

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

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTION

The framers of the Federal Rules of Civil Procedure foresaw the type of problem that has arisen in this case. They anticipated that parties in framing their initial pleadings would at times overlook or not foresee possible claims or defenses. To address that situation, Rules 15 and 16 permit a party under certain circumstances to amend its pleading. The specific standards established by Rules 15 and 16 for such amendments are in some respects liberal, but they are not all-forgiving. When those standards are not met, a party is foreclosed from raising an unpled claim or defense at summary judgment, even if the unavailability of that claim or defense might alter the result in the case.

The federal courts have no general authority to refuse to enforce a mandatory provision of the Federal Rules by deeming it a mere technicality. The Rules contain a number of specific provisions that authorize flexibility in the application of particular Rules, including Rules 15 and 16 regarding amendments to pleadings. The Court should not create additional exceptions to the literal application of the Federal Rules. Flexibility in the administration of the Rules can be important, but what you see (in the text of the Rules themselves) is what you get. If there are recurring circumstances in which the requirements of Rules 8 and 12 are too broad, or in which the standards in Rules 15 and 16 are too demanding, that is a matter for the Advisory Committee on the Federal Rules of Civil Procedure.

Respondent urges the Court to adopt two exemptions which would in certain circumstances bar enforcement of the requirement in Rules 8(b)(1)(A), 8(c) and 12(b) that a defendant plead any affirmative defense. One would bar enforcement of Rules 8 and 12 whenever a defendant's

failure to plead an affirmative defense had not prejudiced the plaintiff. The other would bar such enforcement when an affirmative defense rests on “purely legal arguments.” Neither exemption is consistent with the the Federal Rules.

Respondent argues that its proposed exemptions are not invariably less demanding than Rules 15 and 16. R. Br. 27. But experience demonstrates that a defendant unable to meet the standards in Rules 15 and 16 can often raise that unpled affirmative defense under the sort of exemption proposed by respondent. Pet. Br. 33 n. 13.

A defendant which wants to raise at summary judgment an affirmative defense not included in its original answer can do so only by amending its answer under the standards in Rules 15 and 16. That has been the rule for almost three decades in the District of Columbia Circuit. *Harris v. Secretary, U.S. Dep’t of Veterans Affairs*, 129 F.3d 339 (D.C. Cir. 1997). The district courts in that circuit have repeatedly applied *Harris* without difficulty or reported complaint.

II. A DEFENDANT MAY NOT ORDINARILY RAISE AN UNPLED AFFIRMATIVE DEFENSE

Kontrick v. Ryan holds that “[o]rdinarily, under the . . . Civil Rules, a defense is lost if it is not included in the answer or amended answer.” 540 U.S. 443, 459 (2004). Respondent’s brief makes no mention of this passage in *Kontrick*. Respondent points out that the defendant in *Kontrick* had not raised the defense at issue until after summary judgment (R.Br. 32); but nothing in *Kontrick* suggested that the principle that “an[] [unpled] defense is lost” only applies after a case has been decided on the merits.

Day v. McDonough, 547 U.S. 198 (2006) and *Wood v. Milyard*, 566 U.S. 463 (2012), held that “[o]rdinarily in civil litigation a statutory time limitation is forfeited if not raised in a defendant’s answer or in an amendment thereto.” *Day*, 547 U.S. at 202; *Wood*, 566 U.S. at 470. Respondent does not address those holdings. Respondent insists that it did not “waive” its affirmative defense, citing *Day* and *Wood* for the proposition that a waiver, unlike a forfeiture, requires a deliberate abandonment of a claim or defense. R. B. 31-32. But that demonstrates only that the issue is whether an affirmative defense is forfeited if never pled.

