No. 22-210

In the Supreme Court of the United States

NEIL DUPREE, PETITIONER

v.

KEVIN YOUNGER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unpublished but available at 2022 WL 738610. The order of the court of appeals denying rehearing (Pet. App. 111a) is unreported. The following opinions of the district court denying Lieutenant Dupree relief are unreported: request for remittitur (Pet. App. 10a-28a), motion for summary judgment (Pet. App. 29a-54a), motion to dismiss the amended complaint (Pet. App. 55a-82a), and motion to dismiss the initial complaint or in the alternative for summary judgment (Pet. App. 83a-110a).

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2022. Pet. App. 1a. The court of appeals denied a timely petition for rehearing en banc on April 8, 2022. Pet. App. 111a. The petition for a writ of certiorari was filed on September 6, 2022 and granted on January 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Federal Rules of Civil Procedure, Rule 46, Rule 50 and Rule 56, are reproduced at Joint Appendix ("JA") 347, JA348-50 and JA351-53. The relevant statutory provisions, 28 U.S.C. § 1291 and 42 U.S.C. § 1997e are reproduced at JA354 and JA359-62. The relevant constitutional provision, the Seventh Amendment, is reproduced at JA363.

STATEMENT OF THE CASE

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 purely legal argument simply to ensure that the issue remains preserved for review. Different rules have always applied when an appeal is based on a challenge to the sufficiency of the evidence. But when, as here, the issue is purely legal and divorced from the evidence at trial, raising the issue at summary judgment and having it resolved against you is enough to preserve it.

That rule follows from the final judgment rule. The final judgment rule provides that, except in a few narrow circumstances, all claims of legal error at any stage of the proceedings may be raised in a single appeal from a final judgment. The rule also has deep roots in the history of appellate review. At common law, any legal error apparent on the face of the record—including a court's error in denying a dispositive pretrial motion—was appealable after a jury trial without any further action needed to preserve it. That rule is also consistent with the history of the Federal Rules of Civil Procedure, which were engineered to abolish talismanic district

court rituals that had no purpose but to preserve issues for appeal. The rule is also far more sensible than the alternative, which would require parties to make two futile motions just to keep a claim of purely legal error alive for appeal.

None of Mr. Younger's contrary arguments are persuasive. Mr. Younger claims that reviewing purely legal issues would be "atextual," Br. in Opp. 10, but the irony is manifest: no rule or statute contains any text so much as suggesting that parties must file additional motions simply to preserve purely legal issues for appeal. Mr. Younger's policy arguments also miss the mark, including his claim that courts should never review purely legal issues because it can sometimes be difficult to determine whether an issue is "purely legal." Simply put, it makes no sense to say that the mere possibility of some hard cases is reason enough to hold that purely legal issues are never reviewable without unnecessary, ritualistic preservation motions when there are so many easy cases—like this one—where the issue is plainly purely legal.

Finally, nothing in the Seventh Amendment or the Federal Rules of Civil Procedure requires litigants to resurrect and re-argue purely legal issues already decided against them at summary judgment, especially where, as here, no aspect of the trial is relevant to the resolution of the purely legal question. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined." It thus does not bear on situations where, as here, there is no dispute about the evidence. Likewise, Rule 50 applies by its terms only to motions for judgment as a matter of law made during and after a trial, and its principle application is and has always been to motions contesting the sufficiency of evidence introduced at trial.

The court below erred in holding that Rule 50(a) and 50(b) motions are required to preserve for appellate review a purely legal issue that was resolved at summary judgment and was never at issue in the trial. The court of appeals' judgment should be reversed.

A. Legal Background

The Federal Rules of Civil Procedure provide a framework for resolving issues as a matter of law before, during, and after trial.

1. Rule 56. In the pretrial phase of a case, if it becomes clear that an opponent cannot prevail on a claim, a party may move for summary judgment under Rule 56. The text of Rule 56, unchanged in relevant part since its promulgation, provides:

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(a).

As a consequence of Rule 56's key language—permitting parties to move for "judgment as a matter of law" when there is "no genuine dispute" of material fact—there are two distinct ways that a party can move for summary judgment. *See Johnson v. Jones*, 515 U.S. 304, 316-17 (1995); *see also Ortiz v. Jordan*, 562 U.S. 180, 188-90 (2011).

First, a party can move for summary judgment on the grounds that an opponent cannot muster sufficient evidence to show that a dispute of material fact is "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986); *see Scott v. Harris*, 550 U.S. 372, 380 (2007). As the Court has said, a dispute about a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Thus, if, after a party has had every opportunity to gather evidence, that party nonetheless still lacks the evidence necessary to persuade a reasonable jury of a material fact, the court "shall grant" summary judgment against that party. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When a party moves for summary judgment on this basis, and the motion is denied, the denial of the motion "does not settle or even tentatively decide anything about the merits of the claim"; it determines only "that the case should go to trial." *Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966).

Alternatively, a party can move for summary judgment for a completely different reason—namely, that the undisputed material facts show that the party is entitled to judgment as a matter of law. *See Ortiz*, 562 U.S. at 188-90. A party moving for summary judgment on that basis does not contest the "genuine[ness]" of any factual dispute nor the sufficiency of the opponent's evidence. Fed. R. Civ. P. 56(a). Instead, the party assumes the truth of all the facts and every adverse inference that can be drawn therefrom but claims nonetheless that the undisputed facts show the party is entitled to judgment. When used that way, a motion for summary judgment is more like a common law demurrer. *See* pp. 21-22, *infra* (discussing demurrers).

2. Rule 50. If a case goes to a jury trial, parties may seek judgment as a matter of law under Rule 50.[1] In

[1] In a bench trial, the proper motion is a motion for judgment under Rule 52(c). *See* Fed. R. Civ. P. 52(c).

assessing whether to grant a requested judgment, Rule 50(a) calls on courts to weigh whether a reasonable jury would have a legally sufficient "evidentiary basis" to find for a party on an "issue" on which the party has been "fully heard" "during a jury trial." Fed. R. Civ. P. 50(a). In the Rule's words:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

Rule 50(b) then provides a mechanism by which "a motion for judgment as a matter of law made under Rule 50(a)" may be "renewed" after the jury has returned a verdict. Fed. R. Civ. P. 50(b). Rule 50(b) provides:

> If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.

Fed. R. Civ. P. 50(b).

B. Factual Background

1. Petitioner Neil Dupree is a former intelligence lieutenant in the Maryland Reception, Diagnostic & Classification Center ("MRDCC"), a prison operated by the Division of Correction within the Maryland Department of Public Safety and Correctional Services. Lieutenant Dupree was a "good" and "well-respected" officer who was promoted multiple times for his exemplary service. *See* Dist. Ct. Dkt. 291, at 28:2-28:10, 133:2-134:24, 138:19-139:17, 177:22-178:1. He had served as a corrections officer for more than a decade—all without incident—before the events of this case. Dist. Ct. Dkt. 331, at 144:8-18, 181:3-7.

2. On September 30, 2013, respondent Kevin Younger, an inmate at MRDCC, was the victim of an assault carried out by three corrections officers. Pet. App. 3a. Three years later, in 2016, Mr. Younger brought this 42 U.S.C. § 1983 action against those officers and also named Lieutenant Dupree and several other correctional staff and officials as defendants for their purported roles in the incident. Pet. App. 3a. In his responsive pleading, Lieutenant Dupree asserted the affirmative defense that Mr. Younger had failed to properly exhaust his available administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. C.A. App. 242.

3. After the close of discovery, Lieutenant Dupree moved for summary judgment on this defense, but the district court denied the motion. Pet. App. 4a. No party disputed that ordinarily, Mr. Younger would have been required to exhaust the mandatory administrative remedy procedure (ARP) process before filing suit. Pet. App. 36a-42a. But it was also undisputed that an Internal Investigative Unit (IIU) investigation into the incident was pending at the time Mr. Younger would have been required to exhaust the mandatory ARP process.

