

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NEIL DUPREE, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 22-210  
 )  
KEVIN YOUNGER, )  
 )  
 ) Respondent. )  
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Pages: 1 through 64

Place: Washington, D.C.

Date: April 24, 2023

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NEIL DUPREE, )

Petitioner, )

v. ) No. 22-210

KEVIN YOUNGER, )

Respondent. )

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Washington, D.C.

Monday, April 24, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ANDREW T. TUTT, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

AMY M. SAHARIA, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-210, Dupree versus Younger.

Mr. Tutt.

ORAL ARGUMENT OF ANDREW T. TUTT

ON BEHALF OF THE PETITIONER

MR. TUTT: Thank you, Mr. Chief Justice, and may it please the Court:

When a district court resolves a purely legal issue against a party at summary judgment, that issue is preserved for appellate review. There is no requirement that if the case then progresses to a jury trial, the aggrieved party must make two additional motions repeating the same legal argument simply to ensure the issue remains live for review on appeal. That follows from the final judgment rule, the history of appellate review, the history of the Federal Rules of Civil Procedure, and common sense.

Mr. Younger argues that already-resolved legal issues must be re-raised at trial to be preserved. But it is not clear

1 to me how he thinks that should be done or why  
2 he thinks it should be required. He's offered  
3 two very different rules to this Court, one  
4 astonishingly wasteful and the other entirely  
5 superfluous.

6 In his brief in opposition to  
7 certiorari, Mr. Younger suggested an entirely  
8 superfluous rule, that parties could preserve  
9 purely legal issues by just adding one sentence  
10 to Rule 50 JMOL motions. But, if that were the  
11 rule, it would truly be a pointless formality  
12 with no benefit whatsoever. An "add one  
13 sentence" Rule 50 motion would never be granted  
14 because it is just a bare request for the judge  
15 to reconsider her earlier ruling at summary  
16 judgment.

17 And the posture of any resulting  
18 appeal would be no different than if the appeal  
19 were taken directly from the error in the denial  
20 of the summary judgment motion. The rule would  
21 not prevent retrials, for example, following  
22 successful appeal because any subsidiary fact  
23 disputes would not have been the subject of the  
24 trial. The "add one sentence" rule would only  
25 be a pointless gotcha rule.

1                   Seemingly recognizing that the "add  
2 one sentence" rule has no point, Mr. Younger  
3 pivoted to an astonishingly wasteful rule in his  
4 merits brief in this Court. Under that rule, he  
5 says, to preserve a purely legal issue for  
6 appeal, parties should insist on trying the case  
7 as if the claim was not already foreclosed.  
8 Parties should call every witness, introduce  
9 every document into evidence, and fight over  
10 jury instructions, all as if the judge had never  
11 ruled on summary judgment at all.

12                   He claims this is -- that this  
13 approach would avoid retrials in the event of  
14 successful appeals. But it would never happen.  
15 No one thinks it is right, and I doubt Mr.  
16 Younger will defend it here today.

17                   And if you'll permit me to go slightly  
18 over time, I'll just close by saying that the  
19 Court should reject a rule that would prevent  
20 appellate courts from collect -- correcting  
21 clear legal errors, even when those errors can  
22 be intelligently reviewed on an undisputed  
23 record and when no party is prejudiced by that  
24 review.

25                   I welcome the Court's questions.

1 JUSTICE THOMAS: Mr. Tutt, how would  
2 you define "purely legal"? If you were talking  
3 about whether or not this was a -- a cause of  
4 action or whether a defense was cognizable, I  
5 would understand your argument, I think, more  
6 clearly. But how would you demonstrate -- how  
7 would you prove, for example, exhaustion? It  
8 seems that you would need some facts.

9 MR. TUTT: Well, Your Honor, we simply  
10 put an issue as purely legal when it can be  
11 resolved with reference only to the undisputed  
12 facts. That is the -- that is the way that the  
13 Court framed it in the Ortiz versus Jordan case.  
14 And what it means is that when at summary  
15 judgment you make a motion and you say, I don't  
16 dispute the plaintiff's account of what  
17 happened, I -- and the plaintiff doesn't dispute  
18 any of my facts, and so, given that nothing's in  
19 dispute, I should be awarded summary judgment.

20 Then your motion is purely legal.

21 JUSTICE THOMAS: Well, but I think  
22 doesn't that sort of defy sort of the way things  
23 are done as a matter of practice? Because  
24 sometimes you would actually try it differently  
25 from how you anticipated it at the pretrial

1 stage.

2 MR. TUTT: Your Honor, that might be  
3 so, but in -- in cases like ours, where the  
4 undisputed facts were the basis for the judge  
5 ruling against you -- so, in this case, once we  
6 admitted -- and we do admit that there was an  
7 IIU investigation -- once that was admitted, it  
8 was impossible for us to win --

9 JUSTICE THOMAS: So you're saying that  
10 --

11 MR. TUTT: -- on an exhaustion  
12 defense.

13 JUSTICE THOMAS: -- the Respondent  
14 will say that there were no disputed facts?

15 MR. TUTT: I think Respondent believes  
16 that -- I don't think Respondent would dispute  
17 with us that that issue was purely legal, that  
18 whether an IIU investigation means that PLRA  
19 remedies are unavailable, we do not believe  
20 Respondent disputes at all, and has never  
21 disputed, that that -- that that issue is purely  
22 legal. No facts are in dispute, and it was  
23 resolved against us on the basis of what we  
24 regard as a legal error and we would like to  
25 bring to the court of appeals.



1                   Now there were other -- according to  
2 Respondent, there were other factual disputes in  
3 the case. We don't agree. But whether you  
4 agree with us on that or not, the fact that  
5 there was a pure legal error that prevented us  
6 from having any hope of succeeding or prevailing  
7 at the trial on this issue meant that it was out  
8 of the case.

9                   Any good lawyer who is familiar with  
10 the final judgment rule would think that after  
11 exhaustively briefing this issue and after Judge  
12 Bennett wrote a -- an opinion on it saying this  
13 fact is established and, under this fact, you  
14 cannot prevail on this defense, they would not  
15 believe that they needed to do anything further  
16 to preserve that issue for review.

17                   JUSTICE GORSUCH: So, Mr. Tutt, you're  
18 right, there were a few different bases for --  
19 that the other side argued for excusing  
20 exhaustion. One was the opacity of the  
21 procedures. Another had to do with an  
22 allegation that your client had frustrated his  
23 ability to do that.

24                   Those are pretty fact-bound. Are you  
25 letting those go? Is it just the IIU

1 investigation point that you think is preserved?

2 MR. TUTT: We think that -- we think  
3 that anything that can be -- anything that can  
4 be resolved without reference to a disputed fact  
5 is preserved. So --

6 JUSTICE GORSUCH: But I'm just asking  
7 you, there was those three categories of  
8 arguments. Which one's preserved?

9 MR. TUTT: So we think definitely the  
10 IIU investigation error is something that we can  
11 raise on appeal. And if we were to win and the  
12 court -- the Fourth Circuit were to believe that  
13 there were disputed facts about opacity or  
14 thwarting, there would be a remand and we would  
15 have further briefing on that.

16 JUSTICE GORSUCH: All right. And let  
17 me ask you --

18 MR. TUTT: But --

19 JUSTICE GORSUCH: -- about that  
20 because that raises my bigger question. You're  
21 not willing to let those go. You say those  
22 might be preserved too. But all the district  
23 court actually did was deny your motion for  
24 summary judgment on your affirmative defense.  
25 There was no ruling granting anybody a judgment

1 as a matter of law.

2 And that's pretty awkward to fit into  
3 the box that Justice Thomas alluded to, a pure  
4 legal question was resolved. Arguably, nothing  
5 was resolved. Denial of summary judgment is not  
6 a ruling definitively in favor of anybody on  
7 anything.

8 MR. TUTT: Your -- Your Honor, I read  
9 Judge Bennett's order as definitively saying  
10 that we lose on exhaustion, and I don't know of  
11 a way to read that order that doesn't say that.

12 JUSTICE GORSUCH: Well -- well, a way  
13 to read it would have been a grant of summary  
14 judgment in favor of the plaintiff on -- on an  
15 affirmative defense.

