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 OF PROFESSOR DEREK MULLER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Professor Derek Muller is a professor of law at the University of Notre Dame Law School. He is a nationally recognized scholar in the field of civil procedure, federal courts, and election law. He has taught courses on federal civil procedure, federal courts, complex litigation, and evidence, among other courses. He is a co-author of a Federal Courts casebook published by Carolina Academic Press. And he is a co-editor of a federal rules supplement, *Rules and Laws for Civil Actions*.

Professor Muller has a strong interest in the doctrinal development and proper application of the Federal Rules of Civil Procedure. He has taught the history of the modern rules, and the doctrinal shift from technical and form-pleading standards to flexible rules designed to ensure the presentation by both plaintiffs and defendants of the factual and legal merits of a case.

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states no counsel for any party authored this brief in whole or in part, and that no party nor their counsel, nor any person other than *amicus curiae* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In the permissive spirit of the modern Federal Rules of Civil Procedure, trial courts have the discretion to consider a defendant's unpleaded affirmative defense if that defense presents a question of law needing no further factual development and if there is no prejudice to the plaintiff caused by the delay. This is especially true if considering the defense would aid resolution of a case on its merits. A contrary ruling would be out of step with the text and spirit of the Rules, would be counter to the sound discretion common in lower court practice, and would risk reviving the deliberately-buried days of technical form pleading requirements.

I. The Federal Rules of Civil Procedure were purposefully designed to abolish a system that prioritized rigid formalism over deciding a case on its merits. In response to an era of outcomes determined by harsh technicalities, the drafters of the Rules developed a modern pleading system to fulfill the goal of "function over form" while still respecting the purpose of providing sufficient notice of claims and defenses to the opponent to avoid "trial by ambush." Applying a "no prejudice" standard to a litigant's efforts to assert an unpleaded affirmative defense ensures protection of both purposes. Meanwhile, applying the standard proposed by Petitioner—a standard which would gut trial court discretion to reach the merits of a case in the name of protecting such discretion—risks resurrecting the very skewed priorities that the modern Rules deliberately rejected.

II. While the text of Rule 8(c) is mandatory, neither the Rules nor courts understand the failure to plead an affirmative defense as a *per se* waiver. *See*, *e.g.*, Pet.Br.13-14. In light of the purpose of Rule 8(c) "to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it," *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988), courts have considered late-raised affirmative defenses "when the failure to raise an affirmative defense does not prejudice the plaintiff." *Id.* A "no prejudice" standard comports with both the text and purpose of the Rules. *See*, *e.g.*, Fed. R. Civ. P. 1 & 61. And when, as here, the late-asserted affirmative defense only requires additional legal argument without further factual pleading or development, there is no harm to the plaintiff and no reason to avoid the argument.

III. Petitioner is concerned that allowing courts to address legal arguments concerning unpleaded affirmative defenses would allow effective amendments to the pleadings without satisfying the rules, but Rules 15**Error! Bookmark not defined.** and 16 should pose no barrier anyway. Raising legal arguments at summary judgment is not the same as injecting new factual issues into the case, and is considered under entirely different rules.

Further, since at least *Foman v. Davis*, this Court has interpreted Rule 15 to permit amendments to the pleadings where no "undue prejudice" resulted to an opponent, meaning that the "no prejudice" test is actually *stricter* than the Rule 15 standard. Even if a defendant raising a new legal argument had to satisfy Rule 15, in other words, an affirmative defense that caused "no prejudice" would easily meet the standard. Rule 15(b)(2) makes this especially clear.

IV. Further, Rule 16(b)'s standard generally does not apply to circumstances where no scheduling changes are needed because no additional factual development is needed, and the newly-asserted defense only requires additional legal argument. Even if Rule 16's amendment standard did apply, however, Rule 16 is not intended to create additional restrictions and barriers to Rule 15's amendment standards. Rather, Rule 16 must be read in light of Rule 15's specific text and spirit favoring liberality of amendment and disposition of cases on their merits. Any scheduling order entered under Rule 16(b), for instance—even an order contemplating pleading amendment deadlines—must necessarily be considered in line with the more specific standards already announced in Rule 15 governing pleadings. To read Rule 16 differently conflicts with the Rules' purpose of avoiding rigid formalism and, ironically, seeks to override trial courts' discretion in deciding how to administer their proceedings.

