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IN THE SUPREME COURT OF THE UNITED STATES

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MICHELLE ORTIZ, :

Petitioner :

v. : No. 09-737

PAULA JORDAN, ET AL. :

- - - - - x

Washington, D.C.

Monday, November 1, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

DAVID E. MILLS, ESQ., Cleveland, Ohio; on behalf of Petitioner.

BENJAMIN C. MIZER, ESQ., Solicitor General, Columbus, Ohio; on behalf of Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-737, Ortiz v. Jordan.

Mr. Mills.

ORAL ARGUMENT OF DAVID E. MILLS

ON BEHALF OF THE PETITIONER

MR. MILLS: Mr. Chief Justice, and may it please the Court:

Denial of summary judgment is not reviewable on appeal after trial, especially where the decision depends on whether the evidence on the merits of the claim is sufficient to cross the legal line for liability. In this case --

CHIEF JUSTICE ROBERTS: I'm sorry to interrupt so quickly, but that especially, I take it -- I take it, is a concession that there's a difference between claims for qualified immunity based on evidence and claims that are based on law.

MR. MILLS: Well, there's a difference between defenses that depend on the evidence at trial. What I would say about qualified immunity is that, to the extent any court of appeals is going to enter judgment based on qualified immunity, it needs to understand the conduct of the officials in the case.

1 And so you're always talking about the evidence of that
2 conduct.

3 JUSTICE KENNEDY: Well, of course there's
4 always -- there are always facts. There are often
5 disputed facts. But suppose the issue is whether or not
6 this right -- and maybe there are two rights here --
7 this right was clearly established. That's -- that's an
8 issue of law.

9 MR. MILLS: That is -- that is an issue of
10 law, Your Honor.

11 JUSTICE KENNEDY: And doesn't that fall
12 within the "except" clause that the Chief Justice was
13 talking to you about, which you haven't had much time to
14 fill out, I understand.

15 But -- well, if you're going to say -- and
16 it's really not whether the summary judgment is -- is
17 appealed. That's a little bit -- it's whether or not
18 the issues resolved by the summary judgment motion are
19 appealable. I read into your response, or implied from
20 your response, what the Chief Justice did, that maybe
21 sometimes the summary judgment motion, say, on an issue
22 of law is sufficient to preserve the issue.

23 MR. MILLS: Well -- and that gets to what I
24 think is the heart of the split in the circuits and the
25 confusion, is that every circuit recognizes a very

1 general rule that where the evidence at trial moots that
2 at summary judgment, we're not going to review the
3 summary judgment decision.

4 Now, a number of courts said: Well, wait a
5 second; there are summary judgment issues that don't
6 depend on the evidence, and we're -- those are typically
7 called questions of law. And Respondents point to a
8 number of good examples in their brief of defenses such
9 as statute of limitations, pre-emption, and the like,
10 that indeed very often don't depend at all on the
11 evidence at trial. The difference with qualified
12 immunity is that qualified immunity requires the court
13 to look at the evidence of the claim itself.

14 Now, statute of limitations, for example, is
15 actually quite different, because in statute of
16 limitations -- let's suppose Michelle Ortiz filed her
17 suit 20 years late. It would not matter at all how much
18 evidence she adduced of the Respondents' misconduct. It
19 would be barred by statute of limitations.

20 JUSTICE GINSBURG: So Mr. Mills, what then
21 is the difference? You point out, quite rightly,
22 summary judgment looks to what evidence there was, and
23 the question for the court is: What could the plaintiff
24 prove? When we get past trial, the issue becomes: What
25 has the plaintiff proved?

1 So, what was brought out at trial? What was
2 the record at trial that was larger than the record at
3 summary judgment? Because if there -- if there was
4 no -- no new fact presentation, no more ample fact
5 presentation, then it wouldn't matter. It would be the
6 same body of evidence, right?

7 MR. MILLS: Well, I think that's largely --
8 largely right, Justice Ginsburg, and here's an example
9 of what did change in this case.

10 At the summary judgment stage, what we had
11 were affidavits of the Respondents discussing their role
12 in relation to this case, with no comment whatsoever
13 about what the consequences would have been had
14 Ms. Jordan immediately reported the first sexual
15 assault. The record was bare at summary judgment from
16 Respondents' perspective on that -- on that point.

17 At trial, under cross-examination,
18 Ms. Bright testified that Respondent Jordan indeed
19 violated prison policy by not reporting it and then,
20 very crucially, also agreed that the second, more
21 violent assault would have actually been precluded had
22 that report taken place.

23 Now, that's --

24 JUSTICE ALITO: Well, this gets to what
25 troubles me about this case. Although the Sixth Circuit

1 referred to summary judgment in its opinion, it seems to
2 me the Sixth Circuit actually reviewed the evidence at
3 trial and determined that the defendants were entitled
4 to judgment as a matter of law based on the evidence at
5 trial.

6 So I don't know why this case actually
7 presents the question on which cert was granted. It
8 seems to me it presents a question of -- a purely
9 factual question in the end, whether there was --
10 whether judgment as a matter of law was appropriate.
11 And you never raised the judgment as a matter of law.

12 You never raised in the court of appeals, as
13 I understand it, the argument that the defendants'
14 ability to object to the entry of judgment as a matter
15 of law was waived because they never filed a Rule 50(b)
16 motion. Isn't that right?

17 MR. MILLS: Well -- well, there's a couple
18 points in there that I need to address.

19 First, I think that you are exactly right.
20 What the Sixth Circuit did here is it -- it reviewed a
21 summary judgment decision, but it did peek ahead to the
22 trial evidence, and it said it was doing that. I think
23 that highlights the fundamental problem of reviewing
24 summary judgment after the trial. The Sixth Circuit is
25 implicitly recognizing it would be illogical to look at

1 that summary judgment record, those affidavits, and then
2 ignore this cross-examined testimony of what --

3 JUSTICE ALITO: Well, suppose we were to
4 hold that they -- that they couldn't review the denial
5 of summary judgment. The case is remanded to them, and
6 they say: Okay, well, we made a slip of the pen when we
7 referred to summary judgment in the prior decision. We
8 really were saying that the defendants were entitled to
9 judgment as a matter of law, and, although there wasn't
10 a Rule 50(b) motion, that was waived because it wasn't
11 raised on appeal.

12 So we are -- we come back to exactly where
13 we are now. All we've done is to correct a slip of
14 the -- what was arguably a slip of the pen, perhaps
15 motivated by their belief that the Rule 50(b) issue is
16 jurisdictional. But it really is not under our cases
17 distinguishing between jurisdictional questions and
18 claims processing questions.

19 MR. MILLS: And I agree with that last
20 point. But here's the problem and here's why it isn't
21 just simply a slip of the pen that can be fixed by
22 remanding. Even if this was not summary judgment
23 whatsoever and it was, as Respondents say, essentially a
24 Rule 50(a) review, that conflicts with an entire line of
25 this Court's decisions leading into Unitherm, which

1 makes clear that the court of appeals absolutely lacks
2 the power to review the sufficiency of the evidence
3 where that question wasn't ruled upon by the district
4 court. And so the court of appeals here, regardless of
5 any sort of forfeiture argument, absolutely lacked the
6 power to consider it.

7 The additional point about your --

8 JUSTICE SCALIA: But that's not the point
9 that you've made here. I mean -- and that isn't the
10 point on which we granted certiorari.

11 MR. MILLS: That's right, and I think -- I
12 think what I just said about the 50(b) point is that I
13 think it highlights that this really was a summary
14 judgment review by the Sixth Circuit of --

15 JUSTICE KAGAN: Now, Mr. Mills, if I could
16 just understand your answer to Justice Alito. You
17 concede that the Sixth Circuit opinion is using the
18 record built on the whole trial and that that's a
19 different record from the record that existed at summary
20 judgment; is that correct?

