

No. 09-737

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**In the  
Supreme Court of the United States**

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MICHELLE ORTIZ,  
*Petitioner,*

v.

PAULA JORDAN AND REBECCA BRIGHT,  
*Respondents.*

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*On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit*

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**PETITIONER'S BRIEF ON THE MERITS**

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**QUESTION PRESENTED**

May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?

## **PARTIES TO THE PROCEEDING**

The caption names all of the parties to the proceedings in the court of appeals below.

Petitioner Michelle Ortiz was the plaintiff in the district court. Respondents Paula Jordan and Rebecca Bright were defendants. In the court of appeals below, Jordan and Bright were the appellants, and Ortiz was the appellee.

Officer Douglas Schultz, Warden Shirley Rogers, and Ohio Governor George Voinovich were also named as defendants in the district court, but were not parties in the court of appeals below.

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## **OPINIONS BELOW**

The decision of the court of appeals, Pet. App. 1a–18a, is reported at 316 F. App'x 449. The decision of the U.S. District Court for the Southern District of Ohio, Pet. App. 21a–44a, is reported at 211 F. Supp. 2d 917.

## **JURISDICTION**

The court of appeals issued its judgment on March 12, 2009. Pet. App. 1a. This Court granted certiorari on April 26, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **STATUTORY PROVISIONS AND RULES INVOLVED**

The statutes involved are 28 U.S.C. §§ 1291 and 1292. JA 26, 27. The rules involved are Federal Rules of Civil Procedure 50 and 56. JA 32, 35.

## **STATEMENT OF THE CASE**

Michelle Ortiz obtained a jury verdict after being sexually assaulted by a state corrections officer. Though the defendants did not move for judgment as a matter of law after the verdict, the court of appeals overturned the judgment based on their pretrial summary-judgment motion. The circuits are divided whether, and under what conditions, a party may appeal the denial of summary judgment after a full trial.

While serving a one-year sentence at the Ohio Reformatory for Women, Ortiz was sexually assaulted

by a corrections officer on two consecutive days. On the night of the first assault, he issued the following threat: “I’ll get you tomorrow, watch.” Pet. App. 3a. Ortiz reported the assault, but the next day the officer approached her when she was alone and asleep. Before startling her awake, the officer managed to get his hands inside her underwear and digitally penetrate her vagina. R. 110 (Tr. at 38). While this incident was investigated, Ortiz was shackled and ordered into solitary confinement, where she was later found ill and vomiting. R. 110 (Tr. at 53).

Ortiz brought a 42 U.S.C. § 1983 suit (invoking the district court’s federal-question jurisdiction under 28 U.S.C. § 1331), raising two claims relevant here. First, Ortiz alleged that Respondent Jordan, a case manager at the reformatory, failed to take adequate steps to protect Ortiz from the officer, in violation of the Eighth Amendment. (Respondent Bright later testified that if Jordan had immediately reported the first incident, “the proper people would have taken a role in protecting Ms. Ortiz.” Pet. App. 5a.) Second, Ortiz alleged that Bright, an investigator for the reformatory, violated Ortiz’s due-process rights by ordering her into solitary confinement (which inmates called “the hole”) in retaliation for Ortiz reporting the assaults. (Ortiz stated that Bright ordered her into solitary confinement “because [Ortiz] had lied” about the assault. Pet. App. 6a.)

Jordan and Bright filed a pretrial motion for summary judgment on the basis of qualified immunity. R. 52. On March 29, 2002, the district court denied the motion, concluding that a reasonable jury could find that Jordan and Bright had violated clearly established law. Pet. App. 21a. Jordan and Bright