Respondent asserts that *Wood* held that “a court [of appeals] could ordinarily” address an unpled statute of limitations defense. R. Br. 31 (emphasis omitted). To the contrary, *Wood* made clear that such consideration of an unpled affirmative defense is limited to “exceptional cases” and “extraordinary circumstances.” 566 U.S. at 470-71. Consideration of an unpled affirmative defense was permissible in *Wood* only because it was a habeas corpus case which involved “concerns broader than those of the parties; in particular . . . harmonious relations between the state and federal judiciaries.” *Wood*, 566 U.S. at 471; *see Day*, 547 U.S. at 208-09.

Respondent insists that “[a]s soon as Younge begins to discuss the consequences for failure to comply, her citations to the Rules themselves dry up. Pet. Br. 12-13.” R. Br. 6, 17. To the contrary, two paragraphs of our brief specifically cited and explained why Rules 15 and 16 demonstrate that the consequence of failing to plead an affirmative defense is ordinarily that the defense is lost. Pet. Br. 13-14. We noted in particular that Rule 15(b)(2)

provides an express exception (for unpled issues tried by consent) from the requirement that claims and issues be pled in an original or amended pleading, and we argued that federal courts should not create additional exceptions. Pet. Br. 13. *Expressio unius est exclusio alterius*. See *Leatherman v. Tarrant Cnty. Narcotics Investigation & Coordination Unit*, 507 U.S. 163, 168 (1993).

Respondent insists that failure to comply with Rule 8 (and Rule 12) cannot result in a waiver because other provisions of the Federal Rules “are replete with express admonitions of actual waiver.” R. Br.2 (emphasis omitted). On that reasoning noncompliance with Rules 8 and 12 could never result in the loss of an affirmative defense. But respondent’s argument proves too much. After all, respondent agrees that at least sometimes a defendant loses an affirmative defense by failing to plead it. R. Br. 17-18.

Respondent points out that Rule 12(h) provides that the defenses in Rule 12(b)(2)-(5) are waived under certain circumstances, invoking the maxim *expressio unius est exclusio alterius*. R.Br. 19-20. But the *unius* in Rule 12(h), the circumstance in which there would be a waiver under that Rule, is (as relevant here) when a defendant fails to include one of those defenses in either its original answer (“responsive pleading”) or in an amendment allowed under Rule 15(a)(1) as a matter of course. But we do not contend, and *Kontrick*, *Wood* and *Day* do not hold, that an affirmative defense is lost merely because not included in an original answer or an amendment as of right under Rule 15(a)(1). To the contrary, we agree that an affirmative defense is preserved if added by a not-as-of-right amendment, and maintain only that an affirmative defense is lost if a defendant *never* pleads the defense.

Respondent notes that Rule 71.1(e)(3) provides that “[a] defendant waives all . . . defenses not stated in its answer.” R.Br. 10. But that Rule also provides that after a defendant files its answer “no other pleading or motion asserting an additional . . . defense is allowed.” Here, as in most cases, an “additional . . . defense” can be added by a motion under Rule 15(a)(2), and a defendant can preserve the defense by adding it in that manner. Respondent contends that Rule 71.1(e)(3) “proves that the drafters knew how to write a rule that ‘waives all . . . defenses not stated in [the] answer’” R. Br. 19 (quoting Rule 71.1(e)(3)). But Rule 71.1 was adopted in 1951, fourteen years *after* (the initial version of) Rule 8. The drafters of the original 1937 Federal Rules obviously did not foresee, and then deliberately choose not to use, wording that would be chosen by their successors years later. Even if Rule 71.1 had permitted adding defenses by amendment, and had provided for waiver of defenses omitted from both the original and any amended answer, that could easily be understood as merely codifying already existing practice. *Parrish v. United States*, 605 U.S. 376, 389 (2025).¹

Finally, respondent argues that “[b]ecause Rule 8 does not specify any particular consequence for failure to comply, ‘the question before [the Court] concerns the consequences’ of a violation.” (R. Br. 16) (quoting *Dolan v. United States*, 560 U.S. 605, 609-10 (2010)). But the Court already addressed that question in *Kontrick, Wood, and Day*; the consequence of not pleading an affirmative defense is ordinarily, that “[the]