21 MR. MILLS: I do concede it, except to the
22 extent that I concede they did an adequate review of the
23 record. But I -- I concede that point. For the example
24 -- for example --

25 JUSTICE KAGAN: So they have that first

1 paragraph where they suggest that they're ruling on a
2 summary judgment motion. Then they go through an entire
3 opinion that talks about the facts and the record. And
4 there are very few citations, but your understanding is
5 that when they talk about the facts in the records,
6 they're talking about the post-trial -- I mean the
7 record that has been built up as a result of the trial?

8 MR. MILLS: There are -- there are certainly
9 a number of instances where they definitely are talking
10 about the trial. I do think it -- it is even muddy the
11 extent to which they are incorporating trial facts
12 versus summary judgment facts. The example I gave about
13 this point where Ms. Bright conceded on cross that Ms.
14 Ortiz indeed would have been separated and the assault,
15 second assault, precluded, it's one of two things:
16 Either the Sixth Circuit's reviewing summary judgment
17 and picking a couple of trial facts it thinks helps to
18 review and missing the facts, or it's doing -- it's
19 looking ahead at these trial facts and because --
20 particularly because the district court never weighed in
21 on that, on a Rule 50(b), it's botching the record. And
22 it goes to the heart of this Court's cases from *Cone*
23 *v. West Virginia Pulp & Paper* in 1947 up through
24 *Unitherm*, which says we have to have the district court
25 review the sufficiency of the evidence before the court

1 of appeals could even have the power to possibly
2 consider --

3 JUSTICE SOTOMAYOR: That -- that answer is
4 not addressing Justice Alito's point, which he said a
5 Rule 50 motion is not jurisdictional. You are in
6 essence claiming it is. You're saying they lacked the
7 power, but Justice Alito's question to you said they
8 don't, that they've misread the fact that this is not a
9 jurisdictional motion. So address that question: Why
10 is it jurisdictional as opposed to a claim processing?

11 MR. MILLS: Your Honor, I -- I am not
12 disputing that the Sixth Circuit had jurisdiction to
13 consider the case. But I am making a distinction among
14 jurisdiction and power, and it's the same distinction
15 actually the Tenth Circuit employed in a case called
16 Williams v. Gonterman, which is cited in our reply
17 brief; I think it's at page 10. This exact issue came
18 up, where the verdict loser said: Wait a second; this
19 issue's been forfeited. The Tenth Circuit, reading
20 Unitherm, reading the debate between the majority and
21 the dissenters, who said plain error and those doctrines
22 should apply, said: We lack the power to review this;
23 we have jurisdiction, but we lack the power to --

24 JUSTICE SOTOMAYOR: The claim processing
25 rules, we have said that, unless you object, the court

1 doesn't lack power. Since you didn't object below to a
2 -- a argument that Rule 50(b) precluded consideration by
3 the court of appeals, why wasn't that argument waived
4 before the court?

5 MR. MILLS: It's not waived because, while
6 the general principle is that claims processing rules
7 are indeed subject to waiver and forfeiture, this
8 particular context, as this Court has made clear, that
9 the word "power" is not an accidental use. It's been
10 used in all of these cases.

11 JUSTICE GINSBURG: Why is it -- I mean,
12 power -- jurisdiction is power, power to proceed in a
13 case. But we are in an area where there are many, many
14 cases of this Court that distinguish the Rule 50(a),
15 50(b) from the run-of-the-mine claim processing rule
16 because in the background is the Seventh Amendment
17 Re-examination Clause. That's the whole reason why
18 there is this 50(a)-50(b) litany, why the verdict loser
19 must repeat the 50(a) motion, after -- after the
20 verdict.

21 So I'm surprised that you're using the word
22 "power." You're not referring to any of that history
23 which stems from a constitutional provision, the Seventh
24 Amendment.

25 MR. MILLS: Well, Justice Ginsburg, you're

1 absolutely correct, and I think that footnote 4 of
2 Unitherm goes right to your point. In footnote 4 of
3 Unitherm, the Court explains that the very reason a
4 court of appeals lacks the power, lacks the power to
5 review that question, is because it is essentially, as
6 in Unitherm, going to be as a court of appeals reviewing
7 the conduct -- the sufficiency of the evidence, without
8 a district court ruling on the question. And this Court
9 said in Unitherm that that raises serious Seventh
10 Amendment concerns. This case is actually a very good
11 example --

12 JUSTICE ALITO: Well, Mr. Mills, I got you
13 started on this, but this -- none of this is the
14 question on which we granted review, is it?

15 MR. MILLS: Well --

16 JUSTICE ALITO: We didn't grant review to
17 decide whether a court of appeals can consider judgment
18 of a -- judgment as a matter of law where there isn't a
19 50(b) motion and no argument is made that the -- that
20 issue was waived by failing to make the motion. We
21 didn't grant review on that.

22 MR. MILLS: And, Justice Alito, that
23 highlights another important point about this exchange,
24 and that is that Respondents in the Sixth Circuit did
25 not suggest that the Sixth Circuit did have the

1 authority to take the summary judgment question and then
2 look ahead to trial facts. And so, the Sixth Circuit
3 has taken the summary judgment decision and then acted
4 without authority to look ahead at the trial facts. And
5 so if the argument is that we have forfeited a
6 pre-emptive argument to the Sixth Circuit that it
7 couldn't do this frankly very unorthodox approach, I
8 don't think that that's a proper invocation of
9 forfeiture even regardless of the point about power.

10 JUSTICE GINSBURG: What -- are you saying
11 then that if we explain to the Fifth Circuit -- to the
12 Sixth Circuit, that the record they must look at is the
13 trial record, so it's different from the summary
14 judgment stage, if we told them that, then maybe they
15 would look at the evidence differently, even though they
16 purported to look at the trial evidence?

17 MR. MILLS: Well, I think if that order were
18 given, they would indeed do that. But I would still
19 come back to the point that there is absolutely no basis
20 on which they would have the authority to do that. And
21 the point is, in the Unitherm line of cases, that if you
22 don't have a district court ruling on the very question,
23 the question here of whether their conduct, as they say,
24 crossed a constitutional line, you're circumventing the
25 district court's role in the entire process.

1 As this Court has explained repeatedly, a
2 requisite of a court of appeals reviewing that evidence
3 that went to the jury is that the district court first,
4 who has the feel of the case, who saw the witnesses, who
5 saw Respondent Bright on cross-examination, first have
6 the opportunity in the judge's discretion to grant a new
7 trial --

8 JUSTICE GINSBURG: So, if you're right, then
9 there has to be a remand to the Sixth Circuit with
10 instructions to send the case back to the district court
11 to ask the district court what -- whether it thought the
12 evidence was sufficient?

13 MR. MILLS: I don't think so, Your Honor. I
14 think that the best way to see this case is it's indeed
15 a review of the summary judgment decision. That's the
16 only decision by the district court that had to do with
17 qualified immunity.

18 The Sixth Circuit expressly invoked an
19 exception to say: We can review summary judgment after
20 the trial because it's qualified immunity; and the
21 Eighth Circuit said that's okay and we say that's okay;
22 we're looking ahead at trial facts.

23 And I think what this Court can and should
24 conclude is that it's improper to review the summary
25 judgment decision after trial because the facts have

1 changed --

2 JUSTICE ALITO: And your argument is that
3 where a --the district court denies summary judgment on
4 a qualified immunity issue that is based even purely on
5 an issue of law, there can't be a review unless that's
6 renewed -- there can't be appellate review unless that
7 purely legal question is renewed in a Rule 50(b) motion.
8 That's your -- that's your argument?