16 I take your point that there are some  
17 purely legal questions that you might not have  
18 to renew. I -- I -- I'm not fighting that on  
19 the QP. I just think it's a very small class of  
20 cases that fall into that rule. And when I look  
21 at the lower court opinions, particularly the  
22 Seventh Circuit's thoughtful decision in this  
23 area, most cases involve questions of fact that  
24 are intertwined and have to be presented. There  
25 are a very small class of cases that don't.

1                   And I just struggle to see whether  
2 maybe we picked the right case for deciding this  
3 question given that I would have thought that an  
4 affirmative defense, you would have had to raise  
5 something at trial. You didn't even make a  
6 proffer of evidence. You didn't do anything at  
7 trial on your own affirmative defense.

8                   MR. TUTT: Well -- well, Your Honor, I  
9 promise you picked the --

10                   JUSTICE GORSUCH: I know it's not you,  
11 counsel.

12                   (Laughter.)

13                   MR. TUTT: I promise you picked the  
14 right case. The -- the -- the relevant fact  
15 that meant that we were not going to win at  
16 trial was undisputed at summary judgment.

17                   So --

18                   JUSTICE GORSUCH: Well, here's the  
19 thing, though, on that. Let me -- let me just  
20 press on that.

21                   So a district court issues a denial of  
22 summary judgment on -- you're right, he said, I  
23 think, as a matter of law, IIU is good enough to  
24 excuse.

25                   But things happen between summary

1 judgment and trial, and a district court's  
2 initial ruling on a denial of summary judgment,  
3 if I'm the district court judge, I might feel a  
4 little sandbagged by this procedure and -- and  
5 without having had an opportunity at trial to  
6 reconsider my initial decision. I have not  
7 entered judgment in favor of the other side. I  
8 just denied a motion for summary judgment.

9           And I might -- I might -- I might have  
10 wanted the opportunity to say -- here's what  
11 would often happen, I think, is the district  
12 judge would say, you put on your affirmative  
13 defense, put on all your evidence, and let's go  
14 to the jury, and the jury may reject it, in  
15 which case I'm home free. I don't have to worry  
16 about it.

17           Or, if the jury accepts your  
18 affirmative defense, I can then enter judgment  
19 as a matter of law for the other side at that  
20 point, and then all the evidence is in the  
21 record, it's all fully complete for the court of  
22 appeals, so the court of appeals can decide my  
23 -- my JMOL ruling after trial, and if it rejects  
24 it, it's got the full record available to it,  
25 and it can affirm the jury verdict and we don't

1 have to go try it again.

2 So that -- that's how I might feel  
3 sandbagged if I were in the district judge's  
4 shoes. What's wrong with that?

5 MR. TUTT: Your Honor, what -- what I  
6 think is primarily wrong with it is that it puts  
7 an incredible amount of weight on the formal  
8 question whether Judge Bennett entered summary  
9 judgment against us on this issue. It puts  
10 everything on the idea that the order wasn't  
11 actually a grant of summary judgment. It was  
12 merely a grant of summary judgment --

13 JUSTICE GORSUCH: It was a denial of  
14 summary judgment.

15 MR. TUTT: -- to Mr. Younger.

16 JUSTICE GORSUCH: It wasn't a grant of  
17 summary judgment.

18 MR. TUTT: It was effect -- but he  
19 effectively granted summary judgment to Mr.  
20 Younger because we could not prevail at the  
21 trial on this defense. And so I wish it were as  
22 easy as Your Honor is suggesting to then try --

23 JUSTICE JACKSON: But, Mr. Tutt, why  
24 -- why isn't it as easy? I -- I -- I mean, I --  
25 I'm surprised by your answer to that question

1 because I'm looking at the district judge's  
2 order, and it is clear from the order that the  
3 court said he did not need to resolve disputes  
4 concerning Younger's adherence to the process.

5 He lists a number of factual disputes.  
6 He says these issues are still up in the air,  
7 but I don't need to resolve them because I'm  
8 making this legal ruling. So I -- I don't see  
9 how this judge would have been sandbagged given  
10 the way in which he resolved this question of  
11 summary judgment.

12 Am I wrong to put that much weight on  
13 his actual ruling with respect to this issue?

14 MR. TUTT: No, not at all. I think  
15 you're on page 42A of the Pet. App. is the  
16 critical page, and he says in the second  
17 paragraph that I need not resolve disputes about  
18 facts because there was an IIU investigation.

19 But the preceding paragraph is not  
20 listing facts that are in dispute. And I want  
21 to make very clear we don't dispute anything  
22 that -- that Mr. Younger says he did or happened  
23 to him. We don't dispute any facts in this  
24 case. Nothing is disputed.

25 JUSTICE JACKSON: But even if you did,

1 that wasn't the basis for the district court's  
2 ruling in this case. I mean, couldn't you have  
3 set aside any of the factual issues about  
4 whether or not exhaustion actually happened,  
5 given that the judge says, I don't care about  
6 those issues, what I'm focused on is the -- in  
7 the next sentence, there's no dispute that the  
8 IIU undertook an investigation concerning  
9 Younger's assault.

10 That was the only fact that the  
11 district court cared about. It was undisputed.  
12 And then he made his legal ruling. So I guess  
13 I'm a little confused as to why we would have a  
14 judge caring about facts related to this in the  
15 context of the trial.

16 As a district judge, I think I would  
17 be annoyed if you tried to re-raise issues  
18 related to this exhaustion question that I had  
19 already ruled on, you know, in this way.

20 MR. TUTT: No, Your Honor, I -- I --  
21 I -- I accept the help. I think you're --  
22 you're agreeing with me that you would never  
23 raise this at trial because the judge has  
24 already said this claim is over, it's done, I  
25 ruled on it, there's no facts to put to the



1 jury.

2           The jury doesn't have a role to play  
3 on this issue because the one fact that decides  
4 it has already been admitted, and so let's get  
5 on with the trial. Jurors' time is very  
6 valuable. The court's time is valuable. And  
7 the idea that you would -- you would try a  
8 claim, try out extra factual issues that might  
9 be relevant only if you can convince a court of  
10 appeals to reverse and remand seems like the  
11 height of waste and something that would -- that  
12 would never happen.

13           And, in fact, we cannot figure out  
14 exactly how this trial would happen. So, you  
15 know, would -- would you make evidence  
16 objections because, again, we cannot prevail on  
17 this, so why are we trying to put in irrelevant  
18 evidence?

19           JUSTICE GORSUCH: Well, let me -- let  
20 me see if we can unpack that a little bit. So  
21 you're asking for a remand on the IIU issue,  
22 and, presumably, if you prevail and -- and IIU  
23 is not a matter of law preclusive of your  
24 exhaustion defense, you want a remand to trial,  
25 a second trial on exhaustion, right?

1           MR. TUTT: Well, we are going to argue  
2 to the court that actually, given the undisputed  
3 facts, we can -- we are entitled to judgment.

4           JUSTICE GORSUCH: Sure. And the other  
5 side says there are plenty of disputed facts  
6 aside from the IIU, right?

7           MR. TUTT: Yes, Your Honor, that --  
8 that's their claim.

9           JUSTICE GORSUCH: And so -- so --

10          MR. TUTT: And so --

11          JUSTICE GORSUCH: -- the ultimate  
12 outcome would be a trial on exhaustion?

13          MR. TUTT: Yes. And --

14          JUSTICE GORSUCH: All of which could  
15 have been avoided if you had raised this issue  
16 in the first instance at trial and alerted the  
17 district judge of that potentiality, and the  
18 district judge might have been annoyed and said  
19 no but might have said yes and might have said  
20 let's try it, and I can always reserve judgment  
21 and -- and grant judgment as a matter of law  
22 after the jury's verdict if I have to.

23          MR. TUTT: Let me give you -- let me  
24 give you --

25          JUSTICE GORSUCH: Right?

1           MR. TUTT: -- three reasons why that's  
2 not a good idea or not what would happen.

3           First, if all we are needed to do to  
4 preserve this -- and I -- and if the Court were  
5 to announce a rule, it would -- we would want  
6 the bright-line rule of one sentence, but if  
7 that was the rule, the probability the judge  
8 will change her mind because we added one  
9 sentence to our Rule 50 motion is exactly zero.  
10 It is a unicorn. We will not prevail in  
11 convincing the court --

12           JUSTICE GORSUCH: No, I understand  
13 that. But you -- forget about the Rule 50  
14 motion. There was nothing for the Rule 50  
15 motion to act on because you hadn't put in any  
16 evidence, you hadn't even sought to put in any  
17 evidence of your own affirmative defense.