Pet. App. 36a-42a. Based on these undisputed facts, the district court held that, as a matter of law, the IIU investigation made the ARP process not "available" to Mr. Younger. Pet. App. 40a-42a. Accordingly, the court concluded, Mr. Younger "satisfied his administrative exhaustion requirements and the PLRA [did] not bar his claims."[2] Pet. App. 42a.

4. The case proceeded to a jury trial, during which Lieutenant Dupree did not raise his exhaustion defense because there was no additional evidence relevant to the court's earlier assessment and rejection of the defense.

5. Only a single piece of evidence at trial tied Lieutenant Dupree to the assault: testimony from one of the officers who actually carried out the assault, Mr. Green. Dist. Ct. Dkt. 290, at 142:13-19. On the witness stand, Mr. Green testified that Mr. Dupree had ordered the assault against Mr. Younger in retribution for Mr. Younger's previous assault against an officer. *Id.*; *see also id.* at 166:4-9. According to Mr. Green, Lieutenant Dupree had said he wanted "blood for blood." *Id.* at 142:18-21.

But Mr. Green's story had several serious problems, and at the close of plaintiff's evidence, Lieutenant Dupree moved for judgment as a matter of law under Rule 50(a) on the grounds that Mr. Green's testimony was too thin a reed for a reasonable jury to conclude that Lieutenant Dupree was involved in the assault on Mr.

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[2] As the district court explained: "In this case, there is no dispute that the IIU undertook an investigation concerning Younger's assault." Pet. App. 42a. Consequently, "[t]he Court need not resolve disputes concerning Younger's adherence to the ARP process because the IIU investigation satisfied his obligation to subject his claims to administrative exhaustion." *Id.* "Accordingly, Younger has satisfied his administrative exhaustion requirements and the PLRA does not bar his claims." *Id.*

Younger. Dist. Ct. Dkt. 330, at 119:2-121:21. Mr. Green was not a credible witness, given that he had not implicated Lieutenant Dupree in the assault until just four months before trial—not in Mr. Green's separate criminal prosecution, not in the separate IIU investigation, and not at any other point in the previous six years since the assault had occurred. *See* Dist. Ct. Dkt. 329, at 13:15-20:1, 50:11-51:1. Furthermore, no other witness corroborated Mr. Green's claim that Lieutenant Dupree was involved in the assault in any way. *See, e.g.*, *id.* at 59:7-62:14. Mr. Green's claim that he only carried out the assault because Lieutenant Dupree ordered him to do so was also inherently not credible given his history of assaulting inmates (including, in addition to his criminal conviction for assaulting Mr. Younger and several other inmates, a separate criminal conviction for assaulting an inmate as a guard at *another* prison). *Id.* at 22:15-27:11. Finally, Mr. Green had a reason to lie. He sent a text message to a co-defendant explaining that he thought he could obtain a favorable settlement with Mr. Younger by testifying to the existence of "an order on the record by a supervisor." *Id.* at 36:22-39:4. As Mr. Green admitted on cross-examination, his attorney had been "trying to work something out with somebody on the plaintiff's side that wanted an order given from a supervisor." *Id.* at 38:14-24.

Notwithstanding those facts, the court concluded that Mr. Green's credibility was for the jury to decide. Dist. Ct. Dkt. 330, at 119:2-121:21. If the jury credited Mr. Green's testimony, the court explained, Lieutenant Dupree would be liable. *Id.* Lieutenant Dupree did not raise his exhaustion defense in his Rule 50(a) motion.

6. On February 3, 2020, the jury found Lieutenant Dupree and others liable and awarded Mr. Younger

$700,000 in damages. Lieutenant Dupree did not raise his exhaustion defense in a post-trial Rule 50(b) motion.

7. Lieutenant Dupree appealed, seeking to challenge the district court's holding that the existence of an IIU investigation categorically exempts a prisoner from exhausting the ARP process. C.A. Br. 8-18.

8. The panel dismissed the appeal. Pet. App. 3a. It explained that it was bound by controlling precedent under which Lieutenant Dupree's failure to renew his exhaustion defense in a post-trial Rule 50(b) motion made the claim unreviewable. Pet. App. 5a. The panel explained further that the rule in the Fourth Circuit is that a party who fails to raise an argument in a post-trial motion forfeits "appellate review of not only factual issues, but also purely legal ones." *Id.* "The circumstances of this appeal," the panel continued, "fall precisely within the scope of that rule." *Id.*

The panel stated that it "appreciate[d]" Lieutenant Dupree's argument that, after the district court "fully and finally resolved" Lieutenant Dupree's exhaustion defense, "nothing could have occurred at the merits trial to change that disposition," and that the Fourth Circuit's "precedent is unfair in this context because it 'perpetuates the extinction of [his] potentially meritorious legal defense … simply because [Dupree]—after the merits trial and without any new facts in hand—did not ask the district court to revisit its earlier, purely legal, decision.'" Pet. App. 7a (first alteration in original). But the panel explained that its hands were tied by the law of the circuit. *See* Pet. App. 7a-8a.

SUMMARY OF ARGUMENT

I. Moving for summary judgment on a purely legal issue preserves it for appeal. That follows from the basic structure of appellate review enshrined in the final judgment rule as well as the history of appellate review

and the Federal Rules of Civil Procedure. The contrary rule would be bad policy that gains nothing and costs much.

A. The basic principles underlying the final judgment rule confirm that denials of purely legal arguments raised at summary judgment are reviewable on appeal. It is well established that in an appeal from a final judgment, "claims of district court error at any stage of the litigation may be ventilated." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quotation marks omitted). Purely legal denials of summary judgment fit comfortably within the rule. Unlike denials of summary judgment based on evidentiary sufficiency, which are mooted by the verdict, summary judgment motions raising purely legal claims based on undisputed facts are not mooted by the jury's verdict. They remain live even if a jury returns a verdict against the party that asserts them. There is thus no reason to carve them out of the otherwise "general rule" that all issues resolved in pretrial orders are appealable. *Id.*

B. The historical scope of federal appellate review and the history of the Federal Rules further establish that raising a purely legal issue at summary judgment preserves it. At common law, a trial court's denial of a demurrer—the direct antecedent of the motion for summary judgment—was reviewable on appeal following a jury trial even in the absence of a post-trial motion. The history of the Federal Rules further supports appellate review in these circumstances. The Federal Rules were designed to eliminate unnecessary procedural traps to facilitate the resolution of cases on their merits, and few procedural traps are as unnecessary as a requirement that parties must re-raise purely legal issues that have already been resolved against them.

C. This Court should disregard Mr. Younger's efforts to carve out a policy-driven exception from the settled scope of the final judgment rule, especially one so pointless, cumbersome, costly, and error prone. It would be nothing more than a senseless technicality to require litigants to twice re-raise the same purely legal issue already denied at summary judgment just to preserve it for appeal, and that ceremonial requirement would risk distracting or annoying district court judges and in some cases resulting in needless forfeitures. If the aim were to choose the rule that would trip up the most lawyers, Mr. Younger's would be it.

II. Nothing in the Seventh Amendment or Rule 50 requires a post-trial motion in these circumstances. The Seventh Amendment prohibits reexamination of *facts* tried to a jury and has no relevance where the issues involved are purely legal. For its part, Rule 50 applies only to issues raised during jury trials, and its principal purpose was to allow parties to move for judgment as a matter of law based on the sufficiency of the evidence presented at trial. Nothing in Rule 50's text, history, or application requires parties to ritualistically re-raise purely legal issues from earlier in the litigation.

ARGUMENT

I. PURELY LEGAL ISSUES RESOLVED AT SUMMARY JUDGMENT ARE PRESERVED FOR REVIEW

Purely legal issues resolved at summary judgment are reviewable on appeal following a final judgment. That conclusion follows from the final judgment rule, historical practice, and the history of the Federal Rules of Civil Procedure. That rule also makes far more sense than the alternative.

