

No. 25-352

In the Supreme Court of the United States

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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 OF *AMICI CURIAE*
STATE OF WEST VIRGINIA
AND 16 OTHER STATES
IN SUPPORT OF RESPONDENT**

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The parties here offer two sharply competing visions for how answers should function in federal court. Petitioner Jasmine Younge sees the answer as a kind of tiger trap: step wrong, and your affirmative defense is gone. Respondent Fulton Judicial Circuit District Attorney's Office takes a more pragmatic approach, under which a party can later raise an affirmative defense that didn't appear in the first answer if raising it doesn't prejudice the other side. Given how the Federal Rules prefer decisions turning on the merits rather than technicalities, the DA's Office would seem to have the better of the argument on the first read.

Maybe one could swallow the bitter pill of Younge's approach if the Rules mandated such strong medicine—but they don't. Yes, the Rules say a defendant must raise affirmative defenses in the answer. *See* FED. R. CIV. P. 8(c). But the Rules also say that courts should forgive mistakes of procedure when they don't affect another party's substantial rights. *See* FED. R. CIV. P. 61. And again: The DA's Office's more forgiving approach is triggered *only* when the plaintiff has suffered no prejudice from the late appearance—like at summary judgment—of the defense. So by definition, substantial rights can't be in danger under the DA's Office's view. The first read of the Rules thus proves to be the right one. “It comes down on its face to a very plain admonition: ‘Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.’” *Kotteakos v. United States*, 328 U.S. 750, 760 (1946).

For the States, this debate about answers, prejudice, and pleading isn't just an academic one. Save for the federal government, States are the most frequent litigants—and defendants—seen in federal court. For that reason and many others, “[t]he stakes for the [S]tates are high” when it comes to federal procedure. Diego A. Zambrano, *The States’ Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1813 (2018).

And make no mistake: if the Court were to embrace Younge’s read, then more nonmeritorious cases against States would survive past summary judgment and beyond. That outcome would do more than hurt the States’ (and taxpayers’) pocketbooks. It would also show too little “regard for federal-state relations,” as federal courts would be going ahead against state actors without a genuinely lawful reason for doing so. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (cleaned up). That’s especially so where, as here, a federal court would be pushing aside a defense—one applying to state elected officials and personal staff, 42 U.S.C. § 2000e(f)—that Congress specifically adopted out of respect for States and our federalist system. Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 456-70 (1991) (describing the federalism concerns underlying similar exemptions to the Age Discrimination in Employment Act).

The States don’t ask the Court to bless gamesmanship. A party that sits on a defense until the eve of trial, or that springs one only after its opponent has built a case around its absence, should find no shelter in the DA’s Office’s rule. And a decision refusing to embrace Younge’s blanket rule would still leave courts with other ways to ensure that parties proceed diligently with a case. See, e.g., *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 757-61 (1980); FED. R. CIV. P. 11(c). But those tools respond to what a party

really did and what “real and practical” effects truly followed. *Reed v. Columbia St. Mary’s Hosp.*, 915 F.3d 473, 478 (7th Cir. 2019). Younge’s rule asks only when a piece of paper was filed—and resolves the question the same way whether the delay cost the plaintiff everything or nothing at all.

The Federal Rules should not be so blind to reality. “Fairness, not excessive technicality, is the guiding principle under both Title VII and the Federal Rules of Civil Procedure.” *Gordon v. Nat’l Youth Work All.*, 675 F.2d 356, 360 (D.C. Cir. 1982) (cleaned up). The Court should affirm.

SUMMARY OF ARGUMENT

I. The Federal Rules may require a defendant to plead its affirmative defenses, but they do not say that a defendant who does not do so always loses them.

Younge conflates the duty a rule imposes with the sanction for breaching it. They are separate questions. Rules 8 and 12—which provide that affirmative defenses should be pled—speak only to the nature of the duty. Rule 61 covers the sanction, directing courts to disregard, at every stage, all errors that do not affect substantial rights. And where the drafters wanted defenses waived outright, they said so, as in Rule 12(h)(1) and Rule 71.1(e)(3). They said nothing of the kind in Rules 8(c) or 12(b).

Left with no text, Younge leans into a judge-made sanction, suggesting that waiver is the usual result of not pleading. But federal common law and inherent authority both yield to a governing rule, and Rule 61 provides that rule here. Anyway, even her own authorities describe (at best) only what *ordinarily* happens rather than what

must always happen. They are descriptive rather than prescriptive.