18           MR. TUTT: Your -- well, Your Honor,  
19 that was because, at summary judgment, we had  
20 already --

21           JUSTICE GORSUCH: No, I understand  
22 that point.

23           MR. TUTT: And so -- so --

24           JUSTICE GORSUCH: But -- but forget  
25 about the Rule 50 motion. There's nothing --

1 MR. TUTT: -- to --

2 JUSTICE GORSUCH: -- nothing to seek  
3 judgment on when you haven't even put on an  
4 affirmative defense. It's your --

5 MR. TUTT: Your Honor --

6 JUSTICE GORSUCH: -- it's your burden  
7 in that case. So all I guess I'm saying is now  
8 we're going to have two trials when one might  
9 have sufficed if you had actually sought to put  
10 on your affirmative defense.

11 MR. TUTT: Your Honor, the --

12 JUSTICE GORSUCH: And I am not arguing  
13 with your -- your basic premise that -- that  
14 there are some legal issues that you don't need  
15 to raise.

16 MR. TUTT: Your Honor, the -- if we  
17 had tried to put exhaustion on at trial, I think  
18 that the other side would have said: What are  
19 you doing? You're distracting the jury. You  
20 are --

21 JUSTICE GORSUCH: We'll never know  
22 what they would have done.

23 (Laughter.)

24 MR. TUTT: Well, Your -- Your Honor, I  
25 just don't know of a -- of a situation where

1 this would actually happen, where you would try  
2 to press a foreclosed or a doomed claim.

3 JUSTICE SOTOMAYOR: Can I -- can I  
4 take you --

5 MR. TUTT: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: -- to what's been  
7 troubling me? I do agree with you that the  
8 district court appears to have made a legal  
9 ruling that the existence of an IAU as a matter  
10 of law stops any grievance proceeding, correct?  
11 That was the ruling?

12 MR. TUTT: Yes, Your Honor.

13 JUSTICE SOTOMAYOR: But I thought the  
14 argument before the judge was it doesn't because  
15 we have an example of at least two other  
16 prisoners who were able to pursue their  
17 grievance proceeding despite the existence of an  
18 IAU, correct?

19 MR. TUTT: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: Now I haven't  
21 gotten into this part of the record, but maybe  
22 your -- the other side will correct me or -- or  
23 not, but I don't know if those two other  
24 prisoners' situation was identical to this  
25 prisoner, whether the IAU issues involved in

1 that proceeding -- in that ongoing proceeding  
2 grievance were the same as the IAU.

3 But putting that aside, it seems to me  
4 that that factual issue was inherent in the  
5 question that was presented here, meaning you --  
6 you were going to have to put in some facts to  
7 show that the IAU is not enough to stop a  
8 grievance proceeding.

9 And so what were the facts that you  
10 would have put on? It -- it's not -- in my  
11 mind, this goes back to Justice Thomas's  
12 question is, is it a purely legal question?

13 MR. TUTT: Yes. And I -- and I --  
14 I -- I want -- I think this gives me a chance  
15 to -- to really -- the terminology "purely  
16 legal" in this context, in the Court's cases in  
17 this area, is a little bit different than how it  
18 uses "purely legal" in some other contexts.

19 It -- the Court's cases, when it --  
20 the Court says "purely legal," it means without  
21 reference to disputed facts. That's what it  
22 said in Ortiz. That's what it has said in the  
23 -- the collateral order cases.

24 And so why is that important? It's  
25 important to the other prisoners because Mr.

1 Younger doesn't dispute the fact that those  
2 other prisoners were able to obtain relief by  
3 going through the process even though there was  
4 a pending IIU investigation.

5           The facts are not in dispute. They're  
6 -- so what that means is that there's nothing  
7 for the jury to do in this case. It's not  
8 resolving disputed credibility. It's not  
9 dissolve -- resolving anything. This is really  
10 -- it's a difficult question. It's a -- it's a  
11 question that -- that calls on the judge to  
12 exercise his -- his judgment --

13           JUSTICE SOTOMAYOR: No, I beg --

14           MR. TUTT: -- as a matter of law, but  
15 --

16           JUSTICE SOTOMAYOR: -- I beg your  
17 pardon.

18           MR. TUTT: Yes, Your Honor.

19           JUSTICE SOTOMAYOR: Someone's going to  
20 have to look at the nature of those IAU  
21 proceedings and the grievance process, and  
22 that's factual. That's not purely legal.

23           Yes, they went through, but there's no  
24 concession that they went through on the issue  
25 that -- that was in question here, whether or

1 not an assault had happened.

2 MR. TUTT: Your Honor, in the JA is  
3 the summary judgment briefing. And Mr. Younger  
4 doesn't dispute that these other prisoners were  
5 able to make use of the process and really  
6 doesn't take issue with the idea that they're  
7 similarly situated to himself.

8 JUSTICE SOTOMAYOR: Assume that I  
9 disagree --

10 MR. TUTT: Yeah. Yes, Your Honor.

11 JUSTICE SOTOMAYOR: -- that the  
12 question was yes, they did for something. But  
13 that doesn't answer the question of the what and  
14 what that means and why. Those are factual  
15 questions in my mind.

16 I'm -- so assume my assumption.

17 MR. TUTT: Yes, Your Honor. You know,  
18 what I will say is the bigger -- the bigger  
19 picture of this case, beyond the facts of this  
20 case, are that at summary judgment, when the two  
21 parties join issue on undisputed facts, there --  
22 it is a question that is teed up only for the  
23 judge to resolve.

24 And when the judge resolves it against  
25 you and you don't dispute the relevant fact --



1 so even saying that there is that subsidiary  
2 fact dispute about whether there are similarly  
3 situated prisoners, that could be resolved on  
4 remand. So, if -- if -- if Mr. Younger is  
5 correct, we -- we still lost because the IIU  
6 investigation was undertaken. And so that's  
7 still a purely legal --

8 JUSTICE BARRETT: Mr. --

9 MR. TUTT: -- error. Yes, Your Honor.

10 JUSTICE BARRETT: -- Mr. Tutt, so  
11 could you win here on the QP and -- given that  
12 there might be some complexities with respect to  
13 whether this was a mixed question or a purely  
14 legal question, could you win here on the QP and  
15 then have to fight it out on remand?

16 I mean, your friend on the other side  
17 says you shifted arguments on appeal anyway, so  
18 you might have forfeited it.

19 MR. TUTT: Yes, Your Honor.

20 JUSTICE BARRETT: Why should we decide  
21 any of that?

22 MR. TUTT: We have a tricky -- tricky  
23 task on remand, but we -- but you can obviously  
24 decide the QP for us and let us go and -- and  
25 meet our burden on remand in the Fourth Circuit.

1                   But we think this is reviewable. And  
2                   that's -- I mean, the bigger question that --  
3                   that ultimately this is about is -- is we  
4                   contend this case came out wrong. This is a --  
5                   this -- this is a judge -- a -- a verdict that  
6                   should never have happened. Lieutenant Dupree  
7                   should not be subject to this judgment.

8                   JUSTICE BARRETT: But we don't have to  
9                   decide that, right?

10                  MR. TUTT: Yes, Your Honor. That's  
11                  right. We just have the chance --

12                  JUSTICE BARRETT: And we don't even  
13                  have to decide what the standard is. You're  
14                  saying that the standard should be, you know,  
15                  without reference to any undisputed facts. But  
16                  we don't necessarily even have to articulate a  
17                  standard here, right, because there's some  
18                  disagreement among the circuits on the majority  
19                  side of the split about how to isolate that  
20                  question of what is a purely legal issue. I  
21                  mean, maybe we should let that percolate.

22                  MR. TUTT: Yeah -- Your Honor, yes,  
23                  you can rule for us. As long as it says  
24                  reversed at the bottom, we --

25                  (Laughter.)