1. The Advisory Committee Note to the 1966 amendments does not indicate any intent to change the consequence of failing to plead an affirmative defense. Rule 12(h) had to be rewritten because the original wording provided that a defendant could not assert any affirmative defense if it moved to dismiss the complaint prior to filing its answer.

defense is lost.” *Kontrick*, 540 U.S. at 458. And although the text of Rule 8 itself is silent on this issue, the text of Rules 15 and 12 is not. Rule 15(b)(2) provides that if an issue is tried by consent, it “must be treated in all respect as if raised in the pleadings.” That provision necessarily assumes that otherwise an issue outside the pleadings (as amended) could not be raised at trial. Rule 12(b) is headed “How to Present Defenses,” and the heading of Rule 12 is “Defenses . . . When and How Presented.” So when Rule 12(b) provides that “[e]very defense . . . must be asserted in the responsive pleading,” it is specifying *the* manner in which an affirmative defense must first be asserted.

Dolan provides that in determining the consequence of noncompliance with a federal provision, courts are to focus on whether the provision is a jurisdictional condition, a claims-processing rule, or a directive requiring or forbidding particular conduct. 560 U.S. at 610-11; *see Hamer v. Neighborhood Hous. Servs. Of Chicago*, 583 U.S. 17, 19-20 (2017). Rules 8 and 12 are clearly mandatory claims-processing rules, which (subject to waiver, forfeiture, and tolling) are enforced as written. *Hamer*, 583 U.S. at 20-21. “Mandatory claim-processing rules ‘seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.’” *Manrique v. U.S.* 581 U.S. 116, 121-22 (2017).

Dolan holds that courts have some latitude in determining the “remedy” for a “violation” of a directive. 560 U.S. at 611. Respondent, seeking to treat Rules 8 and 12 as that sort of directive, suggests that failing to plead an affirmative defense is a “violation” of Rules 8 and 12, and that forfeiture of an unpled affirmative defense would be a “remedy.” R. Br. 8, 16. But the requirement in Rules 8 and 12 that a defendant

plead any affirmative defense is not (like, for example, the mandatory disclosures in Rule 26(a)) a freestanding directive that a litigant could violate; rather, that requirement is a precondition to invoking the defense. And the loss of an unpled affirmative defense is not a “remedy,” it is the inherent consequence of failing to meet the precondition imposed by Rules 8 and 12 for the invocation of such a defense.

III. RESPONDENT’S PROPOSED EXEMPTIONS ARE INCONSISTENT WITH THE REQUIREMENT THAT A DEFENDANT PLEAD “ANY” AND “EVERY” AFFIRMATIVE DEFENSE

Rule 8(c)(1) requires a defendant to plead “any . . . affirmative defense.” Rule 12(b) directs that “[e]very defense” must be pled. Respondent’s proposed interpretation of these rules would, in effect, exempt from those requirements two types of affirmative defenses: (1) affirmative defenses the non-pleading of which did not prejudice the plaintiff and (2) affirmative defenses based on “purely legal arguments.”

Respondent’s reasoning is straightforward in its logic, but indefensible in its result. A defendant which moves for summary judgment without pleading an affirmative defense does not comply with Rules 8 and 12. But, respondent maintains, neither Rule specifies the consequence of noncompliance. According to respondent, the “consequence” of noncompliance should be that a court will apply a prejudice test. (Or perhaps a purely-legal-argument test). If a defendant’s failure to plead the affirmative defense prejudiced the plaintiff (or if the defense was not purely legal), the court will decline to decide the summary judgment motion, and the defendant

will have seek to amend its answer under the standards in Rules 15 and 16. But if the failure to plead that affirmative defense did not prejudice the plaintiff (or if the defense was purely legal), the court will overlook the fact that the defense is unpled and decide the summary judgment motion.

