierkiewicz*, 534 U.S. at 514 (citation omitted). Younge bemoans that, where an affirmative defense does not depend on any disputed facts, courts will have no reason not to address them at summary judgment, Pet.Br.30, but that is “cause for celebration,” not lament. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 437 (2021). Reaching the correct merits

outcome is the *point* of procedure. The injustice would be preventing a defendant from raising a clear-cut legal defense based on an immaterial technical error.

CONCLUSION

For the foregoing reasons, the Court should affirm.

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