1 JUSTICE BARRETT: You'll take  
2 anything?

3 MR. TUTT: -- we will take it. You  
4 know, we think that -- that the eight circuits,  
5 some of them have had this rule for decades.  
6 Most, if not -- if not all, of the circuits use  
7 the sort of undisputed fact framework and have  
8 not had any difficulty with -- with  
9 administering this rule or -- or allowing  
10 parties to take this appeal.

11 And the reason is that they all have  
12 adopted the one-sentence "add it to your JMOL"  
13 just as a formality method of preservation from  
14 what we understand. And when it comes down to  
15 that, when you're down to just put in a sentence  
16 in your JMOL, then, really, there's no purpose  
17 in the rule at all.

18 And the only way to make it sure that  
19 parties actually are able to do this  
20 preservation confidently and be able to make  
21 sure that they're actually going to be able to  
22 take their appeal is to make it a rule that  
23 simple.

24 And so the idea that you'll have to  
25 try a counterfactual fake trial on a foreclosed

1 issue that the judge has already said you lose  
2 on really would be very, very difficult for  
3 counsel to actually know that they've actually  
4 preserved their issue.

5 JUSTICE GORSUCH: What do we say to  
6 the -- the JMOL thing doesn't really fit here  
7 because there was no affirmative defense  
8 presented, so there's no JMOL. But put that  
9 aside. The -- the other side's response would  
10 be something like this: Prudent counsel will  
11 always put that line in the JMOL anyway to avoid  
12 malpractice possibilities later. So whatever we  
13 say, they're still going to do it.

14 And why not a clear bright-line rule  
15 that's easily administrable, puts everybody on  
16 notice, and -- and -- and avoids potential  
17 malpractice claims for everyone? I think that's  
18 the -- that's the pitch on the other side for a  
19 case that isn't yours.

20 MR. TUTT: So let me give you -- well,  
21 let me give you three reasons why that -- it's a  
22 little bit more difficult than that. And first  
23 is that this rule that you have to re-raise this  
24 issue in a JMOL, it goes against the grain of  
25 what the structure of the final judgment rule is

1 for every other kind of interlocutory order.

2 If you lock up a legal error in an  
3 interlocutory order on the way to trial in any  
4 other context -- and I don't think Mr. Younger  
5 disagrees -- it is preserved for review. You  
6 know, in exchange for only getting that one  
7 appeal, you know that any error in that  
8 interlocutory order is going to merge.

9 And so there will still be inadvertent  
10 forfeitures, Your Honor. Parties will still --  
11 because they are thinking about the structure of  
12 how this is done and how issue preservation is  
13 done, they're just not -- they're not in tune  
14 with this Court's holding even if this Court  
15 were to adopt a bright-line rule.

16 I mean, maybe it would be in the CLEs  
17 for a while. Maybe people would -- would know  
18 about it for a few -- you know, for a while.  
19 But it goes against the instincts of -- of  
20 lawyers about how -- how orders merge into final  
21 judgment.

22 And it's not as simple -- I mean, if  
23 you were to adopt Mr. Younger's rule, it is not  
24 as simple as adding one line apparently.  
25 Apparently, you have to come to the court. You

1 have to try to get the evidence in. The judge  
2 will say, what are you doing? Why are you  
3 trying to try this issue? I told you you  
4 already lose. You'll have to figure out exactly  
5 how you can do it in a way where everybody  
6 agrees, okay, I'm not going to say that you  
7 waived this issue on appeal if you don't  
8 actually try to try it.

9 JUSTICE GORSUCH: I think, I mean, I  
10 -- I'm just looking -- thinking back to my -- my  
11 practice days, and I'd always at least make a  
12 proffer, and I would always put that line in.  
13 Better safe than sorry.

14 And I doubt that many people think  
15 strategically about, oh, well, that's preserved,  
16 I don't need to raise it. I think your better  
17 argument isn't for those folks. It's for the  
18 accidental, you know, the -- the fellow who  
19 isn't thinking about these issues.

20 MR. TUTT: And even if it's easy --  
21 and I'll -- I'll grant you that, you know, if  
22 this Court were to say all you've got to do is  
23 add a line, it would be relatively easy, we --  
24 we'd be able to do it -- it still has some cost.

25 CHIEF JUSTICE ROBERTS: You can finish

1 your answer.

2 MR. TUTT: Thank you, Your Honor.

3 It still has some cost. And any cost  
4 for a rule that truly has no purpose is -- is --  
5 is too high a cost.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Thomas?

8 Justice Alito?

9 JUSTICE ALITO: What if this rule were  
10 spelled out in black and white in the civil rule  
11 -- the -- the Federal Rules of Civil Procedure?  
12 So it would be simple that going forward,  
13 attorneys would be charged with reading the rule  
14 and seeing that this is what they have to do,  
15 and it would be very simple.

16 MR. TUTT: Your Honor, if it was in  
17 the rules, I think we would have to follow it.  
18 That's -- that's just blackletter law. So I  
19 think we would have to do it.

20 JUSTICE ALITO: But, right now, it's  
21 not clear?

22 MR. TUTT: It's not clear. It's not  
23 in the rules.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Sotomayor?

1 JUSTICE SOTOMAYOR: No.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 Justice Jackson?

6 JUSTICE JACKSON: Yeah, I just -- I'm  
7 still struggling to understand the point of  
8 putting the line in there. Is it your position  
9 that nothing that happened at trial or would  
10 happen at trial would change the district  
11 court's view of the ruling that had already been  
12 made on this issue?

13 MR. TUTT: Yes, Your Honor. Yes.  
14 This was entirely divorced from anything at the  
15 trial.

16 JUSTICE JACKSON: And so the court of  
17 appeals could have taken this up? There's  
18 nothing about the trial or the fact that they --  
19 that there was no evidence related to this  
20 affirmative defense that prevented the court of  
21 appeals from ruling on this issue. They just  
22 invoked this principle that because you hadn't  
23 put the line in or you didn't raise it again at  
24 Rule 50, that they just weren't going to do it,  
25 is that --



1 MR. TUTT: Yes, Your Honor. Yes,  
2 that's exactly right.

3 JUSTICE JACKSON: And can you think of  
4 a reason why that -- you would need to do that?

5 MR. TUTT: No, Your Honor. We --  
6 we've been struggling, and, apparently, Mr.  
7 Younger has been as well, because no one can  
8 come up with a -- with a good reason for this  
9 rule, except that it's a technicality that crept  
10 in to the -- to practice and has been followed.  
11 But we cannot think of a reason that -- that you  
12 need to do this one sentence in the two motions  
13 book-ending the verdict.

14 JUSTICE JACKSON: All right.

15 MR. TUTT: We just don't --

16 JUSTICE JACKSON: Thank you.

17 MR. TUTT: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Ms. Saharia.

21 ORAL ARGUMENT OF AMY M. SAHARIA

22 ON BEHALF OF THE RESPONDENT

23 MS. SAHARIA: Mr. Chief Justice, and  
24 may it please the Court:

25 When a court denies summary judgment

1 even on a question of law, it delays final  
2 adjudication of a claim or defense until trial.  
3 The claim or defense remains live. The only way  
4 to finally adjudicate a claim or defense at  
5 summary judgment is to grant summary judgment to  
6 the moving or to the non-moving party.

7           When a court denies a defendant's  
8 motion for summary judgment on an affirmative  
9 defense, as here, the defendant must raise his  
10 defense at trial to preserve it. And to  
11 preserve an argument for entry of a judgment  
12 different from the jury's verdict, a defendant  
13 must move under Rules 50(a) and (b).

14           Petitioner's attempt to avoid this  
15 outcome by distinguishing between evidentiary  
16 sufficiency arguments and questions of law has  
17 no basis in the rules, and it has nothing else  
18 commending it either.

19           A clear line for issue preservation  
20 benefits litigants, district courts, and  
21 appellate courts. Petitioner's rule, by  
22 contrast, requires parties to predict in advance  
23 whether an appellate court will deem an issue  
24 legal or factual. His rule creates complexities  
25 when an opinion is unclear as to whether it

1 rests on legal or factual grounds or both.

2           And in cases where factual disputes  
3 foreclose judgment as a matter of law, like this  
4 case, it would give parties a new trial even if  
5 they did not follow any of the usual mechanisms  
6 for obtaining a new trial.