Eliminating for these categories of affirmative defense any practical consequence for noncompliance with Rules 8 and 12 effectively exempts those affirmative defenses from the pleading requirement in those Rules. Application of respondent's proposed prejudice test is not a real world "consequence" or "result." It simply replaces the one-part standard in the actual Rules (did the defendant plead the affirmative defense?) with a more indulgent two-part standard ((1) did the defendant plead the affirmative defense? and (2) if not, did its failure to do so prejudice the plaintiff? (or is the defense purely legal?)). Respondent's assertion that "a defendant can raise an unpleaded affirmative defense at summary judgment, where there is no prejudice to the plaintiff" (R.Br. 2) is another way of saying "a defendant which moves for summary judgment need not plead the affirmative defense on which the motion is based so long as it did not prejudice the plaintiff by not pleading that defense." Respondent's proposal is a not-very-roundabout way of rewriting Rule 8 to read "a party must affirmatively state any affirmative defense *unless its failure to do so does not prejudice the opposing party.*" Or of changing Rule 12 to provide "every defense *except a defense raising a purely legal argument* must be asserted."

Respondent suggests that a possible consequence of failing to plead an affirmative defense could be that the

defendant would not be able to obtain discovery to support its affirmative defense. R. Br. 10. But a core element of several iterations of respondent's proposed prejudice and purely-legal-argument standards is that discovery would have to be irrelevant to resolution of the affirmative defense at issue. *See infra*, 13, 20. If a defendant needed discovery to establish the affirmative defense at issue, that defense would fail at least most versions of respondent's prejudice and purely-legal-argument tests.

This would not be some minor loophole in Rules 8 and 12. Many affirmative defenses do not involve factual issues, but turn solely on questions of law. Lower courts routinely hold that undisputed facts established affirmative defenses such as the statute of limitations, accord and satisfaction, arbitration and award, illegality, and res judicata. Respondent argues that "[n]ot all affirmative defenses are inherently less fact intensive" (R. Br. 47), citing as an example the statute of limitations defense in *Day*. 547 U.S. at 207 n. 6. But that example proves our point. The "essential information" mentioned in *Day*, and referred to by respondent, was the dates of earlier state court actions, which was indisputable.

Under several iterations of respondent's proposed standards, a defendant seeking summary judgment could avoid having to plead the affirmative defense at issue if it could show that there were no issues of material fact. But proof of the absence of genuine issues of material fact is already necessary to obtain summary judgment. Fed. R. Civ. P. 56(a). Respondent itself says that: "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." R. Br. 37

(emphasis in original). So (on this version of respondent's proposed standards) every summary judgment motion that has merit would be exempted from the Rule 8 and 12 pleading requirements. A defendant moving for summary judgment based on an unpled affirmative defense would only be required to amend its answer if that motion was going to be denied anyway.

IV. EXEMPTION FROM THE PLEADING REQUIREMENTS IN RULES 8 AND 12 WHENEVER A DEFENDANT'S FAILURE TO PLEAD AN AFFIRMATIVE DEFENSE DID NOT PREJUDICE THE PLAINTIFF IS INCONSISTENT WITH THE FEDERAL RULES

Under the first standard proposed by respondent, a defendant would be exempted from having to amend its answer to plead an affirmative defense if its earlier failure to plead the defense had not prejudiced the plaintiff. This proposed prejudice test differs from the manner in which prejudice is already considered under existing Rules 15 and 16.

In determining whether to grant a motion to amend under Rule 15(a)(2), a court considers many factors in addition to whether the opposing party had been prejudiced by the delay in adding the proposed new claim or defense. *Foman v. Davis*, 371 U.S. 178, 182 (1962). No single factor is conclusive. This Court has never held that a motion to amend must be granted in the absence of a showing of prejudice. Under respondent's proposed prejudice test, on the other hand, only the presence or absence of prejudice matters.