ARGUMENT

I. The Modern Federal Rules of Civil Procedure Deliberately Abolished the Prioritization of Rigid Formalism.

Today, civil procedure textbooks neatly summarize the current federal pleading requirements in two landmark cases, *Bell Atl. Corp. v. Twombly*, 550 U.S.

544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Not so neatly summarized—and sometimes omitted from first-year curricula—is the extensive history and evolution preceding today's pleading requirements. Even predating the Federal Rules of Civil Procedure, adopted in 1938, the pleading process has been a highly popular, and often controversial, topic amongst courts and legal scholars. At early common law, the pleading stage was prioritized as "a very important, *if not the most important*, element in a lawsuit[.]" C. L. Childers, *Keep On Pleading: The Co-existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 Val. U. L. Rev. 677, 683 (2002) (emphasis added). As a result, litigants were forced to navigate a realm where hyper-technicalities took priority over substantive justice and cases were regularly disposed of on form defects rather than their legal or factual merits. *See id.*; *see also* P. Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. Cal. L. Rev. 529 (1964) ("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.").

Often, liability was established against defendants notwithstanding valid defenses that would otherwise legally bar plaintiffs' claims. In *Gormley v. Bunyan*, 138 U.S. 623, 634 (1891), for instance, the trial court denied defendant's motion to amend the pleadings and issued judgment against defendant despite defendant's valid statute of limitations defense. This Court found no error, reasoning that "[t]he only way in which such statutes are available as a defense is when they are, at the proper time, specially pleaded." *Id.* at 635.[2] Similarly, in *The Confederate Note Case*, 86 U.S. 548, 554 (1873), the trial court declined to consider defendant's unpleaded legal argument that the subject bonds "were void as usurious" and entered judgment against defendant to pay the bonds. This Court affirmed: "Usury, as a defense, should have been specially pleaded or set up in the answer to entitle it to consideration." *Id.* at 560.

Seeing one too many lawsuits turning on a technicality, the drafters of the Federal Rules of Civil Procedure designed a uniform practical system to circumvent "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). The drafters' intention was "to rectify the difficulties of common law and code procedure and practice" and "to remedy the highly technical character of the prior procedural systems, a phenomenon which rigid pleading exemplified." C. Tobias, *More Modern Civil Process*, 56 U. Pitt. L. Rev. 801, 806 (1995) (footnotes omitted). Along the way, the

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[2] *See also Carolina, C. & O. Ry. Co. v. Mumpower*, 205 F. 872, 874 (6th Cir. 1913) (precluding defendant from relying on its statute of limitations defense, which was asserted in defendant's original answer, because it was not explicitly pleaded against plaintiff's *amended* declaration) ("It was quite as open to the [defendant] to waive the limitation at that stage of the case as it was at any other; and it is not denied, as plainly under well-settled rules of practice it could not be, that a failure in some form of pleading affirmatively to raise the defense of the statute of limitations operates to waive it."); *Rich v. Bray*, 37 F. 273, 278 (C.C.W.D. Mo. 1889) ("advantage cannot be taken of the statute of limitations otherwise than by plea").

Rules Committee "limit[ed] the significance of pleadings" in order to "foster[] simplicity and merits-based resolution." *Id.*

One of the ultimate purposes of the modern procedural practice, in other words, was to move from the harsh results of technical pleading standards and focus the attention on the merits of a case. *See*, *e.g.*, F. Amendola, *et al.*, *Purpose of Federal Rules of Civil Procedure*, 35A C.J.S. Federal Civil Procedure § 9 (2026) ("the purpose of the Rules is to simplify procedure and abolish technicalities") ("The Rules favor deciding matters on the merits, not on technical procedural grounds[.]"); A. Steinman, *Purpose and Construction of Rules*, Fed. Prac. & Proc. Civ. § 1029 (4th ed.) ("The primary purpose of procedural rules is to promote the ends of justice.") ("The federal rules are designed to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies.").