The DA's Office's reading also serves the purpose Rule 1 makes binding: answers exist to give notice and an opportunity to respond, and a defense that arrives late without depriving the plaintiff of either has cost her nothing the Rules protect. Nor does it let defendants evade Rules 15 and 16, which cover amendments to pleadings before and after scheduling-order dates. A defendant who amends his answer can remake the suit; a defendant who raises a defense at summary judgment cannot. Rules 15 and 16 police the first circumstance, while Rule 61 governs the second.

II. Younge's policy objections don't withstand scrutiny. Her concerns about how summary-judgment briefing might unwind assume a defendant who says nothing about prejudice until his reply, which no careful lawyer would do and no district court would be helpless to fix. Nor is a prejudice standard beyond the lower courts' abilities to apply consistently. As for symmetry between plaintiffs' and defendants' ability to raise new points, claims and defenses are not the same thing. A new claim expands the case, obliges a response, and drives discovery, while a new defense does none of that. Plaintiffs also draft on their own schedules, while defendants answer in three weeks on a clock someone else started.

The real practical problem lies on Younge's side. If a defense left out of the first answer is lost, then defendants will plead everything. That outcome would in turn defeat Rule 8(c)'s notice function, because an answer listing twenty defenses tells a plaintiff nothing about which ones matter. And it could very well spur more collateral litigation about which defenses stay in and which come out.

III. The burden of *Younge*’s rule would land disproportionately on the States because of the special challenges of answering complaints in government litigation. Government defendants receive complaints about conduct at agencies they do not staff, involving officials who may have left years earlier, and implicating records that might be hard to find. Defenses of the sort that recur in public-sector litigation—defenses like exhaustion, preclusion, limitations, and statutory coverage—often depend on that missing information. No doubt, then, a waiver rule would combine with these circumstances to let weak claims go ahead against public entities that had a complete answer to them all along.

ARGUMENT

I. The Federal Rules impose a pleading requirement but not an automatic bar.

From top to bottom—from text and precedent through purpose and structural coherence—the Rules confirm that a defendant need not have included an affirmative defense in his answer to be able to assert it at summary judgment.

A. The text of the Rules considers prejudice.

Younge offers a temptingly simple textual argument. She notes how certain Rules say a defendant “must” include affirmative defenses in its answer. See FED. R. CIV. P. 8(b)(1)(A), 8(c), 12(b); but see, *e.g.*, *Fields v. United States*, 27 App. D.C. 433, 440 (D.C. Cir. 1906) (“Words like may, must, shall, and so forth, are constantly used in statutes without intending that they shall be taken literally.”). From this requirement, *Younge* reasons that any affirmative defense that’s missing from the answer

automatically and irretrievably drops out of the case. But see, *e.g.*, *Wood v. Milyard*, 566 U.S. 463, 473 (2012) (recognizing that a federal court has authority to consider a forfeited timeliness defense in a habeas proceeding). And because the DA’s Office didn’t include its claimed Title VII exemption in its answer, it purportedly can’t raise it at summary judgment. But see, *e.g.*, *Curl v. Reavis*, 740 F.2d 1323, 1327 n.2 (4th Cir. 1984) (treating “employee status” as an element of a Title VII claim rather than an affirmative defense).

This superficially simple argument proves to be a misleading one, as it confuses separate elements: the rule and the sanction. “[A]lthough the duty” to plead an affirmative defense may be “mandatory,” “the sanction for breach” is not necessarily “loss of all later powers to act.” *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 34 (2016) (cleaned up). So the question of whether an affirmative defense remains live “incorporate[s] three distinct inquiries”:

- “whether an argument [or defense] was made” or raised;
- “the default consequences of failing to make” or raise it “(i.e., whether an argument is waived, forfeited, or merely subject to a less-forgiving standard of review)”; and
- “the special circumstances under which those consequences may be excused.”

Spireas v. Comm’r, 886 F.3d 315, 321 n.9 (3d Cir. 2018) (internal citations omitted).

Younge’s citations to Rules 8 and 12 might help answer the first inquiry—as they concededly explain when and how an affirmative defense should be raised—but they

don't say anything about the other parts pertaining to consequences. See, *e.g.*, *Glob. Tech. & Trading, Inc. v. Tech Mahindra Ltd.*, 789 F.3d 730, 731 (7th Cir. 2015) (Easterbrook, J.) ("Rule 8(c) does not specify a consequence for a litigant's failure to include an affirmative defense in an answer."). Likewise, Younge correctly notes how Rule 15(b)(2) treats trial of an issue by consent as the same as a formal amendment of the pleadings before trial. See FED. R. CIV. P. 15(b)(2). That's just a deeming provision. So that rule, too, only goes to the first inquiry—that is, how an affirmative defense may be presented—not the other two.