If a defendant seeks to amend its answer after the expiration of the scheduling order deadline for such amendments, Rule 16(b)(4) requires that the defendant show “good cause” for modifying that deadline. “The purpose of limiting the period for amending the pleadings is to assure ‘that at some point both the parties and the pleadings will be fixed.’ Advisory Committee Notes to the 1983 Amendments to Fed. R. Civ. P. 16(b).” *O’Connell v. Hyatt Hotels of Puerto Rico*, 357 F. 3d 152, 154 (1st Cir. 2004). The absence of prejudice is irrelevant to the good cause standard itself. However, if good cause is shown, a court could consider the presence or absence of prejudice, among other possible factors, in deciding whether to modify the deadline for amendments to pleadings.

Respondent urges that the prejudice-considering standards in Rules 15 and 16 should not be applied if there is no prejudice.

A. The Scope of The Proposed Exemption Is Unclear

Adoption of this proposed exemption would require the courts to resolve a number of major issues regarding the scope of that exemption.

First, it is unclear whether respondent’s proposed prejudice test is mandatory (in the absence of prejudice, a court may not require the defendant to seek approval of an amendment adding the affirmative defense) or permissive (in the absence of prejudice, a court can either require an amendment or decide the summary judgment motion based on an unpled defense). Respondent says both. Some passages describe this as a permissive rule, indicating

that in the absence of prejudice, a court could (but would not be required to) rule on a summary judgment motion based on an unpled affirmative defense. “[A] district court *can* consider an unpleaded affirmative defense raised in a summary judgment motion, where the defendant’s delay in raising the defense caused no prejudice to the plaintiff.” R. Br. i. (emphasis added). “District courts *can* consider newly raised affirmative defense at summary judgment, so long as there is no prejudice to the plaintiff from the delay.” R.Br. 7 (emphasis added). But elsewhere respondent indicates that in the absence of prejudice consideration of the unpled defense is mandatory, and that the defendant therefore would be entitled to exemption from compliance with Rules 8 and 12. “[I]f there is no prejudice to the plaintiff, the court *should* address the defense.” R. Br. 8 (emphasis added). “Under Rule 61, . . . [because there was no prejudice] the district court not only could but was ‘directed to’ disregard that error.” R. Br. 18 (quoting *Parrish v. United States*, 605 U.S.376, 388 (2025)). “[A] defendant can raise an unpleaded affirmative defense at summary judgment, where there is no prejudice to the plaintiff.” R. Br. 2.

Second, if the prejudice test is permissive, this Court or the lower courts would have to determine what factors other than prejudice should be considered in deciding whether to require the defendant to seek to amend its answer. There is already a considerable body of law regarding what factors other than prejudice a judge can consider in determining whether to permit an amendment under Rule 15(a)(2) and whether to modify a scheduling order under Rule 16(b)(4). It would make little sense for the courts to use the Rule 15(a)(2) and 16(b)(4) factors in deciding whether to *require* an amendment, if they would anyway use the same factors in deciding whether

to *approve* such an amendment. On the other hand, if the standards are going to be different, there ought to be a cogent account of what is wrong with applying the Rule 15(a)(2) and 16(b)(4) standards in this context. Respondent offers no such explanation.

Third, courts would have to establish a standard for what demonstrates prejudice within the meaning of respondent's proposed prejudice test. Respondent suggests several different standards:

“the defendant was raising . . . new facts” R. Br. 26

“new factual issues” R. Br. 14

“additional discovery . . . would have potentially affected the outcome” R. Br. 7

“disputes of material fact” R. Br. 24

“disputed conclusions . . . can be drawn from [the] evidence” R. Br. 23

“triable factual issues” R. Br. 10

the facts were not “undisputable” R. Br. 9

possible further factual development “would ‘change the district court’s answer’” R. Br. 2-3

the plaintiff was “affected by the delay” R. Br. 11

In litigation under Rule 15 the precise definition of prejudice does not matter, because the court can consider any factors it deems relevant. But the exact definition of prejudice would be critical under respondent's proposal, because the absence of prejudice is necessary to the exemption.