The change in results—with more cases resolved on their substantive merits—has been as notable as it was intended. In *Bylin v. Billings*, 568 F.3d 1224 (10th Cir. 2009), for instance, a defendant discovered that, based on pre-existing case law defendant simply had not seen, it had a viable statute of limitations defense *after* the defendant had already filed for summary judgment. *Id.* at 1227. The defendant moved to assert the defense, which required no additional factual development, and the district court ultimately considered and granted summary judgment on that basis, finding that no prejudice had been caused to plaintiff by the delay. *Id.* at 1228-29. The Tenth Circuit affirmed. *Id.* at 1229 ("We conclude that the defendants' late amendment did not unduly prejudice the Bylins, and therefore the district court did not abuse its discretion in allowing the amendment."). Compare that against the results reached in *Gormley*, *supra*. *See also Lux v. Cox*, 32 F. Supp. 2d 92, 97–100 (W.D.N.Y. 1998) (permitting defendant to belatedly assert the affirmative defense of "release" pursuant to Fed. R. Civ. P. 15 and then granting summary judgment in defendant's favor because the release precluded liability); *Granberry v. Greer*, 481 U.S. 129, 131-33 (1987) (holding that a court had discretion to consider a "failure to exhaust" defense even where the defendant failed, due to inadvertence, to affirmatively raise the defense until appeal).

No longer is the pleading stage "a game of skill in which one misstep by counsel may be decisive to the outcome" but instead a method "to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *abrogated by Twombly*, 550 U.S. 544. "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962).

This purpose is immediately incorporated by the "paramount command," set forth in Rule 1, *see* F. Amendola, *et al.*, *Purpose of Federal Rules of Civil Procedure*, 35A C.J.S. Federal Civil Procedure § 9 (2026): "The[se 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." Fed. R. Civ. P. 1 (emphases added). The textual assurance of a just, speedy, and inexpensive proceeding expresses the "spirit" of the Rules in issuing judgments on facts rather than formalistic defects. *Builders Corp. of Am. v. United States*, 259 F.2d 766, 771 (9th Cir. 1958). Further, Rule 2 confirms the deliberate departure from early common law procedure by abolishing former distinctions as to form between actions at law and suits in equity. *See* Fed. R. Civ. P. 2 ("There is one form of action—the civil action.").

Most telling, Rule 61 safeguards against the restoration of the old regime by declaring that "[a]t 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 (emphasis added).

> The mandate in the second sentence of Rule 1 is only one of a number of similar admonitions to the bench and bar scattered throughout the federal rules directing that they be interpreted liberally in order that the procedural framework in which civil litigation is conducted promotes the ends of justice and facilitates decisions on the merits, rather than determinations that turn on technicalities. Perhaps the most important of these statements is the harmless error provision found in Rule 61[.]

A. Steinman, *Purpose and Construction of Rules*, Fed. Prac. & Proc. Civ. § 1029 (4th ed.); *see also Parrish v. United States*, 605 U.S. 376, 388–89 (2025). Rule 61 therefore bars any argument that a technical error is determinative of a litigant's case. *See* M. K. Kane and

A. Steinman, *History and Purpose of Rule*, 11 Fed. Prac. & Proc. Civ. § 2883 (3d ed.) ("At the heart of Rule 61 is the proposition that the critical consideration is the seriousness of the error, not its occurrence.").

Co-existing with this purpose is the modern Rules' effort to ensure parties receive sufficient notice of the factual claims and defenses raised against them—a policy that has been respected throughout the progression of civil procedure. *See, e.g.*, F. Amendola, *et al.*, *Purpose of Federal Rules of Civil Procedure*, 35A C.J.S. Federal Civil Procedure § 9, n.21 (2026) ("The gravamen of the Federal Rules of Civil Procedure is to eliminate trial by ambush."). "The purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it." *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988).

Accordingly, working to simultaneously vindicate the Rules' focus on "function over form," *see Parrish*, 605 U.S. at 389, and prevent trial by ambush, courts are instructed to limit delayed amendments to the pleadings to circumstances where there is no prejudice to the opposing party. *See, e.g.*, Fed. R. Civ. P. 15(b); *Glob. Tech. & Trading, Inc. v. Tech Mahindra Ltd.*, 789 F.3d 730, 731 (7th Cir. 2015); *see also* M. K. Kane and A. Steinman, *History and Purpose of Rule*, 11 Fed. Prac. & Proc. Civ. § 2883 (3d ed.) ("Plainly Rule 61 teaches that the proceedings are not to be disturbed because of an error that prejudiced no one.").