7           Petitioner's claim that Rule 50  
8 motions are pointless when a district court has  
9 decided a legal question at summary judgment  
10 ignores the realities of litigation. Parties  
11 refine their arguments at trial. Judges see  
12 legal issues in a new light after gaining a  
13 deeper appreciation of a case. And in the --  
14 and in the many cases where legal questions have  
15 a connection to the evidence, the evidence may  
16 change at trial. A denial of summary judgment  
17 always means that the court remains open to  
18 persuasion at trial.

19           I welcome the Court's questions.

20           JUSTICE THOMAS: Would your view be  
21 any different if the court had granted summary  
22 judgment on exhaustion in your favor?

23           MS. SAHARIA: Yes, I think that would  
24 have made all the difference in this case.

25           JUSTICE THOMAS: Why is that?

1 MS. SAHARIA: Because a grant of  
2 summary judgment is a final adjudication of a  
3 claim or defense, and it removes that claim or  
4 defense from the case for purposes of trial.

5 JUSTICE THOMAS: Well, why wouldn't  
6 the Petitioner simply argue that what you're  
7 saying now is the other side of the coin, that  
8 if it was denied Petitioner, then it was  
9 actually in effect granting summary judgment to  
10 you?

11 MS. SAHARIA: Because the rules have a  
12 clear mechanism for a district court to decide  
13 to do that, to decide to grant summary judgment  
14 in favor of the non-moving party. It's Rule  
15 56(f).

16 The district court did not do that  
17 here. And that is an important choice. If a  
18 district court had done that at that time, that  
19 would have meant the district court was then  
20 taking the risk that if it was reversed on  
21 appeal, there would need to be a new trial on  
22 the remaining factual disputes relevant to  
23 exhaustion.

24 But, because the court did not take  
25 that affirmative step of granting summary

1 judgment in our favor under Rule 56(f), it  
2 simply kicked the can down the road to trial on  
3 this claim or this defense.

4 And if at trial defendant had raised  
5 his defense as he should have, he could have  
6 come to the court and said: I acknowledge you  
7 denied the motion, the defense remains live, but  
8 I don't have any new arguments for you, I don't  
9 have any new evidence, Court, so we think the  
10 defense is foreclosed.

11 And the -- the court could have  
12 decided at that time whether to litigate the  
13 remaining disputes in one trial, to foreclose  
14 yet another trial if the legal ruling turned out  
15 to be wrong, or the district court at that time  
16 could have said, you're right, I don't want to  
17 litigate these remaining disputes now, I will  
18 either enter a judgment under Rule 56(f) in  
19 favor of the plaintiff, or I might choose to  
20 exclude your evidence.

21 JUSTICE KAGAN: So just to clarify,  
22 you are saying that he needs to do something  
23 more than have a sentence in his Rule 50 motion,  
24 that he has to come forward at trial with his  
25 evidence, with, like, I want to try this

1 affirmative defense and put it to the district  
2 court at that time?

3 MS. SAHARIA: I think, in the case of  
4 an affirmative defense, yes, the defendant needs  
5 to do that. Now, if he had moved under Rule 50,  
6 of course, our response would have been Rule 50  
7 is just not available to you here because there  
8 are remaining factual disputes relevant to  
9 exhaustion that have not been tried in this  
10 case.

11 When it -- when there's an affirmative  
12 defense and the burden is on the defendant, I do  
13 think the defendant needs to come forward in  
14 some way at trial and ask the district court to  
15 either try the defense or to acknowledge to the  
16 district court that he didn't have anything else  
17 to offer to the court.

18 JUSTICE KAGAN: I mean, isn't Mr. Tutt  
19 right that in a case like this, the court is  
20 going to look at the person and say: What are  
21 you talking about, I already ruled against you?

22 MS. SAHARIA: I -- I -- I don't think  
23 the district court necessarily would have come  
24 to that conclusion at all. We don't know  
25 because he didn't ask the court.

1 JUSTICE JACKSON: But wait, did you  
2 read his opinion? I mean, it was not at all  
3 equivocal on the issue. The district court  
4 said, I don't need to resolve those disputes  
5 because I'm ruling on the matter with respect to  
6 the legal issue in this way, period. So --

7 MS. SAHARIA: But, to -- to the extent  
8 the district court had concern that his legal  
9 ruling at summary judgment could be reversed on  
10 appeal, and acknowledging there were factual  
11 disputes remaining in the case, the court might  
12 have preferred to try those factual disputes at  
13 the first trial.

14 CHIEF JUSTICE ROBERTS: Counsel --

15 MS. SAHARIA: It might not have.

16 CHIEF JUSTICE ROBERTS: -- you know,  
17 you said the judge just might change his mind,  
18 and I'm sure there are recorded instances of  
19 that happening.

20 MS. SAHARIA: There are, Your Honor.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: But -- but,  
23 surely, it is in a distinct minority of cases.  
24 And your rule adds a lot of complexity to  
25 address that small minority, and I wonder if

1 that makes sense.

2 MS. SAHARIA: So district courts do  
3 change their mind, of course, not in every case,  
4 and I would concede probably in the minority of  
5 cases. But trial is the main event in any case  
6 that goes to trial, and there's no complexity in  
7 requiring parties when they have a pure abstract  
8 question of law, which this case does not, but  
9 if there is an abstract question of law that was  
10 decided at a summary judgment motion, but that  
11 motion was denied, parties should address that  
12 issue to the district court in the Rule 50  
13 motion to give the district court the chance to  
14 pass on that question with the full benefit of  
15 having sat through that trial and seen the  
16 evidence and -- and gained a deeper appreciation  
17 of the case.

18 JUSTICE KAGAN: I take it --

19 JUSTICE SOTOMAYOR: The problem --

20 JUSTICE KAGAN: -- this position puts  
21 a lot of pressure on the district court to allow  
22 you to put on whatever you want to put on,  
23 right?

24 I mean, we couldn't really give you  
25 the legal ruling that you want without district



1 courts feeling, okay, I guess the rules have  
2 changed, I have to allow people to put on  
3 evidence of a whole batch of things that I  
4 think, you know, can -- I have and I can dismiss  
5 and I have dismissed as a matter of law.

6 MS. SAHARIA: Not at all. The -- the  
7 choice is the district court's. The district  
8 court in this case very well could have said: I  
9 don't want to hear that evidence. We're not  
10 going to present it to the jury. I made up my  
11 mind at summary judgment.

12 And if the court had excluded his  
13 evidence on exhaustion or had entered judgment  
14 in our favor under Rule 56(f), that issue would  
15 have been preserved for appeal. But you have to  
16 put that choice to the district court. And any  
17 other approach would allow a defendant in this  
18 situation to -- to potentially sandbag or to  
19 hold back his defense from trial, knowing  
20 there's a possibility the district court might  
21 want to litigate those remaining factual  
22 disputes.

23 Defendants in this situation who have  
24 a procedural defense like exhaustion, a weak one  
25 like this defense, oftentimes don't want to try

1 that defense to a jury because it detracts from  
2 the credibility of their defense on the merits.

3 JUSTICE ALITO: Well, do you deny that  
4 there is such a thing as a purely legal issue?

5 MS. SAHARIA: No, I agree that there  
6 is such a thing.

7 JUSTICE ALITO: All right. If it's a  
8 purely legal issue and the district court makes  
9 a ruling at summary judgment that resolves the  
10 purely legal issue against the defendant and,  
11 therefore, does not grant -- doesn't grant  
12 summary judgment for either party on that, what  
13 is the point? And the -- the evidence that's  
14 going to come in at trial has nothing whatsoever  
15 to do with a purely legal issue.

16 What is the point of saying that  
17 the -- the party that was unsuccessful at  
18 summary judgment has to raise the issue again?

19 MS. SAHARIA: The point is that the --  
20 the parties' arguments might change that are --  
21 they may have better or -- better or different  
22 arguments to convince a district court at that  
23 time.