A. Legal errors in interlocutory orders, including summary judgment decisions, merge with the final judgment and may be appealed therefrom

The basic structure of appellate review establishes that purely legal issues raised at summary judgment are not extinguished by a subsequent trial on other issues. That conclusion follows from the final judgment rule.

1.a. Under the final judgment rule, appellate review is typically unavailable until the conclusion of a case. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009); *see also Behrens v. Pelletier*, 516 U.S. 299, 305 (1996); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-43 (1993). As a result, typically, "the whole case and every matter in controversy in it must be decided in a single appeal." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (alterations and quotation marks omitted).

The Court has long held that, in exchange for making parties wait until final judgment to appeal, *all* legal errors that precede that final judgment may be appealed therefrom. The "general rule" is that, in an appeal from a final judgment, "claims of district court error at any stage of the litigation may be ventilated." *Quackenbush*, 517 U.S. at 712 (quoting *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)). Claims of legal error by the district court may thus "be stored up and raised at the end of the case," *Kurowski v. Krajewski*, 848 F.2d 767, 772 (7th Cir. 1988); *Gloria Steamship Co. v. Smith*, 376 F.2d 46, 47 (5th Cir. 1967) (similar).

b. An appeal from a final judgment thus "opens the record and permits review of all rulings that led up to the judgment." 15A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3905.1 (3d ed. 2022 update). As a consequence, the "variety of orders open to review on

subsequent appeal from a final judgment is enormous." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 293 (2016) (Alito, J., concurring in part and dissenting in part) (quotation marks omitted); *accord* 15A Wright, Miller & Cooper, *supra*, § 3905.1.

The exceptions to the general rule that all interlocutory issues are reviewable are few and well-defined. For example, where an error in an interlocutory order is by its nature inherently harmless, it has been held that appellate review is unavailable. *See* 15A Wright, Miller & Cooper, *supra*, § 3905.1. A judge's decision to grant a motion to recuse, thus recusing herself from a case, for instance, is harmless and therefore unreviewable "because it should be presumed that any trial judge is able to try any case." *Id.* (citing, *inter alia*, *Hampton v. City of Chicago*, 643 F.2d 478, 479 (7th Cir. 1981)). Another example is where the issue resolved by an interlocutory order is mooted by later developments in the district court proceedings, such as a jury verdict. Denials of summary judgment on the basis of evidentiary sufficiency are the quintessential example of orders mooted by later developments (they are mooted by the jury's verdict). *See id.* Outside the few narrow exceptions, however, the general presumption holds that "[o]nce appeal is taken from a truly final judgment … earlier rulings generally can be reviewed." *Id.*; *see Ciralsky v. CIA*, 355 F.3d 661, 668 (D.C. Cir. 2004) (Garland, C.J., for the panel).

c. Denials of summary judgment where there is no dispute about the facts and the only issue is the correct application of law—*i.e.*, orders rejecting purely legal claims—fall squarely within the class of interlocutory orders appealable following a final judgment. They resolve and remove certain legal issues from the realm of issues to be addressed at the trial. They are classic examples of orders embodying "steps towards final

judgment in which they will merge" and which may "be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Thus, as the leading civil procedure treatise explains, permitting "a party who unsuccessfully sought summary judgment" to appeal a purely legal issue "simply appears to reflect the general rule that a party may raise any error in the trial on appeal." 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2715 & n.41 (4th ed. 2022 update) (collecting cases). Needless to say, the vast majority of Circuits have adopted and long followed that common-sense rule. *See Feld v. Feld*, 688 F.3d 779, 783 (D.C. Cir. 2012); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-20 (7th Cir. 2003); *Ericsson Inc. v. TCL Commc'n Techn. Holdings Ltd.*, 955 F.3d 1317, 1321 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2624 (2021); *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 201 n.2 (2d Cir. 2014); *Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding, LLC*, 784 F.3d 177, 187 (3d Cir. 2015); *In re AmTrust Fin. Corp.*, 694 F.3d 741, 750-51 (6th Cir. 2012); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902-03 (9th Cir. 2004); *Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997).

2. The arguments against applying the general rule to motions for summary judgment based on purely legal issues fail.

a. As an initial matter, there is no merit to the argument that the final judgment rule should not apply to purely legal summary judgment denials because it does not apply to denials based on sufficiency of the evidence. That argument overlooks the key difference between motions for summary judgment based on evidentiary disputes and those based on legal questions.

No one disputes that one of the few pretrial issues that does not merge with a final judgment following a jury trial is the denial of a motion for summary judgment based on the existence of a genuine dispute of material fact. *See Ortiz*, 562 U.S. at 190. But the rationale for that narrow exception is that, when a district court denies summary judgment based on disputed material facts, the court "does not settle or even tentatively decide anything about the merits of the claim"; it determines only "that the case should go to trial." *Switzerland Cheese Ass'n*, 385 U.S. at 25; *see Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 425 (4th Cir. 2005) (Motz, J., concurring in part and dissenting in part); *Chemetall GMBH*, 320 F.3d at 718-19. It follows that, once a case goes to trial and a jury reaches a verdict, any error premised on the claim that there was not enough evidence to send the case to trial is moot. *Chemetall GMBH*, 320 F.3d a 718-19.

In contrast, a trial does not moot a summary judgment decision on a purely legal issue. *Varghese*, 424 F.3d at 425-26 (Motz, J., concurring in part and dissenting in part). "[B]y definition a legal defense provides a basis to avoid liability for an otherwise meritorious claim." *Id.* So "[e]ven when a plaintiff has sufficient evidence to escape summary judgment and proceed to trial, a legal defense may entitle a defendant to the award of summary judgment" and "[a] subsequent trial verdict for the plaintiff does not change that fact." *Id.* at 426.

This case presents a concrete example of the exact distinction between the two types of summary judgment denials. Lieutenant Dupree argued at summary judgment, on the basis of the undisputed facts, that Mr. Younger's suit was barred by the PLRA's exhaustion provision. The district court disagreed, holding that one of the undisputed facts—the existence of an IIU investigation—meant that the PLRA did not preclude

Mr. Younger's suit. Once the district court reached that conclusion, there was nothing more for either party to say about exhaustion at the trial. There was no dispute about the facts. But unlike an issue rejected at summary judgment based on the sufficiency of the evidence, the trial did not moot this issue. If the district court erred in denying Lieutenant Dupree's motion for summary judgment, Mr. Younger's suit is barred because he failed to exhaust.

b. There is also no merit to the argument that an erroneous denial of summary judgment is different in its consequences or substance from the other kinds of appealable pretrial orders. Other appealable pretrial orders can (and often do) involve examination of the merits of the party's claims and sometimes even examination of their evidence. Errors in the resolution of these orders can also be case-dispositive, requiring a retrial or even the entry of judgment for the appellant. For example, after a jury trial, a party may appeal:

- a denial of a motion to dismiss for lack of personal jurisdiction, *see First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1129-30 (10th Cir. 1987);
- a denial of a motion to remand a case for lack of subject matter jurisdiction, *see Lewis v. Rego Co.*, 757 F.2d 66, 69 (3d Cir. 1985);
- a decision regarding which state's law to apply, *see Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569, 571-72 (7th Cir. 1995);
- a denial of a default judgment for discovery misconduct, *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 79 (3d Cir. 2019);
- a decision to disqualify or refuse to disqualify counsel, *see Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985);

- an order requiring a party to disclose confidential materials that the party claims are protected by attorney-client privilege, *Mohawk Indus. Inc.*, 558 U.S. at 109;
- an order certifying or decertifying a class action, *see Rosario v. Livaditis*, 963 F.2d 1013, 1015-16 (7th Cir. 1992);
- a ruling on whether to bifurcate a trial, *see Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 595, 601-04 (9th Cir. 2016);
- an order *granting* summary judgment to either party on any issue or set of issues, *see Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1346 (Fed. Cir. 2009).