On the question of consequences—what they are, and when they can be excused—Younge suddenly stops citing the Rules. That pivot isn't surprising, as the Rules cut against her. Although Younge's favored rules say nothing about consequences, Rule 61 stresses that "the court *must* disregard *all* errors and defects that do not affect any party's substantial rights" "[a]t *every* stage of the proceeding." FED. R. CIV. P. 61 (emphasis added). As Younge herself emphasizes, words like "must," "all," and "every" constitute "language of crystalline clarity" that function "without exception." Pet'r.Br.12; see also *id.* at 10-11 (discussing definitions of "must," "any," and "every"). They confirm that this Court and Congress—working together under the Rules Enabling Act—wanted the "salutary policy embodied in Rule 61" to reach every level and every stage of court proceedings, *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984), pleadings included. So a district court must "disregard" any non-prejudicial violation of rules like Rule 8(c).

As the DA's Office has detailed, Resp.Br.18-20, the Court and Congress spoke with similar clarity in the few instances where they really did want affirmative defenses

to be outright waived. Under Rule 71.1(e)(3), for instance, “a defendant waives all objections and defenses not stated in its answer”—but only for federal condemnation proceedings. FED. R. CIV. P. 71.1(e)(3). Rule 12(h) similarly warns that a party “waives any defense” not included in a proper motion or pleading, but only as to four specific defenses not implicated here. FED. R. CIV. P. 12(h)(1). Even the headings and subheadings—which address only when “certain” and “some” defenses are waived—“supply cues” that waiver is the exception and not the categorical rule. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 380 (2018) (cleaned up).

And the use of the word “waiver” in all those provisions is deliberate, as waiver is the only rightful trigger for “extinguish[ing]” an issue in the blanket way that *Younge* champions here. *United States v. Olano*, 507 U.S. 725, 733-34 (1993). “The use of ‘explicit language specifying [that] sanction’ in Rules 12(h)(1) and 71.1(e)(3) ‘but not in Rule’ 8(c) ‘cautions against inferring the same limitation’ in Rule 8(c).” *McIntosh v. United States*, 601 U.S. 330, 341 (2024) (cleaned up); cf. *Russello v. United States*, 464 U.S. 16, 23 (1983). Even more so given how “[t]he Federal Rules ... should be liberally construed.” *Schlagenhauf v. Holder*, 379 U.S. 104, 121 (1964); see also FED. R. CIV. P. 8(e) (“Pleadings must be construed so as to do justice.”).

B. No precedent supports *Younge*’s blanket rule.

Left with no text supporting her preferred sanction, *Younge* pivots to some purportedly “well established”

common law, judicial doctrine, or ad hoc sanction power that aligns with her blanket-bar rule.* Pet'r.Br.12.

But whether this argument looks to the courts' inherent authority to sanction, judges' powers to develop rules of administration, or the federal power of common lawmaking, all offer only shaky ground. "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. Fed. Deposit Ins. Corp.*, 589 U.S. 132, 133 (2020). Pleading penalties don't fall into one of the few categories the Court has identified. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Likewise, inherent powers "must be exercised with restraint and discretion"; sanctions resting on such powers are primarily meant to head off "conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). There's not a whisper of bad faith or abuse in this case. Even if there were, bad faith or misconduct couldn't be assumed in every case in which a defense fails to appear in the first answer. Yet that universality would be necessary to justify the categorical rule Younge pushes. And "judge-made rules" must always be applied in a way that "preserve[s] a stable background," not "guess[ing] anew in each case." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010). But Younge's rule would ask the Court to upset "the ordinary background rule" governing purely legal arguments. *See* Resp.Br.15.

* This precedent may be less a product of careful judicial judgment and more of a holdover from a bygone era. "[M]any federal courts previously predicated the waiver of an unpleaded affirmative defense on the language of the pre-1966 version of Federal Rule of Civil Procedure 12(h)." 5 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1278 (4th ed. Apr. 2026 update). Rule 12(h) changed to become more permissive in 1966, Resp.Br.20, but the principles seem to have lingered on.

More to the point, federal common law, judge-made doctrine, and “the inherent powers of the courts may be controlled or overridden by statute or rule.” *Smith v. Spizzirri*, 601 U.S. 472, 477 (2024) (cleaned up); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588-89 (1993) (holding that the Federal Rules “superseded” and “displaced” federal common law on admissibility of scientific evidence); *Ross v. Blake*, 578 U.S. 632, 639 (2016) (holding judge-made exceptions to exhaustion couldn’t be applied to statutory exhaustion scheme). That’s what Rule 61 does here. Its harmless-error standard defines the circumstances in which rule violations may be actionable, rather than a court’s inherent sense of things. In the face of that language, courts aren’t free to shape their own waiver and forfeiture rules on the fly. Cf. *Black v. United States*, 561 U.S. 465, 474 (2010) (reversing the lower courts’ imposition of a special forfeiture rule that was not found in the Federal Rules).