This case illustrates why the differences among these standards matter. There were disputes regarding many of the relevant subsidiary facts, such as whether Younge was accountable to the chief of staff (Pet. App. 100a-102a), and whether she was regarded in the eyes of the public as representing the district attorney. Pet. App. 97a-100a. Younge did identify several types of discovery she wished to pursue regarding the affirmative defense. The magistrate judge held that discovery regarding one subsidiary issue was not needed because the relevant information "should be known to Younge [personally]." Pet. App. 77a. Another proposed form of discovery was disapproved as a "fishing expedition," because Younge could not identify by name the individuals she would want to depose. Pet. App. 78a. But the magistrate judge did not suggest that the information sought was irrelevant, and the epithet "fishing expedition" has long been deemed insufficient to preclude relevant discovery. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). So, while the magistrate's reasoning might fall within some of the definitions of prejudice proposed by respondent, it would not be within others.

B. The Proposed Exemption Is Inconsistent With The Federal Rules

Respondent argues that Rule 8 does not address the consequence of noncompliance and urges the Court to

fashion a legal formula under which the consequence (if any) of noncompliance depends on whether the noncompliance prejudiced the plaintiff. But that argument ignores the nature of the pleading requirement at issue. Compliance with Rules 8 and 12 is a precondition of a defendant's ability to raise an affirmative defense at all. If the defendant does not comply with Rules 8 and 12, it cannot raise the defense—at summary judgment, at trial,² or on appeal.

Respondent argues that the overriding purpose of the Federal Rules is to assure a decision on the merits, and it insists that courts should not enforce any Rule when that would preclude a possible claim or defense, unless doing so is necessary to prevent prejudice to the opposing party. But the Federal Rules seek to further many purposes in addition to reaching the merits and avoiding prejudice. Rule 15(a), as *Foman* makes clear, authorizes judges to consider all interests of the parties and the court itself, not just reaching the merits and avoiding prejudice. The scheduling order provisions of Rule 16 help to assure the “speedy” resolution of a case. Fed. R. Civ. P. 1. The very purpose of procedural *rules* is to provide predictability, ease of administration, and an incentive for compliance. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008), pointed to “the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression.”

In requiring in Rules 8 and 12 that defendants plead all affirmative defenses, and in fashioning Rules 15 and 16, the framers struck a particular balance of these sometimes divergent interests. Had the framers

2. Except as provided in Rule 15(b)(2).

in drafting the Rules been concerned only with reaching the merits and avoiding prejudice, countless provisions—including Rules 8, 12, 15 and 16—might have been written differently. The “good cause” requirement of Rule 16(b)(4) is certainly inconsistent with respondent’s view of the limited purposes which the Rules should serve. But the task of this Court is to apply the Rules as written, not to implement a litigant’s arguments regarding how the Rules could be improved.

Respondent reads Rule 61 far too broadly, proposing an interpretation which would greatly complicate and severely limit enforcement of all Federal Rules. Respondent would extend Rule 61 far beyond the usual application of Rule 61, which has been to address errors occurring in the course of a trial or other formal proceeding. *E.g.*, *United State v. Olano*, 507 U.S. 725 (1993) (improper presence of alternate juror during jury deliberations); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984) (mistaken statement by juror during voir dire); *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963) (erroneous admission of evidence); *United States v. Borden Co.*, 347 U.S. 514 (1954) (erroneous exclusion of evidence).

Parrish v. United States, 605 U.S. 376 (2025), concerned the interpretation of the Federal Rules of Appellate Procedure, and thus was not governed by Rule 61, which applies only to the Federal Rules of Civil Procedure. *Parrish* cited Rule 61 in support of a decision to reject an arcane interpretation of Rule 4(a)(6) of the Appellate Rules which was likely to ensnare “unsophisticated litigants” without benefitting the opposing party. 605 U.S. at 389. *Parrish* might be relevant if there were a dispute about whether to interpret in some abstruse manner the Rule 8 requirement

that a defendant “state” affirmative defenses or the Rule 12 requirement that a defendant “assert[]” those defenses. But this case presents no such issues.