Each of the above pretrial orders is appealable without a post-trial motion. Appellate review of the denial of a purely legal argument at summary judgment is neither more difficult nor more consequential than appellate review of these other pretrial orders after a trial.

c. There is similarly no merit to any argument that summary judgment rulings are inherently tentative, discretionary, or otherwise incapable of appellate review. Nowhere is that demonstrated more clearly than this Court's collateral order precedents, which permit interlocutory appeals in exactly the circumstances of this case: a denial of summary judgment where the denial is made on purely legal grounds.

This Court has long held that a defendant may immediately appeal the denial of a motion for summary judgment where that defendant claims absolute immunity, qualified immunity, or sovereign immunity, as long as the claimed error in denying immunity is a purely legal error. *See Will v. Hallock*, 546 U.S. 345, 350 (2006); *see also, e.g.*, *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982) (absolute immunity; summary judgment);

Puerto Rico Aqueduct, 506 U.S. at 144-45 (sovereign immunity; motion to dismiss); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity; summary judgment); *see also Behrens*, 516 U.S. at 313.

As this Court has made clear, an appellate court can intelligently review the issues resolved by these orders, even at summary judgment, because to do so the court "need not consider the correctness of the plaintiff's version of the facts." *Mitchell*, 472 U.S. at 528; *see also Johnson*, 515 U.S. at 313-17. "All it need determine is a question of law." *Johnson*, 515 U.S. at 312. "To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief," *Mitchell*, 472 U.S. at 528, but the relevant question remains a purely legal one: whether the undisputed facts entitle the moving party to judgment, *see Behrens*, 516 U.S. at 313.

So too here, where the same rationale applies for permitting appellate review of purely legal claims denied at summary judgment. In both contexts, the court reviews the purely legal issue "with reference only to undisputed facts and in isolation from the remaining issues of the case." *Johnson*, 515 U.S. at 313 (quotation marks omitted).

B. Both the history of appellate review and the history of the Federal Rules confirm that no post-trial motion is necessary to preserve purely legal issues for appeal

The history of appellate review in federal courts as well as the history of the Federal Rules cement the conclusion that moving for summary judgment on a purely legal issue preserves the issue for review. For the 150 years preceding the adoption of the Federal Rules, courts of appeals had the authority to review—and did review—lower courts' denials of demurrers even following jury verdicts. Demurrers are the direct

antecedents of summary judgment motions. And when a motion for summary judgment seeks judgment on the basis of a purely legal issue, it is virtually identical to a demurrer at common law and thus warrants the same treatment.

Moreover, it is especially appropriate to permit appellate review of denials of motions for summary judgment on purely legal issues in light of the history of the Federal Rules of Civil Procedure. The core purpose of the Rules was to eliminate technical barriers and ensure that cases would be decided on their merits.

1. History of Appellate Review. The history of appellate review in federal courts removes any doubt that purely legal issues resolved by a pretrial motion are reviewable. At common law, the denial of a demurrer was reviewable even after a jury trial, and that practice sets a floor for the scope of appellate review of denials of summary judgment today.

a. For most of American history, review of legal errors committed by a lower court in actions at law was obtainable only through a writ of error.

Writ of error review was a common-law method of review in which any legal error apparent on "the face of the proceedings" could be reviewed by the higher court. 3 William Blackstone, *Commentaries* 405 (1768); Edson R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126, 142 (1927). The "record" consisted of "the pleadings, the process, the verdict, and the judgment" in the proceedings below.[3] *Barton v. Auto. Ins. Co. of Hartford, Conn.*, 63 F.2d 631, 634 (1st Cir. 1933) (quotation marks omitted); Sunderland, *supra*, at 142;

[3] The table of contents of the record in an exemplary case, *Teal v. Walker*, 111 U.S. 242 (1884), is included as an appendix. *See* Pet. Br. App. at 2a-3a.

Note, *Appealability of Rulings on Motion for New Trial in the Federal Court*, 98 U. Pa. L. Rev. 575, 575 (1950).

As originally conceived, the record "provided too little information for higher courts to attend to anything but superficial formalities." Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 Colum. L. Rev. 793, 810 (2022). Accordingly, in 1285, Parliament enacted the Statute of Westminster, which introduced a broadened writ of error that expanded the scope of writ of error review to encompass errors not apparent on the face of the record, which parties could raise by filing "bills of exceptions." *Id.* at 810-11; *see Nalle v. Oyster*, 230 U.S. 165, 176-77 (1913); *see also* Statute of Westminster II 1285, 13 Edw. c. 35, § XXXI (Eng.). Bills of exceptions functioned as follows: "The plaintiff in error wrote down the legal rulings made by the trial judge and the exceptions the plaintiff in error made to those rulings, and the judge would seal these exceptions and attach the bill to the parchment record." Johnson, *supra*, at 811.

Several hundred years later, the Judiciary Act of 1789 established the initial parameters of appellate review in U.S. federal courts, and among other authorities it granted federal circuit courts the power to review the final decisions of the district courts in civil cases on a writ of error. Judiciary Act of 1789, § 22, 1 Stat. 84-85. Immediately following the enactment of the Judiciary Act, the courts of appeals adopted writ of error review as it was "known at common law" without "any material variation." *Pomeroy's Lessee v. State Bank of Indiana*, 68 U.S. (1 Wall.) 592, 599 (1864); *see Krauss Bros. Lumber Co. v. Mellon*, 276 U.S. 386, 389 (1928) (similar).

b. At common law, and in federal courts before the adoption of the Federal Rules, a litigant could seek the pretrial termination of an action through a procedural

device known as a demurrer. *See* Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* 157-62 (Samuel Tyler ed., Washington, D.C., William H. Morrison 3d Am. ed. 1882).

As Chief Justice Rehnquist explained in his dissent in *Parklane Hosiery Co. v. Shore*, "[t]o demur, a party would admit the truth of all the facts adduced against him and every adverse inference that could be drawn therefrom, and the court would determine which party should receive judgment on the basis of these admitted facts and inferences." 439 U.S. 322, 349 n.16 (1979) (Rehnquist, J., dissenting); *see also* Charles H. King, *Trial Practice—Demurrer Upon Evidence as a Device for Taking a Case from the Jury*, 44 Mich. L. Rev. 468, 468 (1945). The "modern device[s]" used by the Federal Rules of civil procedure—motions to dismiss and motions for summary judgment—"are direct descendants" of this "common-law antecedent[]." *Parklane Hosiery*, 439 U.S. at 349-50 (Rehnquist, J., dissenting); *see id.* at 349 n.16. They "accomplish nothing more than could have been done at common law, albeit by a more cumbersome procedure." *Id.* at 350.

c. A writ of error could be used to review a lower-court's error in ruling on a demurrer even after a jury verdict. *See* Alison Reppy, *The Demurrer — At Common Law, Under Modern Codes, Practice Acts, and Rules of Civil Procedure*, 3 N.Y.L. Sch. L. Rev. 1, 10 (1957). As this Court explained in *Nalle v. Oyster*, because any legal error in denying a demurrer is apparent on the face of the record, no further motions are required to preserve the error for appeal, even after a jury trial. *See* 230 U.S. 165, 176-78 (1913); *see also Baltimore & P. R. Co. v. Trustees of Sixth Presbyterian Church*, 91 U.S. 127, 130 (1875). The holding in *Nalle* was consistent with a long line of decisions tracing back to the earliest decisions of

the federal courts. *See Nalle*, 230 U.S. at 176-77 (collecting seven of the Court's cases).