> Rule 61, requiring courts to ignore procedural errors save when they have affected the substantial rights of the

> parties, should be read in connection with Rules 1 and 8(f), calling for liberal construction of the civil rules and of the pleadings thereunder, as well as such rules as 15, 21, 32, 59, and 60, by which amendments of the process or pleadings, correction of mistakes, granting of new trials, and all matters, are ***all*** **contingent on whether or not the error was prejudicial**.

M. K. Kane and A. Steinman, *History and Purpose of Rule*, 11 Fed. Prac. & Proc. Civ. § 2881 (3d ed.) (emphases added).

The standard is no different when determining whether a defendant can belatedly assert an unpleaded affirmative defense. *Hassan*, 842 F.2d at 263 ("When a plaintiff has notice that an affirmative defense will be raised at trial, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice. And, when the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue."); *see* P. Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. Cal. L. Rev. 529, 533 (1964) (noting that the "apparent intent of [*Hutchison v. New Amsterdam Cas. Co.*, 13 F.R.D. 175 (W.D.Pa. 1952)'s] holding is to spread the application of the test of 'prejudice' to all pleading amendments.").

The Court should consider the Question Presented against this backdrop and in the context of these rules. The district court and the Eleventh Circuit rightly enforced the letter and spirit of the Rules by holding that, in a case where Petitioner suffered no prejudice from Respondent's delay, the district court should consider Respondent's meritorious affirmative defense and dispose of the case on the merits.

II. Trial Courts Should Be Able to Consider Legal Arguments Requiring No Further Factual Development and Resulting in No Prejudice, Even if First Raised in a Motion for Summary Judgment.

Neither the Parties nor the lower court dispute that the language of Fed. R. Civ. P. 8(c) is mandatory. *See* Pet.Br.10; Resp.Br.15-16; *Younge v. Fulton Jud. Cir. Dist. Att'y Office*, No. 23-11418, 2025 WL 974309, *4 (11th Cir. Apr. 1, 2025). The only question concerns the consequence for failing to plead an affirmative defense, and then later raising legal arguments that would support the unpleaded defense.

On that score, neither the Rules, this Court, nor lower courts, understand the failure to plead an affirmative defense as a *per se* waiver. Rule 8 does not specify any particular consequence for failing to plead an affirmative defense, unlike other provisions of the Rules. *See*, *e.g.*, Fed. R. Civ. P. 12(h). This Court has itself recognized "exception[s] to the rule that a federal court will not consider a forfeited affirmative defense," *Wood v. Milyard*, 566 U.S. 463, 470 (2012) (citing *Granberry v. Greer,* 481 U.S. 129 (1987) & *Day v. McDonough*, 547 U.S. 198 (2006)), and has considered legal arguments supporting affirmative defenses without formal pleading amendment. *See also id.* at 474 (distinguishing between "intentional relinquishment or abandonment of a known right" and "inadvertent error," and finding legal consideration of an unpleaded affirmative defense acceptable in the latter case, but not the former).

Put simply, "[t]he waiver rule that has developed in the practice under Rule 8(c) is not applied automatically with regard to omitted affirmative defenses and as a practical matter there are numerous exceptions to it based on the circumstances of particular cases." 5 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1278 (4th ed. 2026) (collecting authorities from each circuit at n.11). "[T]he 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.* (collecting authorities at n.12).

In light of the purpose of Rule 8(c) "to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it," *Hassan*, 842 F.2d at 263, it is not surprising that courts have considered late-raised, but inadvertently omitted, affirmative defenses "when the failure to raise an affirmative defense does not prejudice the plaintiff." *Id. See also Glob. Tech. & Trading, Inc.*, 789 F.3d at 731 ("Several of our decisions hold that a district court may (though it need not) permit an untimely affirmative defense, provided the plaintiff does not suffer prejudice from the delay. . . . Most other circuits follow the same approach."); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999) ("[T]here is ample authority in this Circuit for the proposition that absent unfair surprise or prejudice to the plaintiff, a defendant's affirmative defense is not waived when it is first raised in a pre-trial dispositive motion[.]"); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) ("In the absence of a showing of prejudice, however, an affirmative defense may be raised for the first time at summary judgment."); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993); *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1374 (3d Cir. 1993).