In any event, Younge overstates even the judge-driven principles. See, e.g., *Ahmad v. Furlong*, 435 F.3d 1196, 1201 (10th Cir. 2006) (cited at Pet’r.Br.29) (“[S]trict adherence to the pleading requirement is inappropriate when the purpose of the requirement has been otherwise fulfilled.”). Almost all her authorities suggest that, at most, it is “ordinarily” the case or a “general rule” that affirmative defenses may end up waived or forfeited by not including them in the answer. See *Day v. McDonough*, 547 U.S. 198, 202 (2006) (explaining what “[o]rdinarily” happens and then nevertheless dismissing purportedly forfeited affirmative defense); *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004) (explaining what “[o]rdinarily” happens and then finding it was too late to consider affirmative defense when it was raised *after*

trial). Yet these cases could very well be describing the *outcomes* of applying the same prejudice test that the DA's Office prefers—it's likely true, after all, that a defendant cannot "ordinarily" raise an affirmative defense late in the day without causing some prejudice to the plaintiff.

Even giving the cases the broadest and best reading for *Younge*, they would speak only to "the default consequences," *Spireas*, 886 F.3d at 321 n.9—not whether those presumptive consequences would attach in any given case (let alone every case). See Resp.Br.31-33 (understanding these cases to say that "inadvertently failing to raise a defense results in, at worst, correctible forfeiture, not waiver"); accord *Reed*, 915 F.3d at 478 (recognizing the possibility of forfeiture but stressing that the rule was "not to be applied rigidly" (cleaned up)). *Younge*'s own authority favors the DA's Office on this score. It too recognizes that any waiver from "Rule 8(c) is not applied automatically with regard to omitted affirmative defenses." 5 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1278 (4th ed. Apr. 2026 update) (cited at Pet'r.Br.12). Thus, "the substance of many unpleaded Rule 8(c) 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." *Id.* That more flexible principle is exactly what the DA's Office asks for.

C. The prejudice standard advances the Rules' purposes, such as deciding cases on the merits.

The DA's Office's approach is also more consistent with the Rules' purpose.

“[T]he spirit of the Federal Rules is that decisions on the merits should not be avoided on the basis of mere technicalities.” *Parrish v. United States*, 605 U.S. 376, 388 (2025) (cleaned up). The rules were in fact “designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court.” *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). Indeed, they reject the very scenario that lurks here: treating “pleading [a]s a game of skill in which one misstep by counsel may be decisive to the outcome.” *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Altogether, then, the Rules were designed to create “more flexible and simplified procedures aimed at deciding cases on the facts.” Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324 (2008). And truth be told, even *before* the Rules, “[p]leadings [we]re intended to serve as a means of arriving at fair and just settlements of controversies between litigants[,] ... not [to] raise barriers which prevent the achievement of that end.” *Maty v. Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938).

Rule 8(c) is no different. “The purpose of such pleading [of affirmative defenses] is to give the opposing party notice of the plea of [the defense] and a chance to argue, if he can, why the imposition of [that defense] would be inappropriate.” *Blonder-Tongue Lab’ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971). In other words, answers perform the basic due-process function of providing notice and an opportunity to be heard. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000). Consistent with that important but straightforward function, lower courts have entertained affirmative defenses so long as they don’t present “unfair surprise,” *Crown Castle Fiber, LLC v. City of Pasadena*, 76 F.4th

425, 439 (5th Cir. 2023) (cleaned up), or cause “tangible” prejudice, *Garcia v. Salvation Army*, 918 F.3d 997, 1009 (9th Cir. 2019) (cleaned up). A defense can be decided if the court reaches a “practical, commonsense conclusion that Rule 8(c)’s core purpose ... has been vindicated.” *Lawless v. Town of Freetown*, 63 F.4th 61, 66 (1st Cir. 2023) (cleaned up).

Other parts of the Rules are consistent with this same purpose. For example, “[t]he purpose of [Rule 15(a)] is to provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.” *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006) (cleaned up). Allowing a defendant to raise an affirmative defense at the summary judgment stage does just that. Similarly, “Rule 16(b)’s overriding purpose is the facilitation of judicial economy.” *Dominique v. Ga. Gulf Corp.*, No. 95-30862, 1996 WL 101416, at *7 (5th Cir. Feb. 27, 1996). Allowing an affirmative defense serves that purpose, too, as a case could otherwise go to trial on a matter that never should have gotten out of the gate—hardly a reflection of judicial economy.