An early example is *Slacum v. Pomery*, 10 U.S. (6 Cranch) 221 (1810). *Slacum* was an action on a debt. *Id.* at 221. The jury gave a verdict for the plaintiff and the defendant appealed on the grounds that the plaintiff had failed to plead a necessary element of the cause of action. *Id.* at 223. Counsel for the plaintiff urged this Court to reject that appeal, explaining that writ of error review was unavailable because "[t]here was no motion in arrest of judgment" and "[t]his objection was not taken in the court below." *Id.* at 223. During oral argument, Chief Justice Marshall rejected that assertion: "There can be no doubt that any thing appearing upon the record, which would have been fatal upon a motion in arrest of judgment is equally fatal upon a writ of error." *Id.* Later, in the opinion for the Court, he elaborated: "Had this error been moved in arrest of judgment, it is presumable the judgment would have been arrested; but it is not too late to allege, as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below." *Id.* at 225.

Another example is *Teal v. Walker*, 111 U.S. 242 (1884). There, the defendant filed a demurrer claiming the complaint failed to "state facts sufficient to constitute a cause of action." *Id.* at 245. The lower court overruled the demurrer and the case proceeded to trial, which resulted in a verdict against the defendant. *Id.* at 245-46. On appeal, the plaintiff (the "defendant in error") argued that, by answering the complaint and taking the case to trial, the defendant had waived the right to appeal the denial of the demurrer. *See* Brief for Defendant in Error at 5-6, *Teal*, 111 U.S. 242 (No. 280); *Teal*, 111 U.S. at 246. Rejecting that argument, this Court explained that the error in overruling the demurrer *was* preserved for review:

> The writ of error is not taken to reverse the judgment of the court upon the demurrer to the complaint, for that was not a final judgment, but to reverse the judgment rendered upon the verdict of the jury. The error, if it be an error, of overruling the demurrer could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict. The question, therefore, whether the complaint in this case states facts sufficient to constitute a cause of action, is open for consideration.

Teal, 111 U.S. at 246.

Several other pre-Federal Rules cases of this Court stand for the same proposition: appellate courts could review a lower-court's error in ruling on a demurrer even after a jury verdict. *See, e.g.*, *Baltimore & P. R. Co.*, 91 U.S. at 130; *Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1873); *Suydam v. Williamson*, 61 U.S. (20 How.) 427, 432-33 (1858); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669, 676 (1851); *Woodward v. Brown*, 38 U.S. (13 Pet.) 1, 5 (1839); *Macker's Heirs v. Thomas*, 20 U.S. (7 Wheat.) 530, 531-32 (1822).

d. The scope of modern federal appellate review is at least as broad as the scope of appellate review by writs of error at common law.

Following a final judgment, courts of appeals today "have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C.

§ 1291. The scope of what is reviewable on "appeal," in turn, is informed by the Act of January 31, 1928, ch. 14, § 1, 45 Stat. 54 (formerly codified as 28 U.S.C. § 861a). In that Act, Congress abolished writs of error and replaced them with appeals. Despite the change in terminology, the Act effected no change in the scope of appellate review. Rather, Congress provided that "[a]ll relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal." Act of January 31, 1928, ch. 14, §1; *see Federal Courts—Statute Abolishing Writs of Error*, 41 Harv. L. Rev. 673, 673-74 (1928); Philip M. Payne, *The Abolition of Writs of Error in the Federal Courts*, 15 Va. L. Rev. 305, 306-09 (1928-1929); *see also* Johnson, *supra*, at 848-49.

Twenty years later, Congress repealed Section 1 of the 1928 Act as part of its general revision and recodification of Title 28. *See* Act of June 25, 1948, ch. 646, § 39, 62 Stat 992. But as this Court recently reiterated in *Oklahoma v. Castro-Huerta*, those general revisions and recodifications did not change substantive law except where Congress's intent to do so was clearly expressed. 142 S. Ct. 2486, 2498 (2022); *see Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 (1972) (so holding specifically for the 1948 revisions to the Judicial Code). Congress expressed no intent in the 1948 revision to the Judicial Code to depart from the previously codified scope of appellate review.

Accordingly, a party may, at minimum, obtain the same review on appeal today that was available to a party on writ of error review at common law.

e. The close analogy between demurrers at common law and motions for summary judgment under the Federal Rules of Civil Procedure shows that appeals from denials of motions for summary judgment are appealable in the same way that denials of demurrers were appealable at common law.

Summary judgments were admittedly not a part of trial court practice at common law. Summary judgments were first pioneered in England in 1855 and incorporated into the law of several states by the turn of the 20th century. *See* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 Yale L.J. 423, 423-24 (1929); *see* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 566-67 (2012); *see also* John A. Bauman, *The Evolution of Summary Judgment Procedure*, 31 Ind. L.J. 329, 342-44 (1956). Over time, they grew increasingly popular and were eventually introduced into federal practice through the Federal Rules of Civil Procedure.[4] *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 3-5 (2010); Langbein, *supra*, at 566-67, 569-70.

Summary judgment motions, along with motions to dismiss, were intended to essentially replace demurrers. *See* Miller, *supra*, 60 Duke L.J. at 22. That is especially true when summary judgment motions raise purely legal issues, in which case they function exactly like common-law demurrers. A party can use the summary judgment device to "admit the truth of all the facts adduced against him and every adverse inference that could be drawn therefrom" and request a judgment "on the basis of these admitted facts and inferences." *Parklane Hosiery*, 439 U.S. at 349 n.16 (Rehnquist, J., dissenting); *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

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[4] The purpose of motions for summary judgment, together with notice pleading and broadened discovery, was to permit a greater proportion of meritorious cases to make it to trial and a greater proportion of non-meritorious cases to be eliminated pretrial. Miller, *supra*, 60 Duke L.J. at 3-5; Charles E. Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567, 578 (1952).

It follows that the scope of appellate review of a denial of summary judgment should match (if not exceed) the scope of review of its "common-law antecedent[]." *Parklane Hosiery*, 439 U.S. at 350 (Rehnquist, J., dissenting). And since filing a demurrer to the evidence was sufficient to place a legal error in the record and ensure it would be reviewable on appeal, even without a post-trial motion, *Baltimore & P. R. Co.*, 91 U.S. at 129-30; *see Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 391 (1913) (same), there is no reason to treat purely legal motions for summary judgment any differently.

2. History of the Federal Rules of Civil Procedure. Finally, permitting review of purely legal issues resolved at summary judgment advances the core historical purposes of the Federal Rules by eliminating an unnecessary barrier to appellate review of the merits of a case.

"The Federal Rules of Civil Procedure are the product of the progress of centuries from the medieval court-room contest … to modern litigation." *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 62 (1952) (Frankfurter, J., dissenting). Their "aim was to speed litigation without prejudicing the legitimate interests of litigants; to see to it that full and fair consideration is given to the issues litigants raise but that litigation does not become a socially wasteful game." *Id.* at 56. To that end, the Rules are applied not as "talismanic formulas," but "as rational instruments for doing justice between man and man in cases coming before the federal courts." *Id.* at 55-56.

The Court has said many times and in many ways that the Rules embody a strong policy of favoring decisions on the merits. *See, e.g.*, *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986). It is therefore "entirely contrary to the spirit of the Federal Rules of Civil Procedure for

decisions on the merits to be avoided on the basis of … mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). The Rules exist "to further, not defeat the ends of justice." *Surrowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

That was the drafters' intent. Before the appointment of the Advisory Committee that drafted the new Rules of Civil Procedure, Chief Justice Hughes stated, "[i]t is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances." *Laverett v. Cont'l Briar Pipe Co.*, 25 F. Supp. 80, 81 (E.D.N.Y. 1938) (citing Address of Chief Justice Hughes, 21 A.B.A.J. 340, 341 (1935)). The drafters agreed and adopted the guiding purpose of having "justice be administered according to justice and common sense, and not according to the necessity of complying with empty forms and ancient rituals." *Proceedings of the Institute at Washington, D.C.*, *in* Federal Rules of Civil Procedure: Proceedings of the Institute at Washington, D.C. and of the Symposium at New York City 130 (Edward H. Hammond, ed. 1938) (Statement of Edgar B. Tolman); *see* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 288 (2013) (similar).