A "no prejudice" standard comports with both the text and purpose of the Rules. *See*, *e.g.*, Fed. R. Civ. P. 1 & 61. When, as here, the late-asserted affirmative defense only requires additional legal argument without further factual pleading or development, requiring formal amendment of the pleadings would not advance the purpose of the Rules. This Court has "decline[d] to adopt an absolute rule barring consideration" of legal arguments supporting "a forfeited [affirmative] defense." *Wood*, 566 U.S. at 473. It should not create such a rule now.

III. Rule 15 and Rule 16 Do Not Apply, But They Would Be No Barrier Here Even if They Did.

Petitioner is concerned that legal arguments supporting an unpleaded affirmative defense, if considered without a corresponding amended pleading, would vitiate Rules 15 and 16. *See* Pet.Br.13-14. Petitioner is wrong for several reasons, the first being that raising new legal arguments in support of already-developed facts is different than amending a pleading to raise *new* facts. On the face of the Rules, amendments to the pleadings under Rule 15—like

Rule 8 itself—generally concern the injection of new factual "issues" into a case, not new legal arguments. As this Court has recognized, the standards for raising new legal arguments and new factual matters are distinct, *Dupree v. Younger*, 598 U.S. 729, 737 (2023), and rules governing pleadings are generally concerned with ensuring the parties have sufficient information concerning the *factual* elements of a case. *See Johnson v. City of Shelby, MS*, 574 U.S. 10, 12 (2014). *See also Hassan*, 842 F.2d at 263. While raising a new affirmative defense could inject new factual issues into a case *in some circumstances*, amending pleadings is not required where—as here—the trial court is only required to consider legal arguments.

But just as importantly: Rule 15 and Rule 16 do not create any additional barrier for a party to overcome where, as here, raising a new legal argument causes no prejudice at all.

A. Rule 15's "no undue prejudice" standard is satisfied by a finding of "no prejudice."

Since at least *Foman*, 371 U.S. at 182, courts have interpreted Rule 15 to permit amendments to the pleadings where no "undue prejudice" resulted to an opponent. And if there is "***no*** prejudice," as the lower courts found here, *Younge*, 2025 WL 974309, *5 (emphasis added), there certainly cannot be "undue prejudice."

Rule 15's "undue prejudice" standard, in other words, is actually *more permissive* than the "no prejudice" standard applied by the 11th Circuit here.

Id. *See Bylin*, 568 F.3d at 1229 ("Typically, courts will find prejudice only when an amendment unfairly affects non-movants 'in terms of preparing their [response] to the amendment.'" (quoting *Minter v. Prime Equipment Co.,* 451 F.3d 1196, 1208 (10th Cir.2006)). What Petitioner seeks, then, is not an application of Rule 15's substantive standard, but a windfall based on a perceived technical misstep: while legal argument on Respondent's affirmative defense may have been substantively proper, the fact that the trial court heard those arguments without the Respondent amending its answer is disqualifying. Pet.Br.18.

Rule 15, itself, does not require this. Under Rule 15(b)(2), for instance, trial courts are *required* to accept trial of unpleaded issues tried by consent: "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." *Id.* That is true as a matter of practical function regardless of whether the pleading forms themselves are ever actually amended to address the issue. Rule 15(b)(2) is clear: "A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. *But failure to amend does not affect the result of the trial of that issue*." *Id.* (emphasis added). This is analogous to doing what the lower court did here: allowing a defendant to raise legal arguments concerning an affirmative defense whose facts were fully developed in discovery without objection, even where the defendant did not assert the defense in its pleadings. *See Wallin v. Fuller*, 476 F.2d

1204, 1210 (5th Cir. 1973).[3] Said otherwise, affording Respondent here an opportunity to raise legal arguments concerning an affirmative defense where no new factual development was needed—and where the district court explicitly found no prejudice was caused to Petitioner is ultimately consistent with the substantive standard of Rule 15.