Rather than engage with these purposes, Younger launches a jeremiad against purposivism. Pet’r.Br.14-19. Whatever the merits of purposivism as a general matter, the Rules present a distinct question. Federal Rule of Civil Procedure 1 pairs an express statement of purpose—“secur[ing] the just, speedy, and inexpensive determination of every action and proceeding”—with an express direction that this purpose should be considered when “constru[ing], administer[ing], and employ[ing]” the Rules. Because the purpose is itself a legislative act, “[n]one of the standard objections to judicial reliance on legislative history inhibit [the Court’s] resort to a

statutory declaration of purpose for help in interpreting a part of the statute [or rule] to which it applies.” *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 480 (7th Cir. 2016), *aff’d*, 583 U.S. 202 (2018). At the same time, when a rule or statute provides express direction as to how it should be construed, this Court has said it must listen. *Russello*, 464 U.S. at 27.

Taken together, these provisions confirm that the Court must account for the Rules’ “paramount command” in construing their provisions. *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016); see also, *e.g.*, *United States v. Hougham*, 364 U.S. 310, 317 (1960) (rejecting an argument a party could not add a damages claim because it would “subvert the basic purpose” of a rule that only sought to avoid prejudice). The lower court thus did the right thing when it searched for prejudice and, having found none, allowed the defense.

D. The prejudice standard is structurally coherent.

Lastly, Younge is wrong in suggesting that the DA’s Office’s rule will circumvent Rules 15 and 16’s requirements for amendment of pleadings. Younge’s argument presumes that raising a defense at summary judgment and amending a pleading to add the defense are one and the same. See Pet’r.Br.32 (arguing that a defendant “can achieve the practical effect of an amendment” by simply raising the defense at summary judgment). But that’s not right.

When a defendant amends his answer, he can “effectively remake the suit.” *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 35 (2025). He is no longer bound by his earlier admissions or allegations. See *In re Overstock Sec. Litig.*, 119 F.4th 787, 800 (10th Cir. 2024)

(“Factual assertions in pleadings, *unless amended*, are considered judicial admissions conclusively binding on the party who made them.” (cleaned up; emphasis added)). By changing the scope of the case, he might be entitled to more discovery. Jurisdiction might be affected. He might add counterclaims. It makes sense for the Federal Rules to require judicial approval before consequences like these arrive late in the case.

On the other hand, when a defendant raises an affirmative defense in a motion for summary judgment, he must take the case as he finds it. He secures no new discovery and can make no new claims. Nor can he add to the factual record: new facts would either prejudice the plaintiff or generate the very dispute that defeats his own motion. See, *e.g.*, *Nat’l Treasury Emps. Union v. Helfer*, 53 F.3d 1289, 1295 (D.C. Cir. 1995) (refusing to consider a new defense because it “raise[d] new legal *and factual* questions” (emphasis added)). The record is what it is.

True, the plaintiff must now face a potentially meritorious defense that it might have hoped to escape. But the prospect of losing on the merits has never been the kind of prejudice the Rules protect against. See *Glob. Tech.*, 789 F.3d at 733 (rejecting a prejudice claim where the plaintiff’s own pre-suit research should have revealed the defense). Meanwhile, a defendant who deliberately sits on a defense for tactical advantage is still answerable under Rule 11 and the court’s inherent authority. The diligence inquiry doesn’t fall out of the case; it just moves. And, of course, the prejudice inquiry itself has real teeth; just see how it knocked out one of the DA’s Office’s late-raised affirmative defenses in this very case. See Resp.Br.6.

* * *

The Rules require defendants to plead their affirmative defenses. They do not require courts to pretend that a harmless failure to do so decides anything.

II. Younger's approach would complicate the proceedings.

A. Younger overestimates briefing, uniformity, and fairness concerns.

In support of her view, Younger also offers up a series of policy arguments suggesting that the DA's Office's reading would cause complications in the briefing and motions practice. Although the plea for practicality is justified, Younger's concerns are overstated.