9 MR. MILLS: That is my argument, with a
10 couple key pieces -- first of all, they could, of
11 course, take a collateral order appeal, but if they
12 proceed to trial -- and here's -- here's sort of the
13 fundamental point about qualified immunity. Sure, there
14 are purely legal questions in the qualified immunity
15 inquiry. Was the right clearly established? But to
16 enter judgment, to enter judgment, whether it's the
17 district court or the court of appeals, that court must
18 know what the conduct is.

19 JUSTICE ALITO: But what if the facts are
20 utterly undisputed? There's a videotape of exactly what
21 went on. Nobody has the slightest disagreement about
22 the facts. The only question is whether the right was
23 clearly established, and the district court rejects that
24 at summary judgment. What benefit -- what is the point
25 of saying that the defendants have to raise that same

1 issue again in a Rule 50(b) motion? It's utterly a -- a
2 pointless exercise.

3 MR. MILLS: Well, it's certainly a less
4 compelling case than this one where the facts indeed
5 change. But I would say that there -- it's not utterly
6 pointless because the 50(b) motion still invokes all the
7 protections that this Court has described where the
8 district court, who had the feel of the case, gets the
9 first chance to consider whether a new trial should be
10 granted --

11 JUSTICE KAGAN: Mr. Mills, when -- when
12 Unitherm talks about the district court feeling the case
13 and having a feel for the case, it's talking about
14 having the feel for the evidence and for the facts. The
15 whole rationale of Unitherm is based on the evidence,
16 the facts, not on purely legal questions.

17 So suppose we disagree with you about the
18 reach of Unitherm. Suppose we say Unitherm doesn't have
19 any application to purely legal questions. What would
20 that mean for your case? Which part of your claims were
21 purely legal and which part were instead founded on the
22 facts, in which case you would have a better Unitherm
23 argument?

24 MR. MILLS: It -- it would still mean you'd
25 have to reverse in this case, and I think in

1 Justice Alito's hypothetical perhaps, perhaps not.

2 But in this case, as -- as Respondents
3 themselves say, the question here is actually very
4 simple. It's whether their conduct crossed a
5 constitutional line. And the point is that, even in the
6 qualified immunity inquiry, the question is: Does the
7 conduct -- and that's conduct in one way at summary
8 judgment and another way at trial -- does that conduct
9 cross a clearly established constitutional line?

10 CHIEF JUSTICE ROBERTS: I don't understand,
11 counsel, how your argument -- that in every case you
12 need to know the facts, every qualified immunity case
13 you need to know the facts, and those only come out
14 after trial -- is consistent with our recognizing that
15 you can have a collateral order appeals denial of
16 summary judgment. In other words, you can consider
17 qualified immunity without knowing how the facts are
18 going to come out at trial, which is why we allow you to
19 have an appeal before trial.

20 MR. MILLS: You're absolutely right. And at
21 summary judgment, officers are entitled to invoke
22 immunity, and they're entitled to take that immediate
23 appeal. And it's typically -- well, required under
24 Johnson v. Jones that it be what this Court's called a
25 question of law. The defendants assume the facts

1 against them, and they say to the court of appeals, it
2 may be a purely legal question, like this isn't -- this
3 is clearly established or isn't clearly established.
4 But to -- to say whether that line is crossed, I mean,
5 as recently as Iqbal, this Court explained --

6 CHIEF JUSTICE ROBERTS: Well -- so you're
7 just saying your case on qualified immunity isn't like
8 that case; is that all?

9 MR. MILLS: Well, I'm saying it -- it's like
10 that case to the extent that the court still has to
11 understand, if it's going to enter judgment, what the
12 conduct was. Even if it's looking at purely legal --

13 JUSTICE SCALIA: No, it doesn't. It doesn't
14 have to know what it was. It assumes it to be what --
15 what the plaintiff claims it was.

16 MR. MILLS: That's right.

17 JUSTICE SCALIA: At the summary judgments,
18 you give the benefit of the doubt to the plaintiff.

19 MR. MILLS: That's right.

20 JUSTICE SCALIA: So there's always a factual
21 element to the -- to the ruling.

22 MR. MILLS: That's right. And I -- I think
23 that bolsters my point. There is always a factual
24 element to the ruling. And so, when you go to trial and
25 you put on a trial that is all about Respondents'

1 conduct and you have them under cross-examination and
2 that evidence grows of their misconduct, then we're
3 talking about a situation where --

4 JUSTICE SCALIA: It's never going to be any
5 better than what you assumed. It's never going to be
6 any better for the plaintiff than what you assumed at
7 the summary judgment stage.

8 MR. MILLS: Your Honor, it actually was in
9 this case. It actually was better at trial in this
10 case --

11 JUSTICE SCALIA: For -- for --

12 MR. MILLS: -- for the plaintiff.

13 JUSTICE SCALIA: Why was that?

14 MR. MILLS: And it was -- one example I gave
15 earlier: Ms. Ortiz, before trial, didn't have knowledge
16 of what would have happened had Mrs. Jordan not violated
17 prison procedures and immediately reported the first
18 assault. On cross-examination, however, Mrs. Bright, at
19 page 242 of the trial transcript, said: "The second
20 assault, the violent assault, would have been
21 precluded."

22 Now, it seems to me, again reading the cold
23 transcript --

24 JUSTICE SOTOMAYOR: That's -- just finish:

25 Because if Ms. Jordan had reported the incident that she

1 was required to, they would have put Ms. Ortiz in
2 segregation automatically; is that it?

3 MR. MILLS: Not that they would have put her
4 in segregation, but that they would have taken steps to
5 separate her from the officer, whether that meant
6 removing the officer from the location or putting her in
7 another cell. The important piece of that is not only
8 did it change from summary judgment to trial; the Sixth
9 Circuit got it entirely wrong.

10 CHIEF JUSTICE ROBERTS: But you have an
11 obligation in opposing summary judgment to, in your list
12 of disputed facts or facts that preclude summary
13 judgment, to put all that in. And why didn't you put
14 the point you are raising now in the opposition to
15 summary judgment?

16 MR. MILLS: That's not something Ms. Ortiz
17 would have knowledge of.

18 CHIEF JUSTICE ROBERTS: I know. So it --

19 JUSTICE GINSBURG: But you -- you prevailed
20 on the summary judgment motion. There was a summary
21 judgment motion, right? And it was denied.

22 MR. MILLS: That's right. That's right.

23 JUSTICE GINSBURG: So the -- we know that
24 the district judge thought that, at that point, there
25 was a case to be presented for trial based on the

1 plaintiff's allegations.

2 MR. MILLS: That's absolutely right. And --

3 CHIEF JUSTICE ROBERTS: Well, but -- but you
4 may prevail. You may have three different factual
5 disputes that the other side is saying are undisputed,
6 and the fact that you prevail on one doesn't meant that
7 you didn't have an obligation to put in your opposition
8 the others.

9 MR. MILLS: Well, Your Honor, I -- I just
10 can't see how Ms. Ortiz would have an obligation to put
11 in some fact that's outside of her knowledge and,
12 frankly, something that came out when a Respondent caved
13 in a bit on cross-examination.

14 JUSTICE BREYER: How would you put the rule
15 about when you have to renew a motion? You move for
16 summary judgment. Can you say this? You've looked up
17 the treatises and so forth. If the motion for summary
18 judgment involves either a question of fact or a mixed
19 question of fact and law, it has to be renewed. If it
20 involves neither of the others, neither of those two
21 things, but it's a pure question of law and not mixed,
22 it doesn't have to be renewed.