B. Rule 16 generally does not apply to legal arguments raised in a timely-filed motion for summary judgment.

The amendment standard contained in Rule 16(b) does not alter the analysis, either. First, raising new legal arguments concerning already-developed facts in a timely-filed summary judgment motion does not generally implicate scheduling order concerns, and so Rule 16 generally does not apply. *See supra* § III (noting that rule 8 is generally concerned with *factual* issues, not legal arguments). Because all relevant facts were already developed in discovery and no further factual development was needed, the assertion

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[3] Treating affirmative defenses this way comports with the text and structure of the Rules, and enforces the balance between offensive and defensive opportunities envisioned by the Rules. Because modern civil procedure aims to protect the interests of both plaintiffs and defendants to ensure that the focus of litigation is maintained on the merits of a case, granting trial courts the discretion to consider legal arguments supporting a delayed affirmative defense under a "no prejudice" standard maintains that balance. *See Sys. Inc. v. Bridge Elecs. Co.*, 335 F.2d 465, 466 (3d Cir. 1964) (recognizing that a defendant does not truly "waive" an affirmative defense unless he "fails to correct the omission either prior to trial or during trial" as permitted by Rule 15(a)–(b)).

of the personal-staff exemption here was purely legal in nature and had no impact on the governance of the course of trial. *See Wallin*, 476 F.2d at 1208 (acknowledging that the purpose of a Rule 16 scheduling order is to govern the course of a trial); *see infra* § III–C. (discussing that Rule 16 must be read in light of Rule 15). The assertion of new legal arguments did not reopen discovery, trigger continuances, or disrupt "expedit[ious] litigation." *See Wallin*, 476 F.2d at 1208. Importantly, the assertion did not compromise Rule 16's goal of eliminating surprises at trial. *See id.* Respondent merely raised a new legal argument, which is afforded more flexibility than raising new factual issues and can be addressed throughout litigation. *Dupree*, 598 U.S. at 735 & 737.

True, a well-plead affirmative defense is made up of both factual *and* legal arguments. *See Defense*, Black's Law Dictionary (12th ed. 2024). But here, all facts underlying the personal-staff exemption were thoroughly explored by both parties prior to Respondent's first mention of the defense, and the Petitioner did not seek to reopen discovery. *Younge*, 2025 WL 974309, *5. The Rules, neither in text nor purpose, require a litigant seeking to assert a new legal theory to first make a "good cause" showing under Rule 16. *See, e.g.*, *Glob. Tech. & Trading, Inc.*, 789 F.3d at 731; *Brinkley v. Harbour Recreation Club*, 180 F.3d at 612; *Camarillo v. McCarthy*, 998 F.2d at 639.

C. Rule 16's scheduling provisions should be read in light of Rule 15's provisions governing amendment to pleadings.

Nevertheless, even if Rule 16's scheduling constraints were to apply to pure legal arguments raised at summary judgment, the structure of the Rules themselves demand that Rule 16 be read in light of Rule 15. While Rule 16 governs scheduling orders generally, Rule 15 specifically governs amendments to the pleadings, including at all stages of litigation. "'[A] specific provision' . . . 'controls one[s] of more general application.'" *Bloate v. United States*, 559 U.S. 196, 207 (2010) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991)).

On one hand, Rule 15, as detailed above, reflects the opportunity, not only to amend pleadings before trial, but also *during* and even *after* trial. Fed. R. Civ. P. 15(a) & (b). Ultimately, Rule 15 grants trial courts the discretion to consider amendments to ensure that a case is determined on the actual merits. *See id.*; *see also* P. Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. Cal. L. Rev. 529, 534 (1964) ("In allowing [an] amendment [under Rule 15], the court is merely permitting the valid issues to be presented for determination. This is the purpose of Rule 15.").

Rule 16, on the other hand, permits a trial court to manage its own docket, and to refuse to allow a case to drag on without end without a showing of "good cause." Fed. R. Civ. P. 16(b)(4). Such discretion granted under Rule 16 ensures that litigation is administered in an orderly manner. *Buffington v. Wood*, 351 F.2d 292, 297–98 (3d Cir. 1965) ("The clear dictate of this pretrial rule is to give the courts, through the issuance of pretrial orders, wide discretion and power to advance causes and simplify procedure before presentation of cases to juries."). But Rule 16 does not indicate that it is providing additional limitations to the amendment process, which are already governed by Rule 15. "Unbending adherence to the strictures of Rule 16 would [] frustrate another broad policy of the Federal Rules favoring liberality of amendment. This policy is principally embodied in Rule 15, which deals with amendments to the pleadings." *Wallin*, 476 F.2d at 1209. "It is unlikely that the pretrial order under Rule 16 was intended to make the pleadings, and therefore Rule 15, obsolete." *Id.*

To the contrary, Rule 16 necessarily must be read in light of standards for amendment in Rule 15. *Id.* ("Courts have therefore widely recognized that Rule 16 must be read in light of Rule 15, and that in some circumstances the policy of Rule 15 should moderate the strictures of Rule 16.") (citations omitted); *Bucky v. Sebo*, 208 F.2d 304, 305 (2d Cir. 1953); *see also* P. Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. Cal. L. Rev. 529, 540 (1964) (acknowledging that "Rule 16 can easily become a barrier to freedom of amendment under Rule 15" when viewed to suggest an "irrevocable notification" period for parties).