1. It doesn't follow, for example, that allowing a defendant to raise an unpled affirmative defense will somehow upset the ordinary course of things on summary judgment. Pet'r.Br.34-40. As best the States can tell, this "problem" is merely one of Younger's own imagination; she assumes, without much justification, that a defendant will wait until a reply brief to address his own failure to plead the affirmative defense and explain why no prejudice would result from hearing it. A defendant who takes this approach would do so at his own peril, as a failure to address the relevant standard could kill off the defense entirely. See FED. R. CIV. P. 7(b)(1)(B) (requiring a movant to state the grounds for his relief with "particularity"); cf. *In re Under Seal*, 749 F.3d 276, 292 (4th Cir. 2014) (explaining that a party's "failure to argue for plain error and its application ... surely marks the end of the road for [its otherwise forfeited] argument" (cleaned up)). Regardless, a plaintiff would not be put in any difficult position even if the defendant's opening brief

on summary judgment didn't raise the prejudice issue. Harmless error, waiver, forfeiture, and abandonment issues often first appear in a response brief without disastrous effect—a point this Court knows from experience. See, *e.g.*, Br. for Resp. B.P.J. at 30 n.12, *West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026) (No. 24-43), 2025 WL 3191846 (arguing that argument was waived).

Arguments in a reply brief that respond to those arguments then aren't impermissible “new” arguments. Contra Pet'r.Br.37-38. And even if they were, the district court could rightly deal with that issue by striking the offending new material, offering the plaintiff a chance at a surreply, or ordering supplemental briefing for everyone; district judges are thus not helpless in the face of motions practice in their own courts. Younge worries that such solutions could vary from court to court. *Id.* at 39. They do. But so does most of summary judgment practice, as the Federal Rules set only minimal briefing requirements and local rules supply the rest. The district courts have managed.

And really, the ordering “problem” that worries Younge so much is the best way of approaching the issue. When the inquiry centers on prejudice, the plaintiff owns all the key facts. Younge knows what discovery she took, what discovery she'd have liked to take, and what witnesses she'd have deposed. If a late-raised defense cost her something, she is the only party who can say what it was—and she can say it in her opposition without waiting for the defendant to speak first. Indeed, the Eleventh Circuit affirmed here in part because Younge could not name any other discovery that would have mattered. See Pet.App.12a-13a & n.7. That failure of proof was not a briefing-order problem.

2. Younge also places too much weight on purported inconsistencies in the lower courts' standards. What matters is how "most" courts "permit a defendant to raise an affirmative defense for the first time in a post-answer motion" so long as "no prejudice" runs to the plaintiff. 2 MOORE'S FEDERAL PRACTICE §§ 8.07-8.08 (3d ed. 1997) (calling the contrary rule "too restrictive"). Any variations in how they then apply that test—looking to unfair surprise, undue delay, or the like—are more variations in "nomenclature" than substance. *Glob. Tech.*, 789 F.3d at 733. Diligence and prejudice can converge, for instance, because a defendant who sat on a defense for tactical reasons will nearly always have caused some prejudice by the time he springs it. Cf. *Doggett v. United States*, 505 U.S. 647, 655 (1992) (describing how a lack of diligence can lead to a presumption of prejudice in the speedy-trial context). And to the extent that differences do exist, this Court can now resolve them. Any disuniformity is a reason to decide but not a reason to decide in Younge's favor.

Lower courts can consistently apply a standard centering on "prejudice" because "prejudice" is one of the most applied concepts in federal litigation. Indeed, prejudice offers the best of both worlds, promising not only "a uniform procedure" but also one "that is flexible, simple, clear, and efficient." CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 62 (5th ed. 1994).

3. Lastly, Younge mistakenly focuses on symmetry, suggesting that a win for the DA's Office would make it easier for defendants in the Eleventh Circuit to raise new defenses than it would be for plaintiffs to raise new claims. Pet'r.Br.20-24.

The argument is unusual, resting as it does on one circuit's cases rather than the proper construction of the

Federal Rules. If some disparity exists in the Eleventh Circuit, then Younge’s proposed remedy also seems to run backwards. Rule 61 does not distinguish between plaintiffs and defendants; it tells courts to disregard errors that don’t affect substantial rights, whoever made them. So if the Eleventh Circuit is too grudging toward plaintiffs, then the answer is that a plaintiff’s harmless omission should be excused too—not that a defendant’s harmless omission should become fatal. See Resp.Br.46-47.

Even assuming this issue extends beyond the Eleventh Circuit, a little asymmetry in application is to be expected given the nature of litigation. At a later stage, it is more likely that a “plaintiff’s new allegations” will “expand the scope of the litigation” and be “significantly more prejudicial than a few affirmative defenses.” Anthony Gambol, *The Twombly/Iqbal Plausibility Pleading Standard and Affirmative Defenses: Gooses and Ganders Ten Years Later*, 41 PACE L. REV. 193, 220 (2020). New claims also trigger a duty on the part of the defendant to respond, while an affirmative defense does not oblige the plaintiff to do anything. New claims promise more discovery and a potentially “extortionate settlement,” while “[a]n affirmative defense cannot wreak similar havoc.” *Paleteria La Michoacana v. Productos Lacteos*, 905 F. Supp. 2d 189, 192 (D.D.C. 2012). These differences in effect may explain why Rule 8(c)(1) says only that defendants must “affirmatively state” an affirmative defense while Rule 8(a)(2) compels a plaintiff to “show[]” the plaintiff is “entitled to relief.” FED. R. CIV. P. 8. Higher standards are tied to the higher burdens.