23 MR. MILLS: I think that's -- that's a fair
24 way to state it.

25 JUSTICE BREYER: Is there any authority for

1 that? I mean, is there any -- it seems to be roughly
2 what you're trying to argue, roughly. At least it seems
3 to me a rule that would make sense. Is it that -- what
4 do you find related to that? It seems to me that must
5 have been thought about before this minute.

6 MR. MILLS: Well --

7 JUSTICE BREYER: Not necessarily by you, but
8 by somebody.

9 MR. MILLS: Yes, indeed. I think it has
10 been thought about. I think it's been thought about
11 really by every circuit when they recognize the very
12 basic principle that the real evidence of a case is the
13 evidence at the trial, and what that means is that, if
14 the evidence at trial goes to the question at summary
15 judgment, whatever that legal issue may be, it's
16 illogical to ignore exactly what happened at trial and
17 go back to summary judgment.

18 JUSTICE BREYER: Yes, but let's imagine it
19 has nothing to do with qualified immunity.

20 MR. MILLS: Yes.

21 JUSTICE BREYER: A bread-and-butter case.

22 MR. MILLS: Yes.

23 JUSTICE BREYER: You can't appeal a denial
24 of motion for summary judgment. But there's a trial and
25 the lawyer forgets to renew the motion. So sometimes

1 he's lost it; I guess sometimes he hasn't. I would
2 think he would have lost it if it's a mixed question of
3 fact or law or if it's a pure question of fact that the
4 answer turns on. I would think he hadn't lost it if in
5 fact it's a pure question of law. But is that the basic
6 hornbook rule out of this context?

7 MR. MILLS: Yes, I think it is. I think it
8 is the basic horn rule --

9 JUSTICE KAGAN: And, Mr. Mills, if that were
10 the basic hornbook rule, your claims are all matters of
11 fact or mixed questions of fact and law?

12 MR. MILLS: Our claims are mixed questions
13 of fact and law, yes.

14 JUSTICE KAGAN: There are no purely legal
15 issues?

16 MR. MILLS: There are purely legal
17 components to those inquiries; there's no doubt about
18 it. Again, a purely legal question might be what is the
19 constitutional right; is it clearly established?

20 JUSTICE KAGAN: Well, that's what I'm
21 asking. I'm asking is -- is -- are the questions that
22 you have those sorts of questions, or are they factual
23 inquiries that would fall on the other side of
24 Justice Breyer's line?

25 MR. MILLS: At the end of the day, these are

1 factual inquiries in which you have to understand the
2 officers' conduct. All I'm saying is that the second
3 component to establish immunity or anything else does
4 include always a pure question about whether the right's
5 clearly established. But there is no doubt that, to
6 assess whether that line has been crossed, you have to
7 understand what the facts are.

8 JUSTICE ALITO: The -- what's -- determining
9 what is a mixed question is notoriously difficult. What
10 about the -- the situation where the -- the ruling is,
11 assuming certain facts to be true, the -- the right was
12 not clearly established? Now, is the fact that certain
13 facts are assumed to be true enough to make that a mixed
14 question?

15 MR. MILLS: Yes, it is, because that's a
16 classic sufficiency challenge at Rule 50, to assume
17 the -- that's what Rule 50 requires. Assume the facts
18 against you after the verdict's come back and now say,
19 you know what, Your Honor, it was insufficient.

20 I'd like to reserve my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Mizer.

23 ORAL ARGUMENT OF BENJAMIN C. MIZER

24 ON BEHALF OF THE RESPONDENTS

25 MR. MIZER: Mr. Chief Justice, and may it

1 please the Court:

2 As I think the discussion has already
3 demonstrated, Ms. Ortiz's question presented hinges on a
4 false assumption. That assumption is that the Sixth
5 Circuit was reviewing the summary judgment order as the
6 final appealable order in this case.

7 JUSTICE KENNEDY: Except that it begins,
8 2(a), "Although courts normally do not review the denial
9 of a summary judgment motion after trial on the merits,
10 the denial of summary judgment based on qualified
11 immunity is an exception to this rule." And that's --

12 MR. MIZER: And --

13 JUSTICE KENNEDY: That's the opening. That
14 sets the stage for what follows.

15 MR. MIZER: And --

16 JUSTICE KENNEDY: Now, it may be that
17 everybody, including the Sixth Circuit, misapprehended
18 the rule because there are some cases that depend on an
19 assessment of the record and some cases that don't, but
20 that's not what the Sixth Circuit said.

21 MR. MIZER: I think that the Sixth Circuit's
22 word choice in the sentence that you just read was not
23 perfectly clear, but --

24 JUSTICE KAGAN: Well, Mr. Mizer, you asked
25 for an appeal of the summary judgment motion, so they

1 might have chosen their words based on your request.

2 MR. MIZER: Actually, Your Honor, the
3 summary judgment motion was only one of several orders
4 listed in the notice of appeal. And the Sixth Circuit
5 brief was very clearly couched as an appeal from the
6 verdict, which at the bottom of the prior page of the --
7 of the petition appendix, from where Justice Kennedy
8 just read, the bottom of page 7a, the Sixth Circuit
9 calls it an "appeal from the jury verdict."

10 And then the Sixth Circuit, at petition
11 appendix 2a and throughout its opinion, refers to "trial
12 evidence."

13 JUSTICE GINSBURG: But, Mr. Mizer, then you
14 must concede that this opening sentence that
15 Justice Kennedy just quoted is wrong. Courts normally
16 don't review the denial of summary judgment motion after
17 trial on the merits, but when the summary judgment
18 denial is based on qualified immunity, there's an
19 exception.

20 MR. MIZER: I think that what the Sixth
21 Circuit meant there was that the issue of qualified
22 immunity raised at summary judgment was preserved. I
23 don't think its word choice was perfectly clear, but I
24 think other -- other phrases in the Sixth Circuit's
25 opinion make clearer that what it was doing was viewing

1 the full trial record and viewing --

2 JUSTICE SOTOMAYOR: So that we should -- I
3 think what that means to me is that you really ignore
4 whether it was raised at summary judgment. If you're
5 going to look at the evidence at trial, what do we look
6 at, at trial, to see that the claim of qualified
7 immunity was preserved?

8 MR. MIZER: It would --

9 JUSTICE SOTOMAYOR: Because it's a little
10 illogical to -- to say you're reviewing the summary
11 judgment record when you're not.

12 MR. MIZER: Well, and I don't think the
13 Sixth Circuit was saying it was reviewing the summary
14 judgment record, and that would have been not
15 appropriate. What it was doing was looking at the whole
16 record. And a legal issue doesn't have to be raised
17 post-trial in order for it to have been adequately --

18 JUSTICE BREYER: But surely it has to be
19 raised post-trial if your legal argument is: Look at
20 the facts; the facts of this case as proved do not
21 support liability.

22 I mean, I would have thought that was a
23 classic instance where you do have to make the motion.
24 That's the whole point of having to renew it.

25 MR. MIZER: To the extent --

1 JUSTICE BREYER: Am I wrong?

2 MR. MIZER: Partly, yes, Your Honor. To the
3 extent the -- the argument is that there needed to be a
4 50(b) motion --

5 JUSTICE BREYER: Why not?

6 MR. MIZER: -- and it was --

7 JUSTICE BREYER: I mean, do you normally --
8 forget this case. What the lawyer says is: Judge, they
9 are never going to be able to prove that my client
10 crossed the intersection. Okay? We go to trial. At
11 trial, he wants to say: We've heard all the evidence
12 now, and it doesn't show my client crossed the
13 intersection, so not liable. Okay?

14 Doesn't he have to renew it?

15 MR. MIZER: In your hypothetical?

16 JUSTICE BREYER: Yes.

17 MR. MIZER: Yes.

18 JUSTICE BREYER: Okay. Fine.

19 MR. MIZER: But that's been --

20 JUSTICE BREYER: Now, how is yours one bit
21 different? Because what you're saying is that the
22 evidence, when you look at it, will show the facts are
23 such that there must have been qualified immunity under
24 the law.