24 And the district court might just  
25 think about that legal issue differently after

1 sitting through the trial. When a -- when a  
2 court denies summary judgment --

3 JUSTICE ALITO: Well, it might just  
4 have a change of heart. What -- what -- if --  
5 if nothing that occurs at trial has a bearing on  
6 this purely legal issue --

7 MS. SAHARIA: I think, in --

8 JUSTICE ALITO: -- anything -- is  
9 there anything to prevent the district court  
10 from revisiting what the district court did  
11 earlier if it believed, well, I thought about  
12 this some more and I was wrong or I've done more  
13 research on it?

14 MS. SAHARIA: No, of course, a  
15 district court can reconsider it -- its  
16 position. But, again, I think it goes back to  
17 the structure and -- of -- of Rule 56, which is  
18 a denial of summary judgment is not a definitive  
19 ruling on a claim or a defense that's --

20 JUSTICE SOTOMAYOR: I -- I'm sorry.  
21 Let's go back to when a district court will  
22 change its mind. In my experience, it's when  
23 something new is brought to its attention,  
24 whether it's a decision by another court or it's  
25 a new factual situation or answer.

1                   Here, as Justice Jackson keeps  
2 pointing to the district court's decision, it  
3 wasn't relying on facts. It was saying, as a  
4 matter of Maryland law, given the Maryland  
5 regulations, when an IAU is started, the  
6 grievance procedure must end. A warden's  
7 directed to end it.

8                   Now what's interesting here is the  
9 warden didn't do that. And so I guess the  
10 argument is: What happens when the warden  
11 doesn't follow its own internal regulations?  
12 And the court said it doesn't matter. It means  
13 that the grievance proceeding is no longer  
14 available to the prisoner.

15                   Are you disputing that recitation by  
16 me?

17                   MS. SAHARIA: No. That was the basis  
18 of the district court's opinion.

19                   JUSTICE SOTOMAYOR: All right. So  
20 that is not dependent on facts. And what do you  
21 think would have caused the district court to  
22 change its mind --

23                   MS. SAHARIA: Sure. If --

24                   JUSTICE SOTOMAYOR: -- on that legal  
25 issue if it had been raised again at -- at -- at

1 -- before the conclusion of the trial or -- and  
2 after? Go ahead.

3 MS. SAHARIA: If Petitioner had come  
4 forward with evidence that prison officials tell  
5 inmates that notwithstanding the fact that the  
6 warden is required to dismiss their complaint  
7 and the -- and the --

8 JUSTICE SOTOMAYOR: But why -- why  
9 does that that matter? Because, on appeal, they  
10 can't raise that. They're stuck with the record  
11 they created. Their failure to raise a Rule 50  
12 motion will bar them from expanding the record  
13 with new factual information. They're stuck  
14 with the legal argument they made below.

15 MS. SAHARIA: But they would not have  
16 been at trial if they had --

17 JUSTICE SOTOMAYOR: Yeah, but --

18 MS. SAHARIA: -- presented their  
19 defense.

20 JUSTICE SOTOMAYOR: -- that -- that's  
21 really not the issue before us. The issue  
22 before us is whether -- and what they -- whether  
23 they can appeal. What harm does that do to you?

24 MS. SAHARIA: What harm that does to  
25 us is that if Petitioner had raised this defense

1 at trial, we would have asked the district court  
2 to put on our evidence with respect to the  
3 issues of thwarting and opacity, which are  
4 highly fact-bound.

5 JUSTICE SOTOMAYOR: But why? Why?  
6 The district court had already ruled and said  
7 those were irrelevant to the trial. Why would  
8 the district court even let you do that when it  
9 says, on the legal issue, I disagree with you?

10 MS. SAHARIA: To --

11 JUSTICE SOTOMAYOR: The initial --

12 MS. SAHARIA: -- to avoid a second  
13 trial, if a district court got that legal  
14 question wrong.

15 JUSTICE SOTOMAYOR: I -- I have grave  
16 doubts that a district court would have thought  
17 that a separate trial on exhaustion should stop  
18 it from ruling on the main game, which was  
19 whether or not this prisoner had been assaulted  
20 --

21 JUSTICE JACKSON: And why wouldn't  
22 that evidence --

23 JUSTICE SOTOMAYOR: -- on the order of  
24 prison officials.

25 JUSTICE JACKSON: -- why wouldn't the

1 evidence you're talking about or that  
2 presentation be happening in the context of the  
3 initial summary judgment motion? I don't  
4 understand why -- I mean, summary judgment  
5 requires the presentation of evidence as well.

6 So, to the extent they were making  
7 arguments about exhaustion at summary judgment,  
8 then whatever evidence they had related to that  
9 they would have put on, and you would have put  
10 on evidence in response to it.

11 But we wouldn't have a trial that was  
12 sort of hijacked by this ancillary or different  
13 issue related to the question of exhaustion.

14 MS. SAHARIA: Well, exhaustion is an  
15 affirmative defense. And if the court -- of  
16 course, if the court had not decided anything at  
17 summary judgment, there would have been a trial  
18 --

19 JUSTICE JACKSON: Let me ask it this  
20 way.

21 MS. SAHARIA: -- on a cross --

22 JUSTICE JACKSON: What if -- what if  
23 the very same evidentiary presentation that  
24 you're saying could have happened at trial  
25 actually took place beforehand in the context of

1 the summary judgment motion?

2 So the -- you all say exhaustion --  
3 or, I'm sorry, they say exhaustion. The court  
4 says, let me see your evidence, let me figure it  
5 out. The court hears all the evidence, and the  
6 court still makes this ruling. He says: I  
7 don't have to deal with the evidentiary  
8 presentations. I've decided I'm not going to  
9 rule on those. I'm going to make this legal  
10 ruling.

11 Would it still be your argument that  
12 they hadn't preserved it, that they would have  
13 had to try to put that same evidence in at  
14 trial?

15 MS. SAHARIA: Is -- is Your Honor  
16 asking if the judge were the one sitting as a  
17 fact-finder or whether the judge is just --

18 JUSTICE JACKSON: Well, at the summary  
19 judgment stage, the parties come forward with  
20 evidence. This is pretrial.

21 MS. SAHARIA: Correct. That happened  
22 in this case.

23 JUSTICE JACKSON: Okay. So I guess  
24 what I'm saying is you seem to suggest that the  
25 problem is that the judge did not have a chance



1 or that evidence related to this wasn't  
2 presented at trial, and so the reason why we --  
3 this isn't preserved is because that opportunity  
4 to have the jury weigh in on the evidence was  
5 not allowed in this situation.

6 Am I wrong about the problem that  
7 you're --

8 MS. SAHARIA: That is one problem.  
9 The fundamental problem here is that the  
10 district court denied summary judgment and did  
11 not finally adjudicate this defense, and it was  
12 incumbent on the defendant as a result to raise  
13 it at trial.

14 JUSTICE BARRETT: Counsel, I --

15 JUSTICE JACKSON: Go ahead.

16 MS. SAHARIA: Sorry.

17 JUSTICE BARRETT: I take it from your  
18 brief that you're skeptical that a 12(b)(6)  
19 motion is appealable after final judgment.

20 MS. SAHARIA: That's -- that --

21 JUSTICE BARRETT: Am I reading that  
22 correctly?

23 MS. SAHARIA: That's correct, Your  
24 Honor. And to the extent that Petitioner  
25 suggests that it's well-established that

1 12(b)(6) denials are reviewable on appeal,  
2 that's just not correct.

3 JUSTICE BARRETT: But that's a purely  
4 legal question because, in that context, you're  
5 assuming that all the facts are true, and it is  
6 just a question of law. But I take it that  
7 you're saying, well, but they could at the end  
8 of trial make a 12(b) -- 12(c) motion, and so  
9 they should go through that extra step, or it  
10 makes sense for them to go through an extra  
11 step. Why?

12 MS. SAHARIA: 12(b)(6) motions deal  
13 with the sufficiency of the pleadings. And by  
14 the time a case has gone to trial, the evidence  
15 overtakes those pleadings.

16 Petitioner cited not one case where  
17 any court of appeals has reviewed the denial of  
18 a 12(b)(6) motion. He points in his reply brief  
19 to this Court's decision in the Hughes Aircraft  
20 case. But, there, the question was one of  
21 subject matter jurisdiction. And, of course,  
22 subject matter jurisdiction's always reviewable  
23 --

24 JUSTICE GORSUCH: Counsel --

25 MS. SAHARIA: -- on appeal.

1 JUSTICE GORSUCH: -- counsel, we used  
2 to live in a world of trials. Now nobody wants  
3 to try -- everybody wants to do everything on  
4 the papers.