What’s more, while “requiring equal pleading standards [and requirements] may seem equitable, ... a real challenge is presented by the time constraint under

which the defendant must submit a responsive pleading.” Jessica Marks & Marcus Gadson, *Text, Fairness, and Efficiency: The Case Against the Plausibility Standard for Affirmative Defenses*, 17 FED. CTS. L. REV. 1, 19 (2025). Plaintiffs might have months—or years—to prepare their pleading, which they file after extensive investigation. In contrast, defendants most often have three short weeks to answer on a clock that someone else started. *Id.*; FED. R. CIV. P. 12(a)(1)(A)(i). Courts can and should “recognize the practical implications of the disparate temporal requirements set by the Federal Rules, and account for them” in deciding how claims and defenses should be raised. Justin Rand, *Tightening Twiqbal: Why Plausibility Must Be Confined to the Complaint*, 9 FED. CTS. L. REV. 79, 95-98 (2016).

B. Younge’s rule would push defendants to plead every conceivable defense.

While Younge frets about harms that don’t exist, she also overlooks the inevitably destructive consequence of her own rule.

Younge’s rule creates perverse incentives. If a defense omitted from the first answer is gone for good, no competent lawyer will omit anything. Every conceivable affirmative defense goes in, no matter whether the facts then known support it, because the cost of listing a defense that turns out to be unnecessary is next to nothing (assuming Rule 11 isn’t implicated) and the cost of leaving one out is the case. That’s especially true in places where pleading deadlines are set early in the case by scheduling order. In those courts, defendants will be especially wary of triggering the Rule 16(b) standard that Younge says would apply after that deadline runs.

And remember how it's not even clear sometimes whether a defense is an affirmative defense (says Younge: waived) or a negative defense (not waived). See *In re Sterten*, 546 F.3d 278, 284 (3d Cir. 2008) ("Rule 8(c) itself provides little guidance for determining which defenses, other than those specifically set out, fall within its ambit."). So a cautious attorney will list not just every *affirmative* defense, but every defense—period. See *Schultz v. Cnty. of Chippewa*, No. 17-CV-622-WMC, 2019 WL 1434966, at *1 n.3 (W.D. Wis. Mar. 29, 2019) (observing "the tendency of counsel to rely on such boilerplate or laundry list [defenses] at the outset of a lawsuit to avoid possible waiver").

Defendants already employ this neurotic strategy in some cases, and courts already criticize this "kitchen-sink approach" to pleading. *U.S. All Star Fed'n, Inc. v. Open Cheer & Dance Championship Series, LLC*, 179 F.4th 883, 895 (11th Cir. 2026) (cleaned up). Boilerplate answers reciting a dozen or two defenses—sometimes with no clear connection to the case—are a sadly familiar feature of federal practice. As it is, even under standards disfavoring motions to strike, magistrate judges and district courts spend time striking them under Rule 12(f). See generally, *e.g.*, *Extended Care Clinical v. Scottsdale Ins.*, No. 20-C-7132, 2021 WL 8321870 (N.D. Ill. July 20, 2021); *FTC v. OMICS Grp. Inc.*, No. 216CV02022GMNVCF, 2017 WL 6806802 (D. Nev. Dec. 15, 2017). Quite simply, "[b]oilerplate defenses clutter the docket and, further, create unnecessary work." *Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008). Younge's rule would make the practice universal and rational.

That result would gut the notice function Younge concedes Rule 8(c) is meant to serve. "It is not enough

simply to string cite defenses that come to the pleader's mind." *Extended Care*, 2021 WL 8321870, at *2. That's so because an answer that pleads laches, estoppel, waiver, failure of consideration, and fifteen other defenses tells the plaintiff nothing about what she has to meet. Notice instead comes from selection. Yet a defendant who cannot afford to be selective instead chooses to signal nothing. And none of this is what the rule-writers had in mind. Quite the opposite: "[t]he whole philosophy behind the Federal Rules militates against placing parties in a procedural strait jacket by requiring them to possibly forego valid defenses by hurried and premature pleading." *Wyrough & Loser, Inc. v. Pelmor Lab'ys, Inc.*, 376 F.2d 543, 547 (3d Cir. 1967).