Indeed, the Rules specifically sought to disarm and remove procedural traps that complicated issue preservation for appeal. Nowhere is that purpose clearer than in the drafters' decision to abolish the formal bill of exceptions through Rule 46. *See* 21 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 5036.12 (2d ed. 2022 update) (explaining the formal exceptions practice that Rule 46 addressed and

eliminated). As Edgar B. Tolman, secretary to the committee that drafted the Rules, stated about the reason for adopting Rule 46: "If there is any one thing that has provoked criticism and ridicule of courts and lawyers it is the refusal to consider questions of vital importance, on … appeal, merely because of the failure to note an exception. The purpose of Rule 46 is to get away from the necessity of going through a mere ritual in order to make it possible to be heard." *Proceedings of the Institute at Washington, D.C.*, *in* Federal Rules of Civil Procedure: Proceedings of the Institute at Washington, D.C. and of the Symposium at New York City 123-24 (Edward H. Hammond, ed. 1938) (Statement of Edgar B. Tolman); *see also Proceedings of the Institute on Federal Rules, in* Rules of Civil Procedure for the District Courts of the United States with Notes and Proceedings of the Institute on Federal Rules 311-12 (William W. Dawson, ed. 1938) (Statement of Edgar B. Tolman) ("[I]f there is any one thing about which people have made fun of lawyers and courts, it is this thing of a man arguing the admissibility of evidence before a court until he had exhausted all his eloquence and learning, and then finding on appeal that all the things he has made known to the trial court and that appear in the transcript of the record, can't be looked at by the reviewing court merely because he didn't then and there note an exception.").

At bottom, requiring a party to make a redundant post-trial motion to preserve an issue for review—"indulg[ing] the ancient weakness of the law for stylized repetition," *Johnson*, 344 U.S. at 62 (Frankfurter, J., dissenting)—is a hollow formality contrary to the Rules' basic purposes. At best, it forces "the judge [to] answer the same question twice before his answer is … recognized." *Id.* at 48. At worst, it serves as a trap for the unwary litigant who inadvertently fails to incant the

required "abracadabra" at the right time to ensure that his appellate rights are preserved. *Id.* at 57. Forcing a litigant to abide an adverse, unmeritorious judgment merely because he failed to jump through the hoop of a procedural technicality is deeply antithetical to the basic purposes at the core of the Rules.

C. Requiring parties to re-raise purely legal issues would be unnecessary, cumbersome, costly, and error prone

In his brief in opposition, Mr. Younger argues for a policy-based exception to the final judgment rule, one found in neither the language of Rule 50 nor any other relevant text. This Court need not consider policy grounds in analyzing this straightforward legal question, but to the extent it does, common sense strongly favors Lieutenant Dupree's rule. Forcing parties to file seriatim Rule 50 motions solely to preserve purely legal issues is unnecessary, cumbersome, costly, and prone to error.

1. First, requiring such motions serves no real purpose. If a judge has ruled on a purely legal issue at summary judgment, nothing is gained from filing a pair of additional Rule 50 motions on the exact same subject. Such duplicative filings do not help the aggrieved party, who has essentially zero chance of prevailing on them and who is merely trying to disarm a trap set to spring on appeal. Such duplicative filings also do not benefit the aggrieved party's opponent, who is already on notice of the legal issue at hand and who has already had a full and fair opportunity to litigate it (and won it). And such duplicative filings certainly do not help the beleaguered district court judge, who is unlikely to reverse her earlier decision when nothing relevant to that decision has occurred since the last time she resolved the issue.

Legal questions, after all, are the province of the judiciary, and "the jury never gets a crack at deciding [them]." *Gramercy Mills*, 63 F.3d at 571; *see Burton v.*

E.I. du Pont de Nemours & Co., 994 F.3d 791, 816 (7th Cir. 2021) ("As a practical matter, it would be rather bizarre if the parties had to go to trial just to figure out what legal theory the plaintiff could pursue."). For purposes of reconsidering a purely legal question, then, "the trial is an irrelevance," *HK Sys., Inc. v. Eaton Corp.*, 553 F.3d 1086, 1089 (7th Cir. 2009); "[n]o changed facts or credibility determinations at trial could alter the court's analysis on a pure question of law," *New York Marine and General Ins. Co. v. Continental Cement*, 761 F.3d 838 (8th Cir. 2014) (quotation marks omitted), which "merely serve[d] as a predicate for the jury's work," *Gramercy Mills*, 63 F.3d at 571.

Indeed, if judges changed their minds about purely legal issues in the wake of trial, it would contravene law-of-the-case principles, which require decisions of law to "continue to govern the same issues in subsequent stages in the same case" unless the "court is convinced that its prior decision is clearly erroneous and works a manifest injustice." *Pepper v. United States*, 562 U.S. 476, 506-07 (2011) (citations and quotation marks omitted). Forcing aggrieved parties to file Rule 50 motions thus serves no conceivable purpose beyond checking an unnecessary box on the way to appellate review.

Consider a case involving a contested statute of limitations. Congress sometimes creates causes of action without expressly supplying a limitations period; in those situations, courts must generally "borrow" the most closely analogous state-law limitations period. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414 (2005). Or Congress may prescribe a statute of limitations but fail to indicate whether that limitations period is subject to certain equitable doctrines, like laches or equitable tolling. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572

U.S. 663, 680-82 (2014). These sorts of statutory ambiguities can often make or break a party's case, and resolving them is a routine task of statutory interpretation that requires judges to ask and answer purely legal questions: Did Congress supply a limitations period? If not, what is the most closely analogous state-law limitations period? And what sorts of equitable doctrines are available under the statute?

Each of those questions is entirely divorced from disputes about the record, yet each may end up being the focal point at the summary judgment stage. If the district court denies a party's motion for summary judgment on any one of those questions, a trial may follow as well as an accompanying expansion of the record. But nothing in that trial—and nothing in that expanded record—will have any bearing on the purely legal questions resolved at the summary judgment stage. No amount of evidence can change what a statute says about a limitations period; no witness testimony, however eloquent, can retroactively revise which equitable defenses are available as a matter of law.

2. Similar examples abound, and they collectively underscore the extent of the burden that would be imposed by pointless preservative Rule 50 motions. Besides issues related to statutes of limitations, *see Paschal v. Flagstar Bank*, 295 F.3d 565, 571-72 (6th Cir. 2002), courts at the summary judgment stage often resolve purely legal questions related to:

- res judicata, *Pavon v. Swift Transp. Co.,* 192 F.3d 902, 906 (9th Cir. 1999); *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995);
- collateral estoppel, *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994);
- choice of law, *New York Marine*, 761 F.3d at 838-39;

- preemption, *In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067, 1072-73 (9th Cir. 2020); *Varghese*, 424 F.3d at 425 (Motz, J., concurring in part and dissenting in part);
- governmental immunity, *Kidis v. Reid*, 976 F.3d 708, 719-20 (6th Cir. 2020);
- the admissibility of evidence outside the administrative record, *Banuelos*, 382 F.3d at 903;
- the continuing vitality of a past precedent, *Burton*, 994 F.3d at 815-16;
- the interpretation of a contract's plain terms, *Porter v. AAR Aircraft Servs., Inc.*, 790 F. App'x 708, 712 (6th Cir. 2019); *F.B.T. Prods., LLC v. Aftermath Recs.*, 621 F.3d 958, 963 (9th Cir. 2010); *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1221 n.3 (10th Cir. 2000); *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1189-90 (8th Cir. 1999); and, of course,
- the elements and scope of innumerable statutes and common-law doctrines, including:
    - federal securities law, *Nolfi v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012);
    - federal labor law, *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014);
    - state contract law, *Cribari v. Allstate Fire & Cas. Ins. Co.*, 861 F. App'x 693, 701 (10th Cir. 2021);
    - state-law equitable estoppel, *Kay v. United of Omaha Life Ins. Co.*, 562 F. App'x 380, 385 (6th Cir. 2014); and
    - a property owner's rights under local law, *Feld*, 688 F.3d at 783.