5 MS. SAHARIA: I go to trial, Your  
6 Honor.

7 JUSTICE GORSUCH: I miss it too. It's  
8 a lot of fun, isn't it?

9 MS. SAHARIA: It sure is.

10 JUSTICE GORSUCH: Yeah.

11 JUSTICE SOTOMAYOR: More fun than  
12 here.

13 (Laughter.)

14 JUSTICE GORSUCH: I -- I -- I expect  
15 you're having fun here today too, though.

16 MS. SAHARIA: There's only one judge  
17 at trial.

18 JUSTICE GORSUCH: Yeah.

19 (Laughter.)

20 JUSTICE GORSUCH: Touche. I -- I take  
21 your point fully that the district court denied  
22 summary judgment rather than granted summary  
23 judgment and could have granted summary judgment  
24 if the judge had wanted to do so. It chose not  
25 to under Rule 56(f). I get that.

1           I understand all of your points about  
2 this case has nothing being finally resolved.  
3 However, the QP we took assumed that there's a  
4 pure legal question, right? And that probably  
5 isn't this case, is your argument, which might  
6 counsel for a DIG, but the Court hates to do  
7 that, okay?

8           And what's wrong with saying, like the  
9 Seventh Circuit has, that most questions are  
10 going to be fact-bound or have a fact component  
11 to them and are not reviewable, but there are  
12 some discrete questions of law that are  
13 reviewable even if not presented in a Rule 50  
14 motion?

15           For example, as I think you conceded,  
16 if the court had granted a Rule 56(f) decision  
17 in -- in -- in your favor, that -- that would  
18 have been reviewable, you say.

19           MS. SAHARIA: Correct.

20           JUSTICE GORSUCH: So -- so can we  
21 answer the QP and say, yeah, there are some  
22 discrete legal questions that can be reviewed on  
23 appeal? Whether this case, as Justice Barrett  
24 said, falls into that category or does not, we  
25 do not suggest any view at all.

1 MS. SAHARIA: That would be a somewhat  
2 strange holding --

3 JUSTICE GORSUCH: It -- it would -- it  
4 would in this case.

5 MS. SAHARIA: -- to leave that  
6 critical question to the court on remand. If  
7 the Court does not wish to DIG the case because  
8 this case does not present a pure legal  
9 question, certainly, his defense as a whole does  
10 not present a pure legal question, then I think  
11 what the Court should do is say, again, there  
12 may be very abstract questions of law, like,  
13 let's say, whether a cause of action exists is a  
14 completely abstract question of law, that do not  
15 need to be preserved in a Rule 50 motion.

16 But where what Petitioner is asking  
17 for is for the Fourth Circuit on remand to not  
18 only decide the question of law but to decide  
19 the sufficiency of the evidence on the alternate  
20 issues of thwarting and opacity, he wants the  
21 court to look at the summary judgment record and  
22 determine whether the evidence was sufficient,  
23 which is exactly what this Court said in Ortiz  
24 not --

25 JUSTICE BARRETT: You want us to do

1 that, though, right? Like you're not opposed to  
2 the rule Justice Gorsuch is articulating, right?  
3 Like there might be some purely legal question,  
4 like whether a cause of action even exists, that  
5 might be appealable without a Rule 50 motion.

6 But you're saying, because this case  
7 isn't, it would be very strange for you to  
8 simply say: Yup, some might be appealable.  
9 Remand to the Fourth Circuit to figure out  
10 whether this one is. You would like us, if we  
11 wanted to take that position, to say for  
12 ourselves this was inextricably wound up with  
13 disputed facts and so this one wasn't  
14 appealable?

15 MS. SAHARIA: Yes. And that's what  
16 the Court did in *Ortiz v. Jordan*. The Court --  
17 this Court made that decision in *Ortiz v. Jordan*  
18 and didn't remand it back to the -- to the lower  
19 court.

20 JUSTICE KAVANAUGH: Rule 1 of the  
21 federal rules, as you know, says that they  
22 should be construed, administered, and employed  
23 to secure the just, speedy, and inexpensive  
24 determination of every action and proceeding.

25 So, if that's our kind of north star,

1 the other side makes a big point that this would  
2 not serve those purposes at all and would be  
3 counter -- contrary to those purposes.

4 Do you want to respond to that?

5 MS. SAHARIA: Sure. Clear rules for  
6 issue preservation serve those purposes. It's  
7 by -- it's why, by the way, we require parties  
8 to get up at the charge conference and object to  
9 every single jury instruction, even if the legal  
10 issues have been exhaustively litigated before  
11 the charge conference.

12 It's why we require a Rule 50(b)  
13 motion even after a Rule 50(a) motion. These  
14 rules are an essential part of the rules. They  
15 ensure clarity of the record for -- for the  
16 appellate court. And they -- they allow the  
17 parties one final opportunity to litigate these  
18 key legal issues, such as the jury instructions,  
19 such as Rule 50, with the benefit of the entire  
20 trial, the main event.

21 JUSTICE KAGAN: But going back to  
22 Justice Alito's point, I mean, that might be  
23 a -- an argument for why we should have a rule  
24 of this kind and put it in the rule book.

25 But there is no such rule. And given

1 that there is no such rule, this just looks --  
2 your position just looks as though it's a trap  
3 for the unwary.

4 MS. SAHARIA: Well, it's -- it's --  
5 his rule is more of a trap for the unwary  
6 because it will require parties in advance to  
7 figure out whether there -- what side of the  
8 line their issue falls on, which is why the  
9 circuits on his side of the split still tell  
10 parties in their published opinions to preserve,  
11 because it's the prudent thing to do.

12 I think the court is entitled to  
13 presume some baseline level of competence from  
14 lawyers who are practicing in the federal courts  
15 that they will read this Court's decisions on an  
16 issue as critical as how to preserve issues for  
17 appeal. And so the idea that some parties might  
18 not read this Court's cases, I don't think, is a  
19 sufficient ground for this Court to construe the  
20 rules one way or the other.

21 Now --

22 JUSTICE ALITO: Well, whether the --  
23 the Petitioner is entitled to succeed for -- on  
24 the ground that your client didn't exhaust is  
25 not a pure legal issue, but why isn't the



1 question that -- that was the basis the whole --  
2 why wasn't the district court's holding that the  
3 IIU investigation made the ARP process not  
4 available to Mr. Younger a pure legal question?

5 MS. SAHARIA: I think it's close to a  
6 pure legal question, but I -- I -- I -- I --

7 JUSTICE ALITO: Well, why is it -- why  
8 is it not over the line?

9 MS. SAHARIA: Because Petitioner's  
10 arguments for why he's correct on that issue  
11 depend on facts about the fact that there are --  
12 there are certain inmates that have received  
13 relief even while one of those investigations  
14 was pending.

15 So even his argument on that abstract  
16 legal question does not point the court to a  
17 regulation or a law. There is no regulation or  
18 a law that says in this circumstance that an  
19 inmate can receive relief.

20 His argument on that question depends  
21 very much on factual evidence, anecdotal  
22 evidence of inmates receiving relief in that  
23 circumstance.

24 JUSTICE JACKSON: And -- and -- and so  
25 the trial that you are positing would be trying

1 those facts? I guess I'm trying to understand  
2 -- so Justice Alito raises the question: Don't  
3 we have a legal issue here? You say no, it  
4 still turns on facts.

5 So can you help me to understand how  
6 it turns on facts and how they would be resolved  
7 by some additional trial or something?

8 MS. SAHARIA: Sure, I can give the  
9 Court a very concrete example. Petitioner  
10 points to the example of another inmate, Mr.  
11 Lee, who was assaulted at the same time who  
12 received relief from the IIU investigation. He  
13 put his file into evidence at the summary  
14 judgment record.

15 I don't see anything in that file --  
16 it's at JA 200 to 204 -- that suggests that Mr.  
17 Lee took the middle step, the futile appeal to  
18 the Commissioner of Corrections, that Petitioner  
19 claims our client needed to do.