In the end, plaintiffs would bear a big part of the cost. Faced with an answer listing every affirmative defense and avoidance that a creative defendant might imagine, a plaintiff must either take discovery on defenses that defendant will never press or guess which ones are real. Or she may move to strike, which costs a round of briefing and often does nothing but irritate the court. See, e.g., *Raymond Weil, S.A. v. Theron*, 585 F. Supp. 2d 473, 489-90 (S.D.N.Y. 2008) ("There is nothing dumber than a motion to strike boilerplate affirmative defenses; it wastes the client's money and the court's time."). The net result is a "waste of judicial resources"—namely, a lot of wrangling over defenses that prove to be "irrelevant and unraised by the defendant." *Bass v. Syracuse Univ.*, No. 519CV566TJMATB, 2020 WL 4934585, at *5 n.5 (N.D.N.Y. Aug. 24, 2020).

Rule 61 avoids all of it. When a court can disregard a harmless omission, a defendant has no reason to plead defenses he doesn't have and every reason to plead the ones he does—promptly, because delay is what creates

prejudice and prejudice is what gives up the defense. The prejudice standard rewards the behavior Younger says she wants.

* * *

In short, Younger's rule would not produce better pleadings or more efficient motions practice. It would produce longer answers that say less of substance and spur more collateral fights.

III. Younger's approach will harm the States.

Younger's slant on the Federal Rules would be especially painful for the States. States face unique challenges at the answer stage, and Younger's approach would often have them waiving critical affirmative defenses because of those challenges.

Start with the clock. The United States gets 60 days from service to answer, FED. R. CIV. P. 12(a)(2)-(3), a concession that governments cannot move quite as nimbly as private parties can. States get no such accommodation; they get the ordinary 21 days any other litigant does. (Their lawyers also often have no power to waive service to benefit from the extended response time.) But States must then prepare their answers under the same institutional constraints that justified the federal government's longer clock. Often, the summons arrives at a central office and must be routed to the right division and the right lawyer. The client is an agency, an office, a prison, or the like—rather than a person with the facts at hand. Counsel must hunt the right contact down. (Note how that's exactly backwards from private representation.) The Attorney General may need to decide whether to represent the client directly, hire outside counsel himself, refer the case to insurance

counsel, or do something else entirely. Then, whichever counsel ends up with the case might need to answer before the client's files arrive from within the bowels of the state bureaucracy. And making matters worse, these state cases often concern conduct that occurred years earlier under administrations and officeholders that have since left. That says nothing of the other institutional factors that can even further slow the process, like resource constraints as States tighten their balance sheets.

Now consider what must go into that answer, in Younge's view, on pain of permanent waiver. Many of the defenses that matter most to government litigation have factual predicates that will be difficult, if not impossible, to verify in three weeks. For instance, exhaustion under the Prison Litigation Reform Act is an affirmative defense. See *Jones v. Bock*, 549 U.S. 199, 212 (2007). But whether a prisoner exhausted turns on grievance records that must be pulled from the institution. And the exhaustion defense is hardly unique. Statute-of-limitations defenses turn on facts the complaint may obscure. Claim preclusion can depend on prior suits the answering attorney has never heard of. Immunity and arm-of-the-state questions turn on details of entity structure and funding.

Even the defense at issue here shows how working up an affirmative defense as a governmental defendant can turn on facts that require far more development than 21 days sitting with a complaint can afford. In particular, whether an employee was "personal staff" under Section 2000e(f) can turn on appointment powers, reporting structure, public perceptions, degree of control, status in the chain of command, and "actual intimacy" between the elected official and the employee. *Birch v. Cuyahoga Cnty. Prob. Ct.*, 392 F.3d 151, 158 (6th Cir. 2004) (cleaned

up). It's unlikely that many of those facts will be clear from the face of a complaint naming an office as a defendant.

The volume compounds the problem. Setting aside the federal government, no litigant appears in federal court more often than the States—a fact confirmed by how often States then end up before this Court. See Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC'Y REV. 657, 660 (2014). Much of the States' dockets consist of cases—prisoner petitions, employment suits, civil rights actions—in which late-surfacing defenses are most common. Zambrano, *supra*, at 1855. Now multiply an unforgiving rule across thousands of answers a year, drafted on 21-day clocks by offices managing hundreds of matters. State attorneys answer these complaints with skill and diligence. But no measure of either can change all these realities.

So for States, Younger's rule would likely produce a steady stream of cases in which States will lose defenses that Congress gave them because of omissions that harmed no one. And that outcome is even worse when, as here, the defense that waiver would erase is itself a federalism protection. *Gregory*, 501 U.S. at 460-61. Better to avoid it altogether by rejecting Younger's misguided blanket rule.

CONCLUSION

The Court should affirm.

Respectfully submitted.

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