25 MR. MIZER: The difference, Your Honor, is

1 that this Court's case law concerning -- the Mitchell
2 line of cases concerning collateral order appeals in the
3 qualified immunity context divides qualified immunity
4 claims into two halves.

5 There are evidentiary sufficiency-based
6 qualified immunity claims, and there are legal claims.

7 CHIEF JUSTICE ROBERTS: Yes, that -- that is
8 right, and I find it, in the context where that already
9 matters, whether they're appealable as a collateral
10 issue already very difficult and complicated to sort
11 out. Now, what you want us to do is take that
12 difficulty and continue it on in terms of when you can
13 appeal and when you can't.

14 Some qualified immunity claims are purely
15 legal. Some are purely factual. Some are in the
16 middle. Wouldn't it be easier if we just said: Here's
17 the rule from now on; you've got to renew them all in a
18 50(b) motion. And that makes it a lot easier for the
19 trial courts and the appellate courts to figure out when
20 they have to -- when they can consider it and when they
21 can't.

22 I understand your argument that it makes a
23 difference. I think it's a good argument, because some
24 don't depend on the facts. But going forward, it just
25 creates an awful lot of difficulty that we don't need to

1 buy into.

2 MR. MIZER: Well, first of all, I think
3 that, because it is a difficult question, it should have
4 been raised by Ms. Ortiz properly, and she hasn't raised
5 the 50(b) argument properly. But even if the Court were
6 to reach it, I think the clearer rule is to map the
7 Johnson line onto the sufficiency of the evidence line,
8 otherwise -- for 50(b) motions. Otherwise, then --

9 JUSTICE SCALIA: The Johnson line isn't much
10 of a map, is what the Chief Justice is suggesting. It's
11 a mess. It's very hard to sort those things out. Why
12 -- why should we double the difficulty by -- by bringing
13 it in at the -- at the Rule 50 stage as well?

14 MR. MIZER: Because the converse rule, Your
15 Honor, would create even more difficulties. On
16 Ms. Ortiz's --

17 JUSTICE SCALIA: Why? All you have to do --
18 any lawyer going in knows he has to make the motion at
19 the close of the evidence. What -- what's the big deal?

20 JUSTICE GINSBURG: And, in fact, you did.
21 You did move under 50(a). This whole case is here
22 because apparently -- well, what reason was it that you
23 didn't make the 50(b) motion? You told the court under
24 50(a), after all the evidence was in but before the case
25 went to the jury, that the jury would not have a legally

1 sufficient evidentiary basis to find for Ms. Ortiz.
2 That was -- that was your motion.

3 You were saying: Court, there was no
4 legally sufficient evidentiary basis. Evidentiary
5 basis. That was the motion that you made, recognizing
6 that the judgment -- the question is whether there is a
7 sufficient evidentiary basis.

8 MR. MIZER: And that argument is a different
9 species of argument than the argument on which -- than
10 the -- than the reasoning on which the Sixth Circuit
11 resolved the case, which is, even assuming all the facts
12 as given by Ms. Ortiz and taking -- treating those facts
13 as uncontroverted, still there was not a violation of
14 clearly established law.

15 And under Johnson v. Jones and Mitchell,
16 that is a different question than from the question of
17 whether or not particular conduct has been proven.

18 As --

19 JUSTICE GINSBURG: Well, then what you're
20 saying is you didn't even -- you didn't need to make the
21 50(a) motion, that that was just an unnecessary touching
22 base with Rule 50(a)? Is that what you're saying?

23 MR. MIZER: That is our position, yes, Your
24 Honor, because a legal issue is adequately preserved
25 once it's pressed and passed on in the district court.

1 And to move for summary judgment on the issue is enough
2 to preserve a legal claim, the legal claim being not
3 that particular -- that sufficient evidence exists to
4 prove that particular conduct occurred, but rather that
5 the -- given all of that, that claim as assumed, still,
6 the Harlow line of objective legal reasonableness has
7 not been crossed.

8 JUSTICE GINSBURG: But didn't they --

9 JUSTICE KENNEDY: I suppose there are some
10 cases in which the failure of the court to give a
11 requested instruction preserves the issue, and perhaps
12 50(b) is not required there.

13 Were there any instructions proffered and
14 denied in this case that would have preserved the issue
15 for appeal?

16 MR. MIZER: There was a requested
17 instruction regarding qualified immunity, yes, and it
18 was not given. We're not arguing that that --

19 JUSTICE SOTOMAYOR: What was that
20 instruction?

21 MR. MIZER: The -- the instruction was about
22 the objective legal reasonableness standard under
23 Harlow. I actually don't think that that request was
24 proper --

25 JUSTICE SOTOMAYOR: Do you have a cite to

1 the record?

2 MR. MIZER: I don't have a cite to the
3 record at the moment. But -- but the -- the point is
4 that actually, that that instruction wasn't proper,
5 because the jury doesn't resolve the Harlow objective
6 legal reasonableness question. Instead, the jury
7 resolves the disputed facts, and then the court takes
8 those facts as a given for purposes of the Harlow
9 question.

10 And -- and, in this case, I think there's an
11 example of this distinction. There was very much
12 disputed at trial the question of whether Ms. Ortiz told
13 Ms. Jordan the name of the guard who had assaulted her.
14 And that fact was disputed at trial. We -- we didn't
15 move for 50(b) over that factual dispute, and so we
16 couldn't appeal on that question.

17 But what we did appeal was that, taking that
18 fact as assumed for purposes of -- of the qualified
19 immunity question, still qualified immunity was
20 warranted.

21 JUSTICE SOTOMAYOR: Could you --

22 JUSTICE GINSBURG: Then explain to me what
23 -- you made a 50(a) motion. Why did you -- was there a
24 reason for making the 50(a) motion and not following it
25 up with a 50(b) motion?

1 MR. MIZER: I'm not aware of a reason, Your
2 Honor. But at pages 4 to 5 of the joint appendix, I
3 think it's clear that there were two different types of
4 arguments being made at the 50(a) stage. One argument
5 was a dispute over facts. The other argument was, even
6 if we don't dispute those facts, still Ms. Ortiz's
7 arguments haven't shown a constitutional violation.

8 JUSTICE SOTOMAYOR: How could you --

9 JUSTICE GINSBURG: It's -- it's very clear
10 from Rule 50 that 50(a) and 50(b) go together, and the
11 explanation, as I indicated when Petitioner's counsel
12 was speaking, is the Re-examination Clause of the
13 Seventh Amendment. So I think every first year
14 Procedure student learns 50(a), 50(b) go together, and
15 there's a historic reason why you must back up a 50(a)
16 motion with a 50(b) motion. They're not -- they all --
17 they all ask the same question. The Rule 56, the Rule
18 50, 50(b), they all ask: Is there sufficient evidence
19 to warrant a jury finding, whatever. They all ask that,
20 but they ask -- ask it on the basis of a different
21 record: the summary judgment record, the trial record,
22 and the jury verdict.

23 MR. MIZER: But still, Your Honor, I think
24 the question of whether particular conduct has been
25 proven is a sufficiency question, and that differs in

1 nature from the question of whether, taking that proven
2 conduct as a given, assuming it to be true, without --
3 without questioning the correctness of the plaintiff's
4 version of the facts, that the -- then the Harlow
5 question is a separate question.

6 JUSTICE GINSBURG: Do you know of any case
7 holding that you don't have to couple a 50(a) motion
8 with a 50(b) motion depending upon what's in your 50(a)
9 motion?