20 So that is a --

21 JUSTICE JACKSON: Right. But we're  
22 not trying whether or not Lee did it or not. We  
23 can assume -- we can -- we can assume all of the  
24 facts that relate to how other inmates actually  
25 litigated their or processed their claims.

1                   Can't the court of appeals do that and  
2 then just answer the legal question, does the  
3 fact of the investigation mean that it's  
4 available or unavailable?

5                   MS. SAHARIA: The Court could decide  
6 that particular question, but there's still all  
7 of these remaining factual issues in the case  
8 relating to opacity, thwarting, and as I take  
9 his position, the Fourth Circuit would have to  
10 decide on the basis of the record at summary  
11 judgment whether there were disputes of fact to  
12 determine whether or not he would be entitled to  
13 the relief that he seeks.

14                   And that's the kind of analysis that  
15 this Court said in *Ortiz v. Jordan* appellate  
16 courts should not be doing with respect to  
17 summary judgment rulings. If he had posed that  
18 question to the district court in the first  
19 instance at trial, we would already know the  
20 answer to all of these questions.

21                   JUSTICE JACKSON: And you're saying  
22 the fact that he posed it to the district court  
23 at summary judgment was not enough, it had to  
24 come in in the trial?

25                   MS. SAHARIA: Well, the district court

1 said there were factual disputes at summary  
2 judgment. And if he had gone to the district  
3 court at trial and said: I think your ruling  
4 forecloses my defense, the district court might  
5 have said: You're right, we're done with that  
6 defense, in which case we -- he would have an  
7 appeal.

8 But the district court might have  
9 said: I want to try those factual disputes, so  
10 we can foreclose a second trial if I was wrong  
11 about that legal question.

12 JUSTICE ALITO: Well, if we were to --  
13 if we were to rule against you along the lines  
14 that Justice Gorsuch mentioned as a possible,  
15 it's not -- I mean, we may well not do that, but  
16 if we were to rule against you on that ground, I  
17 bet that on remand to the Fourth Circuit you  
18 would argue that the issue was waived because it  
19 wasn't raised in the Fourth Circuit brief and it  
20 was waived because they didn't make a -- an  
21 evidentiary proffer at trial.

22 Wouldn't you make those arguments?

23 MS. SAHARIA: We would make every  
24 available argument, yes, Your Honor.

25 JUSTICE ALITO: So, you know, we're

1 not -- I mean, that -- that wouldn't decide, but  
2 you say that all those things would have to be  
3 tried. Maybe they wouldn't have to be.

4 MS. SAHARIA: I think I'm struggling  
5 to -- to understand exactly what the question  
6 is, but I do think it would be a -- a somewhat  
7 strange holding for the Court to say there are  
8 some questions of law that do not need to be  
9 preserved, but we're not going to decide whether  
10 this case is -- is -- is one of them and we're  
11 going to let the Fourth Circuit figure that out  
12 in the first instance.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Thomas?

15 Justice Alito, anything further?

16 Justice Sotomayor?

17 Justice Kagan?

18 Justice Gorsuch?

19 Justice Kavanaugh?

20 Justice Barrett?

21 Justice Jackson?

22 Okay. Thank you, counsel.

23 MS. SAHARIA: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Tutt,  
25 rebuttal?

1 REBUTTAL ARGUMENT OF ANDREW T. TUTT

2 ON BEHALF OF THE PETITIONER

3 MR. TUTT: Thank you, Mr. Chief  
4 Justice.

5 A few simple points. Appellate courts  
6 should correct legal errors that are apparent on  
7 the face of the record. Cases should come out  
8 the right way, not the -- not the wrong way. We  
9 shouldn't waste everyone's time with pretend  
10 trials about issues the district court has  
11 already conclusively rejected at summary  
12 judgment.

13 I had -- I had a whole rebuttal  
14 prepared for opposing counsel to back off on the  
15 idea of you have to press it at trial since that  
16 would be an invitation to have all kinds of  
17 forfeitures of issues because there's just no  
18 one way to sort of press things in a way that  
19 would ensure preservation, so you would end up  
20 with the worst of all possible worlds.

21 You'd have counterfactual fake trials  
22 where district courts would all decide that you  
23 weren't allowed to put on your evidence in  
24 different ways because each of them is not going  
25 to want to waste the jurors' time.

1           You know, we've had cases where the  
2       judge has said, I've had to call jurors' jobs  
3       because, you know, their job is telling them  
4       that they can't be here and so let's speed up  
5       this trial.

6           And they're saying maybe we should  
7       have extra days, you know, where, at the end of  
8       the actual trial, you say, you know, I know  
9       that -- that the case is in, the -- I'm ready to  
10      instruct you, but, actually, there's this issue  
11      on which the defendant cannot win. I already  
12      ruled against them at sum -- at summary  
13      judgment, but we're going to need to have  
14      evidence come in on it. You know, this is just  
15      an appellate preservation rule, don't worry, you  
16      can put your -- your pens and pencils down. You  
17      don't have to do anything. You're just going to  
18      sit here for a couple of days as we have this --  
19      this trial on this issue that the defendant  
20      cannot win.

21           We just think that that would be  
22      preposterous. It would never happen. It is not  
23      how it is done. The only question, really, in  
24      this case is, should there be one sentence at  
25      the JMOL stage, or should there not be one

1 sentence at the JMOL stage?

2           And if that's the rule, then the  
3 posture of the appeal is exactly the same. The  
4 posture of the appeal, whether you took it from  
5 summary judgment or whether you take it from the  
6 one-sentence JMOL, any extra fact issues are  
7 still going to have to be tried if there is a  
8 remand. And I take it that Mr. Younger actually  
9 wants a remand. And if he -- and he believes  
10 that a remand would be fair to him, that he  
11 would like to have a chance to try out the  
12 exhaustion defense.

13           I don't see how any -- any right of  
14 Mr. Younger's is prejudiced by this rule. It  
15 just means we're going to have to go and  
16 actually try this issue that he already won  
17 because he won even bigger in the first case --  
18 at an earlier stage in the case.

19           I'd just like to say we think that  
20 this case, as Justice Barrett has pointed out,  
21 can be resolved in a very simple way. We do  
22 think the Court can actually say what a purely  
23 legal issue is.

24           So we think the Court say -- says  
25 there is such a thing as a purely legal claim



1 that can be denied at summary judgment and that  
2 can be appealed, and we think that that kind of  
3 claim would be a claim that can be resolved with  
4 reference to the undisputed facts and decide the  
5 case on that basis and that's it and say  
6 reversed at the end.

7 Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel. The case is submitted.

10 (Whereupon, at 11:02 a.m., the case  
11 was submitted.)

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## Official - Subject to Final Review

<p><b>Commissioner</b> <sup>[1]</sup> 57:18  <b>common</b> <sup>[1]</sup> 3:22  <b>competence</b> <sup>[1]</sup> 55:13  <b>complaint</b> <sup>[1]</sup> 44:6  <b>complete</b> <sup>[1]</sup> 12:21  <b>completely</b> <sup>[1]</sup> 52:14  <b>complexities</b> <sup>[2]</sup> 24:12 33:24  <b>complexity</b> <sup>[2]</sup> 38:24 39:6  <b>component</b> <sup>[1]</sup> 51:10  <b>concede</b> <sup>[1]</sup> 39:4  <b>conceded</b> <sup>[1]</sup> 51:15  <b>concern</b> <sup>[1]</sup> 38:8  <b>concerning</b> <sup>[2]</sup> 14:4 15:8  <b>concession</b> <sup>[1]</sup> 22:24  <b>conclusion</b> <sup>[2]</sup> 37:24 44:1  <b>conclusively</b> <sup>[1]</sup> 61:11  <b>concrete</b> <sup>[1]</sup> 57:9  <b>conference</b> <sup>[2]</sup> 54:8,11  <b>confidently</b> <sup>[1]</sup> 26:20  <b>confused</b> <sup>[1]</sup> 15:13  <b>connection</b> <sup>[1]</sup> 34:15  <b>construe</b> <sup>[1]</sup> 55:19  <b>construed</b> <sup>[1]</sup> 53:22  <b>contend</b> <sup>[1]</sup> 25:4  <b>context</b> <sup>[6]</sup> 15:15 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