Mr. Younger's rule would be especially burdensome in intellectual property cases, where complex legal issues often precede trial in a case. For example, "the ultimate question of patent validity is one of law." *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966). Indeed, the question whether a claim is directed to a patent ineligible abstract idea, natural phenomena, or law of nature is a question that frequently arises in patent cases, *see, e.g.*, *Ericsson*, 955 F.3d at 1321. Similarly, "the construction of a patent, including terms of art within its claim, is exclusively within the province of the court." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). It makes no sense, and invites error, to require parties that have exhaustively litigated the meaning of the critical terms in a patent in a pretrial *Markman* hearing—and tried the entire infringement case on the basis of the court's determination of the meaning of those terms—to formulaically move for judgment as a matter of law during and after the jury trial on the grounds that the judge misconstrued the patent's claims in the *Markman* hearing.

3. Furthermore, forcing parties to make these motions solely for purposes of appellate review comes with real costs, both to the parties and to the court. Parties often fear—sometimes rightly—that cluttering up the limited space available in Rule 50 motions with already-resolved legal issues may distract a judge from any new issues on which the party hopes to prevail. *Cf. Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result) ("He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."). And judges often have little patience for requests to overrule their previous rulings, especially when those rulings have been the center around which the remainder of the case has been litigated. No litigant wants to stand before a

judge and say, "I apologize your honor, but I'm now going to read you a list of arguments. I know you already ruled against us on these arguments, but I have to say this to preserve these arguments for appeal." Yet requiring Rule 50 motions for purely legal issues already litigated and resolved often results in counsel standing up in the middle of a trial and saying exactly that.

Concerns like these are not hypothetical. District courts often make "abundantly clear" that they do "not intend to revisit [a legal] issue once [they have] denied summary judgment." *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 517-18 (Fed. Cir. 2012). Courts on the majority side of the split hold that aggrieved parties may take these hints; that they are "not required to ignore the writing on the wall and press the issue over and over again to preserve it for appeal." *Id.* at 518; *see TVT Recs. v. Island Def Jam Music Grp.*, 412 F.3d 82, 88 n.4 (2d Cir. 2005) ("Defendants' obligation was to give clear notice, not to make pests of themselves."). "It would be unfair to … penalize a litigant for failing to jump up and down or labor an objection that is already a part of the record." *Frank C. Pollara Grp.*, 784 F.3d at 187 (cleaned up). Mr. Younger's rule, by contrast, thrusts aggrieved parties onto the horns of a cruel dilemma: aggravate the judge by raising a purely legal issue for the umpteenth time even though nothing has changed, or keep the present peace but at the risk of forfeiting the issue on a future appeal.

4. Finally, requiring ritual Rule 50 motions solely to preserve claims invites error. In the heat of a trial, where some judges require Rule 50 motions to be made orally directly after the close of evidence, it is an unfortunate reality that sometimes attorneys—and sometimes even the best attorneys—inadvertently fail to make the requisite preservative Rule 50 motions. One can find cases in circuits that follow Mr. Younger's rule in which

repeat litigants and sophisticated parties have failed to make the required motions. *See, e.g.*, *Varghese*, 424 F.3d at 420-21 (Honeywell); *Ji v. Bose Corp.*, 626 F.3d 116, 127 (1st Cir. 2010) (Bose). A ceremonial motion whose sole purpose is to preserve an issue for appeal should not exist at all, let alone carry such enormous stakes.

5. Mr. Younger nevertheless urges this Court to disregard the final judgment rule, the relevant history, and common sense and hold that *no* denials of summary judgment involving purely legal issues should be appealable because determining whether *some* denials are purely legal can be "vexing." Br. in. Opp. 11. But courts are already required to make exactly these kinds of distinctions in immunity cases, *see* pp. 18-19, *supra*, and the distinction between questions of law and fact runs like a skein through areas of American law ranging from standards of review to the basic division of responsibilities between judge and jury. More importantly, the hypothetical existence of some picayune proportion of hard cases is no reason to deny review even in the *easy* cases that overwhelmingly command the field. *See, e.g.*, *Feld*, 688 F.3d at 783; *Chemetall GMBH*, 320 F.3d at 719-20. This case is a perfect example. Even Mr. Younger does not contend that this case involves a disguised factual issue. The district court's denial of Lieutenant Dupree's PLRA exhaustion defense was indisputably based on purely legal grounds.

6. It also misses the mark to argue, as Mr. Younger does, that parties who wish to preserve purely legal arguments rejected at summary judgment should just go ahead and make two additional motions, once at trial and once after trial, because all it would require is adding "one sentence" to each motion "incorporating by reference an argument made at summary judgment." Br. in. Opp. 11. As an initial matter, it is not clear that it is that easy. *See, e.g.*, *DeSilva v. DiLeonardi*, 181 F.3d

865, 866-67 (7th Cir. 1999) (declining to "play archaeologist with the record" and evaluate an argument incorporated by reference). In any event, the ease of surmounting a pointless procedural obstacle is not a good reason to require it. And if "adding one sentence" is really all it would take to preserve an issue for appeal, it is impossible to conceive what other justification there could be for requiring a party to do it. At that point, requiring the motion is truly just a "pointless gotcha rule" that does nothing but deprive litigants of the opportunity to take potentially meritorious appeals. Transcript of Oral Argument at 46, *Ortiz v. Jordan*, 562 U.S. 180 (2011) (No. 09-737) (Alito, J.). Courts "might as well say that the lawyer has to stand on his head when the motion is made or jump up and down three times" to preserve an issue for appeal. *Id.*

II. NOTHING IN THE SEVENTH AMENDMENT OR THE FEDERAL RULES REQUIRES RULE 50 MOTIONS TO PRESERVE LEGAL ISSUES RESOLVED PRE-TRIAL

Courts on the minority side of the split have occasionally invoked either the Seventh Amendment or Rule 50 in support of Mr. Younger's preferred rule. But nothing in either of those provisions requires a party to make and remake futile trial and post-trial motions merely to preserve an issue already conclusively resolved at summary judgment.

A. The Seventh Amendment safeguards only the jury's role as factfinder

First, the Seventh Amendment poses no obstacle to an appellate court's review of a purely legal issue resolved at summary judgment. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by*

> *a jury*, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend VII (emphasis added). By its terms, the Seventh Amendment thus makes clear that issues of *fact* are solely for the jury to decide. But where, as here, the alleged error is one of pure law, the Seventh Amendment has no role to play. For that reason, the Seventh Amendment has never been understood to bar appellate review of dispositive legal issues decided before trial. *See* pp. 22-24, *supra*.

B. Parties need not file motions under Federal Rule of Civil Procedure 50 to preserve issues of pure law

Second, Rule 50 also does not require parties to re-raise purely legal issues raised at summary judgment. The text, history, and application of Rule 50 make that clear.

1. Rule 50 does not by its terms require parties to make any motion in order to preserve purely legal issues for appellate review. Rule 50 is silent on the question of preservation, and both Rule 50(a) and Rule 50(b) make clear that parties "may"—not must—make (or renew) motions for judgment as a matter of law if they like. *See* Fed. R. Civ. P. 50(a)(2) ("A motion for judgment as a matter of law *may* be made at any time before the case is submitted to the jury.") (emphasis added); Fed. R. Civ. P. 50(b) ("If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), … the movant *may* file a renewed motion for judgment as a matter of law ….") (emphasis added).