Respondent contends that “error” in Rule 61 should be expanded to include an attorney’s tactical mistakes that worked to the disadvantage of his or her own client. According to respondent, if in this case its attorney waited so long to raise the affirmative defense that a motion to amend would be denied, that would be the type of error to which Rule 61 applies “[T]he 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 . . . was ‘directed to’ disregard that error.” R. Br. 18. (quoting *Parrish*, 605 U.S. at 388). On that theory, every failure of a party to meet a deadline in, or to satisfy a precondition imposed by, the Federal Rules of Civil Procedure would be a Rule 61-type error, and a court could not enforce the Rule involved without first determining in each instance whether that noncompliance had impaired a substantial right of the opposing party.

The obstacle to judicial administration that would be created by such an interpretation of Rule 61 would not be limited to civil litigation in the district courts. Respondent points out that “ordinarily ‘civil and criminal harmless-error standards do not differ.’” R. Br. 34 (quoting *O’Neal v. McAninch*, 513 U.S. 432, 441-42 (1995)). Rule 61 is expressly applicable to bankruptcy proceedings. Fed. R. Bnkr. P. 9005. Rule 52(a) of the Federal Rules of Criminal Procedure contains similarly a worded standard regarding “error.” So does 29 U.S.C. § 2111, which applies to the courts of appeals and to this Court. The Court should reject this far-reaching misreading of Rule 61.

Rule 61, Rule 52(a) and section 2111 were not adopted to protect a litigant from the mistakes of its own attorney. See *Carlisle v. United States*, 517 U.S. 416, 419, 421 (1996) (district court may not consider motion “filed late because of [defense] attorney error” even though there was “no prejudice to the United States.”).

Respondent complains that “Younge does not even cite . . . Rule [61].” R. Br. 17. But neither did *Hassan v. U.S. Postal Service*, 842 F.2d 260 (11th Cir. 1988), any of the cases applying *Hassan*, or even respondent itself in its briefs in the lower courts. Respondent’s proposed expansion of Rule 61 is not just incorrect, it is unprecedented.

V. THE PROPOSED EXEMPTION FOR ANY AFFIRMATIVE DEFENSE THAT RESTS ON A “PURELY LEGAL ARGUMENT” IS INCONSISTENT WITH THE FEDERAL RULES

The purely-legal-argument exemption proposed by respondent would establish a general limitation governing all deadlines and prerequisites in any of the Federal Rules. The Court is asked to announce a general principle that “[c]ourts may consider new legal arguments at nearly any time.” R. Br. 36. All deadlines and prerequisites in the Federal Rules would have to be interpreted in light of that overriding “background principle.” R. Br. 12, 41. Unless the language of a particular Rule specifically “displace[s] th[at] background principle” (R. Br. 41) or “provide[s] otherwise[,] . . . th[e] ordinary rule should apply.” R. Br. 42. Reading this proposed limiting exception into the entirety of the Federal Rules of Civil Procedure, respondent asserts that “[t]he Rules do not generally limit when new legal arguments can be raised.” R.Br. 10. That

background principle applies in this case, respondent insists, because nothing in the text of Rule 8 “purports to depart from the ordinary rule.” R. Br. 41.

This novel method of interpretation and application is not about or limited to Rule 8, or even just all of the Federal Rules of Civil Procedure. If adopted by this Court, it would apply as well to the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Appellate Procedure, and the Rules of the Supreme Court of the United States. Absent some specific language to the contrary, none of the deadlines and prerequisites in these Rules could be (or, perhaps, need be) applied to the assertion of purely legal arguments.

A. The Scope of The Proposed Exemption Is Unclear

It is unclear whether respondent’s purely-legal-argument rule is mandatory or permissive. Sometimes respondent asserts that a court must decide on the merits any purely legal argument in favor of an unpled affirmative defense. “[I]f an affirmative defense is ‘purely legal,’ . . . courts *should* . . . address it at summary judgment.” R. Br. 12 (emphasis added). “In general, a party can raise new legal arguments at summary judgment and, for that matter, at many further points in litigation.” *Id.* In other passages respondent describe the doctrine as permissive. “Courts *may* consider new, pure legal arguments in favor of an affirmative defense at summary judgment.” R. Br. 36 (emphasis added). “[B]ackground principles *allow* courts to address new legal arguments much later in litigation [than summary judgment] . . .” R. Br. 2 (emphasis added).