10 MR. MIZER: I am not aware of any case, no,
11 although I am aware of cases, including the K & T
12 Enterprises case from the Seventh -- or sorry -- from
13 the Sixth Circuit, that we cite in our brief, which says
14 that legal claims, purely legal claims, may be raised in
15 judgment as a matter of law motions under either 50(a)
16 or 50(b), but that 50(b) is not required with respect to
17 those motions.

18 And so -- so the 50(a) motion here was a
19 belt-and-suspenders -- belt-and-suspenders effort, but
20 it wasn't legally required because of the -- the --

21 JUSTICE SOTOMAYOR: Could -- could you
22 articulate for me the line that you see between assuming
23 all of the facts and it's not enough as a matter of law,
24 and a sufficiency claim. And -- and let's break out the
25 two claims: one against Ms. Jordan, one against Ms.

1 Bright.

2 On a due process claim against Ms. Bright,
3 there are two prongs, I think, to your argument. One is
4 that, as a matter of law under Sandin, putting her in
5 solitary confinement did not violate any -- any
6 constitutional right. And then there's "she didn't
7 retaliate" part of your claim.

8 The two seemed mixed up to me, below. And I
9 thought in reading your submissions to the district
10 court you were saying that, if she retaliated in putting
11 her in segregated confinement, it doesn't matter whether
12 there is a Sandin violation or not; she couldn't do the
13 retaliatory act; is that correct?

14 MR. MIZER: The -- the Sixth Circuit held in
15 this case that the retaliation claim is a different
16 claim from the due process claim, that it would be based
17 on --

18 JUSTICE SOTOMAYOR: The First Amendment.

19 MR. MIZER: -- the First Amendment or some
20 other amendment. And --

21 JUSTICE SOTOMAYOR: I'm trying to separate
22 out your --

23 MR. MIZER: Yes.

24 JUSTICE SOTOMAYOR: -- your argument,
25 however. What is your -- what is your position on this

1 question?

2 MR. MIZER: Our position is that the Sixth
3 Circuit got it right, and Ms. Ortiz hasn't appealed to
4 this Court on that holding, that as a -- as a matter of
5 law under Sandin, placing an individual in segregated
6 confinement does not amount to a due process violation
7 vis-à-vis the -- the ordinary conditions of prison
8 confinement.

9 I also have an answer, Justice Sotomayor, to
10 your question about the -- the jury instruction request.
11 It's in document 84 in the district court record.

12 JUSTICE GINSBURG: Well, you -- you refer to
13 Sandin. There are some extra things about the
14 confinement here. She was shackled, she was ill, and
15 nobody attended to her.

16 MR. MIZER: The -- the medical treatment
17 claims were dismissed by the district court at summary
18 judgment because Ms. Bright did not participate and did
19 not have any knowledge of --

20 JUSTICE GINSBURG: Well, is -- on the
21 question of whether this treatment was punitive rather
22 than just protective custody.

23 MR. MIZER: And, again, on the question of
24 punitiveness, the Sixth Circuit held that that was not
25 preserved -- that claim was not preserved by Ms. Ortiz.

1 And she has not petitioned to this Court for review of
2 that holding by the Sixth Circuit, and so the only
3 question is the square Sandin question of whether
4 segregated confinement is an atypical and significant
5 hardship vis-à-vis the routine conditions of -- of her
6 confinement.

7 JUSTICE GINSBURG: Well, wouldn't it be
8 this, the segregated confinement in this case, not at
9 large?

10 MR. MIZER: The -- again, the Sixth
11 Circuit's holding was that Sandin answered that -- that
12 question as a matter of clearly established law. And
13 since Ms. Ortiz hasn't petitioned for review of the
14 merits of that question, I'm not sure how it's presented
15 to this Court.

16 JUSTICE ALITO: Mr. Mizer, is it your
17 understanding that -- that Unitherm was based on Seventh
18 Amendment considerations, or was it based on prior
19 decisions that in turn were grounded on considerations
20 of fairness to the verdict-winner, namely the
21 opportunity, when a -- a motion for judgment as a matter
22 of law is made after the verdict, to move for dismissal
23 without prejudice or move for a new trial?

24 MR. MIZER: I think Unitherm was more
25 squarely the latter, although it -- the Court did refer

1 to the Seventh Amendment in responding to Justice
2 Stevens's dissent. And the Seventh Amendment concerns I
3 don't think are implicated here, because it is well
4 established that legal claims like qualified immunity
5 are not for the jury to resolve. And so taking --
6 taking the case away from --

7 JUSTICE GINSBURG: Well, then you're --
8 you're saying the category -- the mixed claim -- as
9 Justice Breyer proposed, if it's a purely legal claim,
10 then you're right. If it's a mixed claim, then you're
11 wrong.

12 MR. MIZER: And I think those -- those
13 categorizations are -- are fairly slippery and would be
14 difficult to apply, as I think the Chief Justice
15 suggested. And so the guidance that is clear is the
16 guidance that already exists from Johnson v. Jones,
17 which is that there are -- there two types of qualified
18 immunity claims, and if you're assuming the facts to be
19 true as the plaintiff posits them and you're not
20 controverting particular conduct, then you're in the
21 legal --

22 JUSTICE KAGAN: Well, Mr. Mizer, just --

23 JUSTICE KENNEDY: One -- one way to make the
24 formulation work is to say whether or not the issue
25 depends on an assessment of the record.

1 MR. MIZER: Well, qualified immunity is
2 always going to be an application of clearly established
3 law to fact. And Mitchell notes that -- that there will
4 be some -- some --

5 JUSTICE KENNEDY: Well, but we've been
6 through this. I think it was Justice Alito who gave the
7 hypothetical -- suppose that everybody agrees on what
8 happened; the question is whether or not the right's
9 clearly established.

10 MR. MIZER: And that is this case.

11 JUSTICE KENNEDY: That's a pure issue of
12 law.

13 MR. MIZER: And, as this Court has called
14 it, that's correct and that is this case.

15 JUSTICE SOTOMAYOR: How is that --

16 JUSTICE KAGAN: Well, is it this case, Mr.
17 Mizer? Take the deliberate indifference claim. The
18 question is whether the conduct amounted to deliberate
19 indifference. Why is that any different from asking
20 whether a particular kind of conduct amounted to
21 negligence, which in a previous case this Court said you
22 had did have to make 50(b), a 50(b) motion in order to
23 preserve? That was in the Johnson v. New York case.

24 MR. MIZER: It's different, Your Honor,
25 because the -- the prong of the analysis in the

1 deliberate indifference conduct that the Sixth Circuit
2 was looking at was the objective prong of whether or not
3 the response was reasonable. So assuming all of the
4 worst of -- of Ms. Jordan's intent, as proven by the
5 trial record, and assuming the worst of what she did or
6 didn't do, still her response was as a legal matter
7 objectively reasonable, and that was the Sixth Circuit's
8 holding.

9 And so, therefore, because that's a legal
10 inquiry, there was no 50(b) requirement even if Ms.
11 Ortiz had preserved the 50(b) argument.

12 The -- the -- Ms. Ortiz has also posited
13 that a collateral order appeal is a requirement in order
14 to preserve a qualified immunity claim. That argument
15 is clearly foreclosed not only by the broad agreement
16 among the circuits but also by this Court's decisions in
17 *United States v. Clark*.

18 JUSTICE BREYER: Okay. When you go back --
19 you're the one who has read these cases pretty
20 thoroughly, and as I looked at it, I -- with the
21 incomplete knowledge, I would have thought that
22 Justice Ginsburg's statement of it is basically right.
23 What Rule 50 is about is sufficiency of the evidence.
24 And 50(a) involves we're saying it won't be sufficient.
25 And 50(b) involves it wasn't sufficient. Then you could

1 have the Chief Justice's rule. It would work perfectly.