> The spirit in which a motion to amend pleadings should be approached is illustrated by Rule 15(a) of the Rules of Civil Procedure which provides that leave to file amended and supplemental pleadings shall be freely given when

> justice so requires. **A like spirit pervades Rule 16** in respect to pre-trial procedure which is designed amongst other things to secure a simplification of the issues and to obtain admissions which will avoid unnecessary proof.

Maryland Cas. Co. v. Rickenbaker, 146 F.2d 751, 753 (4th Cir. 1944) (emphasis added).[4]

A more constrictive view of Rule 16 conflicts with modern civil procedure, *see Wallin*, 476 F.2d at 1208, and would ironically override the trial court discretion in how to administer its proceedings that the Rule was designed to protect. A trial court is "at liberty to consider" delayed amendments, for courts "read Rule 16 in light of Rule 15(b)[.]" *Bucky*, 208 F.2d at 305. "The integrity of Federal Rule 15 depends upon the abolition of formalistic distinctions." P. Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. Cal. L. Rev. 529, 542 (1964). "[S]elf-contained limitation[s] on

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[4] Indeed, at least some courts have understood there to be a necessary logical connection between Rule 16(b)'s standard for amendments to a scheduling order and Rule 15's "undue prejudice" standard, holding that Rule 16(b)'s standard should be considered against any prejudice suffered by an opposing party. *See, e.g., Boans v. Town of Cheektowaga*, No. 9CV37, 2017 WL 11566469, at *1 (W.D.N.Y. Oct. 24, 2017); *Kozlov v. Associated Wholesale Grocers, Inc.*, 818 F.3d 380, 395 (8th Cir. 2016); *Nikaj v. Hanover Ins. Co.*, No. 2:16-CV-13925, 2018 WL 4282778, at *2 (E.D. Mich. Sept. 7, 2018); *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 12, n.5 (1st Cir. 2004). While this emphasis is not universal among lower courts, it demonstrates that Rule 16 should not be read in a vacuum or understood to subsume or replace the emphasis in the Rules on the prejudice (or lack thereof) caused to an opposing party. *See, e.g.*, Fed. R. Civ. P. 61.

amendment power" result in counterproductive considerations. *Id.* (describing the "concept of 'timeliness,' like that of 'delay,'" as "useless and indeed deceiving"). "The more important question for the court's consideration" when analyzing whether to permit a delayed amendment, "[i]s the effect which it would have, if [permitted], upon the rights of the parties[.]" *Maryland Cas. Co.*, 146 F.2d at 753.

> The court is directed to make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered, and such order, when entered, controls the subsequent course of the action 'unless modified at the trial to prevent manifest injustice.' . . . [I]t is obvious that a stipulation of counsel originally designed to expedite the trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice upon one of the contracting parties. . . . [T]he importance of avoiding such a result greatly outweighs the relatively slight inconvenience to which the parties and the court might have been subjected if the motion of the [defendant] had been granted.

Id.

Of course, in the end, this relationship need not be decided in this case. Respondent did not need to satisfy Rule 15 or Rule 16 because relying on a meritorious legal argument does not trigger either standard. But the point remains that these Rules are themselves far more flexible than Petitioner suggests, which diminishes any concerns that allowing defendants to raise legal arguments in support of unpleaded affirmative defenses would somehow circumvent the Rules.

CONCLUSION

This Court should affirm the Eleventh Circuit's ruling and answer the Question Presented in the affirmative. Under circumstances where a trial court finds that a late-raised defense presents a question of law for which no further factual development is needed—and correspondingly, that the plaintiff has not been prejudiced by the delay in raising the defense—this Court should hold that a trial court is correct to consider the defense and decide the case on its merits.

Respectfully submitted,

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