If the rule is permissive, courts would have to decide what other factors may be considered.

Respondent offers several different standards for determining whether an unpled affirmative defense raised by a summary judgment motion presents purely legal arguments:

“the facts are undisputed” R. Br. 12

“the facts are indisputable” R. Br. 36

resolution of the motion will not “require reopening discovery” R. Br. 37

“the record is so fully developed as to render further development irrelevant” R. Br. 42;

resolution of the motion “depend[s] on ‘law books’” R. Br. 13, 37 (quoting *Dupree v. Younger*, 598 U.S. 729, 737 (2023)).

The circumstances of this case illustrate the differences among these standards. Key subsidiary facts were indeed disputed. And resolution of the motion depended not on law books, but on deposition transcripts.

Respondent does not address whether a mixed question of law and fact, the type of issue in the instant case, involves a “purely legal argument.”.

Mixed questions are not all alike.. . . [S]ome require courts to expound on the law, particularly by amplifying or elaborating on a broad legal

standard. . . . [O]ther mixed questions immerse courts in case-specific factual issues [T]he standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.

U.S. Bank N.A. v. Village at Lakeridge, LLC, 583 U.S. 387, 395-96 (2018). The resolution of the summary judgment motion in this case turned on factual work; the legal standard governing who is “personal staff” within the meaning of Title VII was never in dispute.

B. The Proposed Exemption Is Inconsistent With The Federal Rules

Respondent argues that the Federal Rules often deal differently with issues of fact and issues of law, and proposes that the Court create such a distinction among affirmative defenses. But the text of Rules 8 and 12 themselves do not make such a distinction. To the contrary, the Rules apply without any limitation to “any” and “every” affirmative defense. Rule 8(c)(1) lumps together in a single list of covered affirmative defenses some likely to be factual (e.g., contributory negligence) and others that will usually be purely legal (e.g., *res judicata*). And the text of Rule 15(a) and Rule 16(b)(4) does not distinguish between amendments raising new factual issues and amendments raising legal issues.

None of the decisions cited by respondent support its assertion that the deadlines and prerequisites in Federal Rules should not be applied to purely legal arguments. It is true that a defendant which did not file a Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim on which relief can be granted may nonetheless raise that

objection in a summary judgment motion. R. Br. 37-38. But nothing in the Federal Rules requires that a challenge to the sufficiency of a complaint be raised first, or only, in a motion to dismiss. Rule 12(b)(6) (unlike Rules 8 and 12) is expressly permissive. *Compare* Rule 12 (“a party *may* assert the following defenses by motion”) (emphasis added) *with* Rule 8(c)(1) (“a party *must* affirmatively state any . . . affirmative defense”) (emphasis added).

It is true that filing a pre-trial motion for summary judgment on a particular issue is not a prerequisite to raising that issue at trial. R. Br. 38. But, again, that is because under Rule 56 a motion for summary judgment is permitted, but (unlike pleading an affirmative defense under Rules 8 and 12) not required. Fed. R. Civ. P. 56(a) (“A party *may* move for summary judgment . . .”) (emphasis added).

Singleton v. Wulff, 428 U.S. 106, 121 (1976), noted that there might be some circumstances in which an appellate court could consider a new legal argument for the first time on appeal. R. Br. 38. But *Singleton* emphasized that doing so would be a departure from the “general rule.” 428 U.S. at 121.

None of these decisions support reading into every (or, indeed, any) prerequisite or deadline in the Federal Rules a limiting “background principle” that—regardless of the restrictions in the text of the Rules themselves—courts can almost always hear a purely legal argument.

CONCLUSION

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

Respectfully submitted,

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