2 But apparently there's a Second Circuit
3 case, and some things in the treatises, that says
4 sometimes Rule 50(a) is being used for some other
5 purpose. And that's what seems to be going wrong. Like
6 if you have a pure question of law, you ought to be
7 outside 50(a); you ought to be doing some other thing.
8 You know, a question like: Was there collateral
9 estoppel that means that he couldn't say he was a
10 policeman because they litigated this 4 months ago?
11 That's a pure question of law.

12 So, what are these cases and that exception
13 in the treatise about? What are they thinking of? What
14 kinds of instances do they think come under 50(a) that
15 aren't sufficiency of the evidence?

16 MR. MIZER: The -- the courts have said that
17 you had can raise in a judgment as a matter of law
18 motion legal arguments like the statute of limitations,
19 collateral estoppel, pre-emption. Very often those will
20 be --

21 JUSTICE BREYER: Okay. Suppose we could say
22 this: That when a lawyer uses 50(a) to make the kind of
23 motion that does not involve sufficiency of the evidence
24 but rather, in fact, could be made without 50(a), under
25 those circumstances, he doesn't have to say 50(b). How

1 would that work?

2 MR. MIZER: That would work just fine from
3 our perspective, Your Honor, and in fact --

4 JUSTICE BREYER: Well, I don't know it would
5 work fine, because it seems to me you have a lot of
6 sufficiency of the evidence thing, but that's another
7 question.

8 MR. MIZER: The --

9 JUSTICE SCALIA: Excuse me. I -- why do you
10 -- why do you seem to concede that 50(a) only -- only
11 applies to evidentiary stuff? I mean --

12 JUSTICE BREYER: They're not --

13 JUSTICE SCALIA: -- the way it reads is, if
14 during a trial by jury, a party has been fully heard and
15 there is no -- no legally sufficient evidentiary basis
16 for a reasonable jury to find for that party on that
17 issue. Well, if it's as a matter of law, no amount of
18 evidence would ever allow a -- a jury verdict in that
19 direction. Surely, that falls within -- within (a) --

20 MR. MIZER: And that --

21 JUSTICE SCALIA: -- even though evidence has
22 nothing to do with it. No matter what the evidence is,
23 this is simply a matter of law. No jury, no reasonable
24 jury, could find for that party on that issue. I don't
25 read this as being purely a -- you know, a provision

1 governing whether there is -- there's enough evidence in
2 an area where there is no absolute rule of law. I think
3 it applies to the absolute rule of law as well.

4 MR. MIZER: If -- if Rule 50(b) -- if Rule
5 50(a) and 50(b) motions were required for all matters of
6 law, then that would change the hornbook understanding
7 of what 50(b) is about. It would expand the Unitherm
8 requirement in -- in ways that it hasn't been applied
9 before, and it would turn Rule 50(b) motions into a
10 clearinghouse for anything that must be -- that's going
11 to be raised on appeal. That's not --

12 JUSTICE SOTOMAYOR: Is that bad? That's
13 what Justice -- the Chief Justice asked you earlier.
14 Why is that such a horrible thing?

15 MR. MIZER: Your Honor, because it would
16 radically change the way that -- that 50(b) is currently
17 treated by parties. If it -- for example, in the
18 Southern District of Ohio, where this case --

19 JUSTICE SOTOMAYOR: You -- I'm -- I'm not
20 sure that answers the question.

21 Isn't it better for the court of appeals to
22 know a district court's opinion on every issue that's
23 going to come up on appeal? And wouldn't our
24 announcement of a rule -- that whether it's an issue of
25 law or fact, it has to be renewed under 50(b), so

1 everybody's on the same page as to what's going to be
2 heard on appeal -- why is that a bad rule? Why would
3 that be a bad outcome as a matter of law?

4 MR. MIZER: Because, Your Honor, the
5 Rule 50(b) motions would then become miniature -- or not
6 even miniature -- full-blown appellate briefs. And the
7 rule in the Southern District of Ohio at the moment, for
8 example, is that 50(b) motions are 20 pages long. If --

9 JUSTICE ALITO: I mean, the answer is it's a
10 -- it's a pointless gotcha rule. That's -- that's --
11 isn't that the answer? It's a pure issue of law, and
12 the district court has already said: I ruled on this on
13 summary judgment; don't bother me with this again. And
14 we're going to say, well, you still have to raise it in
15 a 50(b) motion? What -- that'd be -- that's -- that
16 there's no point. We might as well say that the lawyer
17 has to stand on his head when the motion is made or jump
18 up and down three times.

19 MR. MIZER: That's correct, Your Honor. And
20 the current rule --

21 JUSTICE SCALIA: The point would be that,
22 therefore, you don't have to sort out whether there --
23 there is any factual content to this issue. You don't
24 have to sort out what's a pure question of law and what
25 is a mixed question of law and fact, which is always

1 very difficult. What's the big deal? Make the motion.

2 MR. MIZER: Because, Your Honor, the -- the
3 district courts have never insisted, nor do the rules
4 insist, that the district courts get multiple cracks at
5 a legal question. And the parties --

6 JUSTICE GINSBURG: The -- the purpose of
7 50(b) -- Justice Alito brought out that it's not simply
8 the historical background of the Seventh Amendment, but
9 in that same line of cases, the Court gave a practical
10 reason. And the practical reason related to the
11 district court, that if the motion is made after the
12 jury comes in, the district judge would have the
13 opportunity to exercise her discretion to grant a new
14 trial.

15 Let's take -- is it Ms. Bright -- where the
16 Sixth Circuit said that, well, maybe there could have
17 been a retaliation claim, but the plaintiff didn't make
18 it. The district judge, given the chance, might have
19 said: I would exercise my discretion to allow the
20 plaintiff to have a new trial on this retaliation claim.
21 I thought it was before -- before the court and it was a
22 good claim. The Sixth Circuit thought it wasn't.

23 I mean, the purpose is to get the district
24 judge into the picture to exercise the district judge's
25 discretion on the very question.

1 MR. MIZER: But if a claim is not in a case,
2 Your Honor, then there's no discretion as to whether or
3 not to give it to the jury. And so, just as the
4 qualified immunity question doesn't -- doesn't belong
5 with the jury, so, too, a claim that hasn't been
6 adequately pressed doesn't go to the jury.

7 And so we're not talking about questions
8 that should and can be resolved by the jury. We're
9 talking about legal claims that the jury has no business
10 deciding at all.

11 JUSTICE BREYER: Your case, anyway, is a
12 case, judging from what they wrote, which -- I'm back to
13 where I started -- the mixed questions and the
14 fact-based questions are you really have to renew your
15 motion. And reading your opinion, it seems to me it's
16 filled with determinations of fact. They're reviewing
17 what the jury did and could have found, and on the basis
18 of what they could have found, they say you're not
19 entitled to -- or you are entitled to qualified
20 immunity.

21 So this would seem like a hornbook case
22 where you have to make the motion, and if you have to
23 make the motion, you didn't; and if you didn't, you
24 don't go back and review the facts as the motion on the
25 basis of the facts as they were before the trial. End

1 of matter. What's wrong with that?

2 MR. MIZER: I would disagree with the
3 characterization of the Sixth Circuit's opinion as
4 resolving factual questions, because on the contrary, I
5 think --

6 JUSTICE BREYER: No, no. I mean they went
7 on the jury's resolution of the facts.

8 MR. MIZER: That's correct. And so it's
9 the -- the --

10 JUSTICE BREYER: For that reason, they can't
11 take the facts as they were in your motion for summary
12 judgment. They have to take them on the basis of --
13 they can't just go back and review them on the -- yes.