Instead, Rule 50 was and remains a vehicle for allowing a party to test whether "a reasonable jury would … have a legally sufficient *evidentiary basis* to find for the [non-moving] party." Fed. R. Civ. P. 50(a)(1)

(emphasis added). Rule 50, in other words, is designed to let courts evaluate the sufficiency of evidence entered into the trial record, not to decide questions of pure law that do not depend on that record. *See Galloway v. United States*, 319 U.S. 372, 389 (1943) (holding that "the power to direct a verdict for insufficiency of evidence" "has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure" (citing Rule 50)). And since a trial will moot any *pre*trial ruling on the sufficiency of the evidence, *see* pp. 15-16, *supra*, litigants must file Rule 50 motions if they hope to raise a sufficiency-of-the-evidence challenge on appeal. *See Ortiz*, 562 U.S. at 189 ("Absent such a motion, we have repeatedly held, an appellate court is 'powerless' to review the sufficiency of the evidence after trial." (citation omitted)).

Of course, Rule 50 motions can also be used as a roundabout way of litigating purely legal issues, in the sense that no amount of evidence will be "legally sufficient" to prove a claim or defense that is entirely barred by law. But by its terms, that is not the intended use of Rule 50, and courts generally frown upon litigants misusing the rule for that purpose. *See, e.g.*, *Lexington Ins. Co. v. Horace Mann Ins. Co.*, 861 F.3d 661, 669 (7th Cir. 2017) (explaining that "as a general matter, pure questions of law ought not to be included in a Rule 50(a) motion in the first place, as doing so 'defeat[s the] purpose [of that motion], which is to challenge *the sufficiency of the evidence*'" (alterations in original) (citation omitted)); *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1121 (11th Cir. 2016) (explaining that in a Rule 50 motion, "only the sufficiency of the evidence matters" (quotation marks omitted)); *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 161 (4th Cir. 2012) (explaining that Rule 50 "is not concerned with pure questions of law that are detached from the evidence, not within the domain of

the jury, and only ever properly ruled upon by the judge"); *Ruyle*, 44 F.3d at 841 (explaining that Rule 50 motions "challenge the sufficiency of the evidence rather than the correctness of questions of law"). For present purposes, however, what matters is that litigants do not *need* to use Rule 50 to preserve a question of pure law that has already been resolved at summary judgment. That previous ruling, after all, will not have been mooted by the trial itself, and it remains available for appellate review under the final judgment rule regardless of whether Rule 50 is invoked.

2. History confirms that Rule 50 was designed to cope with issues arising from challenges to the sufficiency of the evidence, not to decide (much less preserve) issues of pure law. In particular, the purpose of Rule 50 was to make judicial review of sufficiency-of-the-evidence challenges in jury trials more efficient while complying with the requirements of the Seventh Amendment. *See Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434, 436-37 (7th Cir. 1957); *see also* Arthur R. Miller, *The Pretrial Rush to Judgment*, 78 N.Y.U. L. Rev. 982, 1090-1091 (2003).

Specifically, Rule 50 was designed to address two conflicting concerns in federal law: (1) respect for the sanctity of jury factfinding and (2) judicial economy. On the one hand, the Seventh Amendment bars federal courts from setting aside jury verdicts on the basis of their own "reexamin[ation]" of the facts. U.S. Const. amend VII; *see* Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 Harv. L. Rev. 801, 814-15 (1964). On the other hand, if a court grants a motion for directed verdict on the basis of evidentiary sufficiency *before* a case goes to the jury, and that decision is reversed on appeal, the entire case must be retried because there is no jury verdict. *See* Kaplan, *supra*, at 814.

Rule 50 addresses this tension between the sanctity of verdicts and judicial economy by (a) first requiring parties to raise their sufficiency of the evidence challenges in a motion for direct verdict *before* the case goes to the jury; and then (b) permitting them to "renew" their motion after the verdict. *See* Kaplan, *supra*, at 814-15; *Weisgram v. Marley Co.*, 528 U.S. 440, 454-55 (2000). That way, if a "renew[ed]" motion for a directed verdict is granted in error, the appellate court can simply reinstate the verdict. *See* 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2540 (3d ed. 2022 update). Thus "[t]he case is so shaped at the trial level as to increase the chance of a final disposition on appeal, should the case go so far." Kaplan, *supra*, at 815; *see Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 150 (1940) ("[Rule 50] was adopted for the purpose of speeding litigation and preventing unnecessary retrials"); *see also, e.g.*, *Fratta v. Grace Line, Inc.*, 139 F.2d 743, 744 (2d Cir. 1943) (advising district courts generally to deny Rule 50(a) motions and "allow the jury to bring in a verdict" to "avoid[] the waste and expense of another trial").

Rule 50's text and history thus make clear that it was never meant to become a modern-day substitute for a bill of exceptions in which all of the claims of legal and factual error in a case are listed out in a pair of motions bookending either side of a verdict. Rather, Rule 50 was written to provide courts a framework to set aside jury verdicts in those specific circumstances where a court determines that the evidence admitted at trial was insufficient to support a verdict. Neither the rule's text nor its history supports its use as a means of preserving purely legal issues, much less those previously resolved at one specific stage of litigation.

3. Caselaw from this Court further confirms the point. The Court has analyzed the reviewability of

unrenewed Rule 50(a) motions challenging evidentiary sufficiency in a quartet of cases. *See Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 213-14, 218 (1947); *Globe Liquor Co. v. San Roman,* 332 U.S. 571, 572 (1948); *Johnson,* 344 U.S. at 49; *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01 (2006). Each case involved the heartland of Rule 50 motions—challenges to the sufficiency of the evidence—and the holding of each case reflects that context. *Cone* held that where a party fails to make a Rule 50(b) motion, an appellate court cannot direct a verdict in the party's favor, primarily because of potential unfairness to the opposing party. 330 U.S. at 215-18. *Globe Liquor Co.* extended *Cone* to hold that a Rule 50(b) motion is also required even in cases where the opposing party has been granted a directed verdict. 332 U.S. at 572-74. *Johnson* likewise extended *Cone* to hold that a Rule 50(b) motion is still required even where the district court expressly reserved ruling on the 50(a) motion and denied the motion only *after* the verdict. 344 U.S. at 51-54. And most recently, *Unitherm* held that a court of appeals cannot award relief on a challenge to the sufficiency of the evidence if the challenger failed to file a Rule 50(b) motion. 546 U.S. at 401-05.

In each case, the Court's decision was anchored by Seventh Amendment-tinted concerns about displacing the role of the jury as factfinder and of overlooking "the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Id.* at 401 (quotation marks omitted); *see also id.* at 402 n.4 (observing that permitting review of an unpreserved sufficiency challenge "may present Seventh Amendment concerns."). Each case involved situations where the specific issue upon which post-trial reversal was sought was rooted in a claim about the insufficiency of the

evidence. *Unitherm*, 546 U.S. at 398 (claim was that "there was insufficient evidence to sustain the jury's … verdict"); *Johnson*, 344 U.S. at 49 (claim was that the verdict was contrary to "to the weight of the evidence"); *Globe Liquor*, 332 U.S. at 572 (claim was that "there were many contested issues of fact which should have been submitted to the jury"); *Cone*, 330 U.S. at 214 (claim was that "petitioner's evidence … was insufficient to go to the jury").[5]

Notably, none of these cases dealt with the separate question whether *purely legal* issues must be re-raised to be preserved, and none addressed the reviewability of issues resolved at summary judgment. The reason why is obvious: Rule 50 is not remotely directed at that question, and it should play no role in deciding whether a purely legal issue resolved at summary judgment can be heard on appeal.

[5] *See also Johnson v. New York, N.H. & H.R. Co.*, 194 F.2d 194, 195 (2d Cir. 1952) (showing issue in the case was sufficiency of the evidence); *Globe Liquor Co., Inc. v. San Roman et al.*, 160 F.2d 800, 802 (7th Cir. 1947) (same); *West Virginia Pulp & Paper Co. v. Cone*, 153 F.2d 576, 580-81 (4th Cir. 1946) (same).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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