14 MR. MIZER: And that goes to show, Your
15 Honor, that the Sixth Circuit wasn't -- wasn't doing
16 what Ms. Ortiz has -- what Ms. Ortiz has posited, which
17 is that they were reviewing the summary judgment record
18 order.

19 JUSTICE KAGAN: Well, Mr. Mizer, suppose
20 that they were. Suppose they committed an error in that
21 respect and that they thought they were reviewing the
22 summary judgment order, and not the final judgment.

23 If that's what they thought, would you agree
24 that they had no jurisdiction at that point to take that
25 appeal because the 30 days had run?

1 MR. MIZER: Yes. Then it would be like a
2 late collateral order appeal that --

3 JUSTICE KAGAN: So your position is --
4 rests, is dependent, on our finding that the Sixth
5 Circuit was reviewing a final judgment order, which was
6 not what the Sixth Circuit in fact said it was doing.

7 MR. MIZER: Again, I would disagree that
8 that's what the Sixth Circuit said because of the
9 language at the bottom of page 7a of the petition
10 appendix, where they clearly say that it's an appeal
11 from the verdict.

12 And so because it's demonstrably not true
13 that they were treating the summary judgment order as
14 the final appealable order here, the question presented
15 by Ms. Ortiz is not actually presented by this case.
16 And the further arguments that a 50(b) motion was
17 required here under Unitherm were never made in the
18 Sixth Circuit and not made in her opening cert petition.
19 And so that argument also is not presented by this case.

20 And so I think the clear resolution is to
21 dismiss the case as improvidently granted, but if the
22 Court were inclined to the view that the merits should
23 be reached, then the clear rule that we posit resolves
24 the case, which is that orders made by the district
25 court along the way in the course of a district court

1 proceeding are adequately preserved for appellate review
2 from the final judgment once they are pressed and passed
3 on below.

4 If there are no further questions --

5 JUSTICE KENNEDY: I didn't hear your -- your
6 last -- are adequately preserved when?

7 MR. MIZER: Once they are pressed and passed
8 on by the district court. And the qualified immunity
9 claim here was pressed and passed on --

10 JUSTICE KENNEDY: So you're saying that if
11 there's anything in the record of the trial that
12 indicates that the judge ruled on the issue, there need
13 not be a 50(b) motion?

14 MR. MIZER: That's correct, Your Honor. And
15 the lower courts, I think, are well-equipped to assess
16 whether or not an issue has adequately been pressed and
17 passed on in the district court.

18 That has been the settled rule of appellate
19 reviewability, and I don't think that it should be
20 changed by imposing a Rule 50(b) requirement for
21 anything other than a sufficiency of the evidence
22 motion.

23 CHIEF JUSTICE ROBERTS: I just want to be
24 clear. Your answer to Justice Kennedy had the caveat
25 that except for the issue we addressed in Unitherm.

1 MR. MIZER: That's correct.

2 CHIEF JUSTICE ROBERTS: Okay.

3 MR. MIZER: If there are no further
4 questions, we ask you to affirm the Sixth Circuit.
5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Mills, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF DAVID E. MILLS

9 ON BEHALF OF PETITIONER

10 MR. MILLS: Thank you.

11 The -- one thing that's important about the
12 Sixth Circuit's language when it said it was reviewing
13 summary judgment, the single decision it cited was the
14 Eighth Circuit's decision in Goff v. Bise. Now, in that
15 -- in that decision, the Eighth Circuit said, yes, we
16 can review this after trial even though it was summary
17 judgment, because it's qualified immunity, but the
18 Eighth Circuit actually ignored the trial evidence. It
19 actually did this seemingly illogical step of just
20 looking at the summary judgment evidence as-is.

21 Now, I think what that shows is the Sixth
22 Circuit was definitely reviewing summary judgment, but
23 it, implicitly at least, recognized that would be
24 entirely illogical. So it tied its decision to the only
25 decision by the district court on qualified immunity,

1 summary judgment, and said: We've got to look at what
2 really happened in this case. And so they looked ahead.

3 Now, the reason the question is adequately
4 presented is because I think the Sixth Circuit's
5 decision shows this entire debate about Unitherm and
6 whether this was a quasi-50(a) review is the -- one of
7 the precise reasons the Sixth Circuit hinged its
8 decision on summary judgment.

9 I think it was quite aware that an appellate
10 court, since at least 1947, in Cone, cannot review the
11 sufficiency of the evidence at trial and overturn the
12 jury's verdict. And so the Sixth Circuit said: Wait a
13 second; we can look to the summary judgment record.
14 Now --

15 JUSTICE SOTOMAYOR: What's the rule that you
16 want us to adopt to answer the question presented? You
17 asked us to take cert on a question presented. What's
18 the answer you want us to give on the question
19 presented?

20 MR. MILLS: Yes. The answer is that a party
21 may not appeal the denial of summary judgment after
22 trial.

23 JUSTICE SOTOMAYOR: In no circumstances?

24 MR. MILLS: I would say that the clearest
25 rule is to say in no circumstances. That's the position

1 of the Fourth Circuit. You say, if you want to
2 challenge a judgment, simply make your motion.

3 But I would add that whichever way this
4 Court goes, the decision here has to be reversed,
5 because there's no doubt that the legal issue of
6 qualified immunity at summary judgment depended entirely
7 on the officers' conduct at trial.

8 CHIEF JUSTICE ROBERTS: So your rule, in
9 response to Justice Sotomayor, would basically require
10 anyone who has an assertion of qualified immunity to
11 take their collateral appeal or interlocutory appeal.

12 MR. MILLS: It would only require it, Your
13 Honor, to the extent that they wish to challenge that
14 decision on the summary judgment record. I'm not at all
15 suggesting that that appeal is required to preserve the
16 issue of immunity. It's easily preserved, but to the
17 extent a trial occurs on the officers' conduct -- and
18 the officers want to say, wait a second, we're still
19 immune -- that evidence even at trial is insufficient
20 for liability. You've got the right to preserve your
21 immunity issue, but you have to have the district court
22 consider the question.

23 CHIEF JUSTICE ROBERTS: So they are put to a
24 choice whether or not their qualified immunity claim
25 rests entirely on law or might turn out, as you say it

1 did in your case, to have some factual aspect?

2 MR. MILLS: That's right. And they --

3 CHIEF JUSTICE ROBERTS: Well, that's kind of
4 a tough choice to put them to, isn't it?

5 MR. MILLS: Well, they have an absolute
6 right to take that immediate appeal, and -- and they
7 chose not to.

8 CHIEF JUSTICE ROBERTS: So they have to take
9 the immediate appeal, and when they do so, they lose the
10 right to appeal at the end?

11 MR. MILLS: No, they do not.

12 CHIEF JUSTICE ROBERTS: Well, why is that?

13 MR. MILLS: They do not because if they lose
14 the appeal and they go to trial, you've got a new case.
15 You've got -- I shouldn't say a new case. You've got
16 new evidence of conduct. And so there's no loss of the
17 issue of immunity. It's just that it turns on the facts
18 from the trial.

19 JUSTICE SCALIA: You've assumed -- you've
20 assumed all the evidence in their favor at the summary
21 judgment stage.

22 MR. MILLS: Yes.

23 JUSTICE SCALIA: So you really think that
24 this is a realistic scenario where there's going to be
25 even more evidence against them than -- I mean, you're

1 assuming the evidence against them. There's going to be
2 even more evidence against them than they assumed at the
3 summary judgment? That's not going to happen very
4 often.

5 MR. MILLS: It happened here.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. MILLS: Thank you very much.

8 CHIEF JUSTICE ROBERTS: The case is
9 submitted.

10 (Whereupon, at 11:04 a.m., the case in the
11 above-entitled matter was submitted.)

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