chose not to bring an immediate appeal to challenge that ruling. Instead, they proceeded to litigate in district court, engaging in years of pretrial proceedings and unsuccessful settlement efforts. Trial ultimately occurred in September 2005, more than three years after the summary-judgment ruling. At the close of Ortiz's case in chief and at the close of all the evidence, Jordan and Bright orally moved for judgment as a matter of law under Rule 50(a). JA 3, 19–20. The district court denied the motion, and the case was submitted to the jury, which found Jordan and Bright liable. It awarded Ortiz \$250,000 in compensatory damages and \$100,000 in punitive damages against Jordan, and it awarded \$25,000 in compensatory damages and \$250,000 in punitive damages against Bright. R. 102. The district court then entered judgment in Ortiz's favor based on the verdicts. Pet. App. 19a. Jordan and Bright filed a post-trial motion for reduction of damages, which was denied. R. 108, 111. Neither Jordan nor Bright renewed their motion for judgment as a matter of law under Rule 50(b), nor did they move for a new trial under Rule 59.

Jordan and Bright then appealed the judgment and the 2002 pretrial order denying summary judgment. JA 22. The Sixth Circuit, in a 2-1 decision, proceeded as though it had jurisdiction under 28 U.S.C. § 1291, which provides appellate jurisdiction over final decisions of district courts. The majority reversed the district court's order denying summary judgment on qualified-immunity grounds, effectively vacating Ortiz's verdict. The majority concluded that Jordan and Bright had not committed any constitutional violations. Pet. App. 11a–13a. The majority also acknowledged that Ortiz's retaliation claim would have been permissible under this Court's precedent,

but only if it were litigated as a “First Amendment” retaliation claim. Pet. App. 12a. Judge Daughtrey dissented, calling the majority’s decision to “extinguish the award by overturning the jury verdict” a “legal travesty.” Pet. App. 14a. Ortiz filed a timely petition for rehearing, which was denied over Judge Daughtrey’s dissent. Pet. App. 45a.

Ortiz filed a petition for certiorari, noting that the circuits are divided on the conditions under which, if ever, a party may appeal the denial of summary judgment after a full trial. This Court granted certiorari.

### **SUMMARY OF THE ARGUMENT**

Since the founding of this Nation, our legal system has protected the right of a jury trial and, with appropriate caution and under appropriate circumstances, enabled judges to take cases away from juries when only one outcome was permitted as a matter of law. We have also entrusted trial judges with the discretion to assess legal questions on a full record developed through trial and verdict. A judge’s consideration of such questions of law is crucial to any sort of review on appeal, which is generally limited to “final” decisions of the district court under 28 U.S.C. § 1291. These principles are evident in the Court’s decision in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), which held that the failure to renew a motion for judgment as a matter of law after the verdict—even though the motion was made at the close of all the evidence—leaves a court of appeals “powerless” to review the issue. The question here is whether the courts of appeals, after a trial and verdict, have the power to review such legal arguments

when those arguments were raised in the context of a pretrial summary-judgment motion.

The courts of appeals lack this power. All circuits recognize the general rule that the denial of summary judgment is not “final” under § 1291 and therefore not appealable after trial, because the trial supersedes the summary-judgment proceedings. Some circuits, however, have crafted an exception where the decision involves a “question of law.” This is a strange exception on its face, as every summary-judgment decision is a question of law. More fundamentally, the exception is not tied to any statutory authority providing the appellate court with jurisdiction to review; a non-final decision cannot become “final” simply because it involves legal questions—even “purely legal” questions. Courts nonetheless justify this exception on the grounds that the verdict winner had notice of the argument, the appeals courts are well-equipped to handle questions of law, and the trial judge passed on the question before the trial. These are precisely the same arguments rejected in *Unitherm* when the verdict loser argued that it had preserved questions of law by making them in a Rule 50(a) motion before the verdict. If making arguments on questions of law at the close of evidence is not sufficient to preserve them for appeal, making such arguments *before* trial at summary judgment surely is not.

There also is no statutory authority to review the denial of summary judgment on appeal after trial where the moving party had the opportunity to appeal immediately but failed to do so. The limited opportunity for immediate appeal arises where the summary-judgment decision qualifies as a “collateral

order,” which is deemed “final” under § 1291. As an initial matter, such decisions (like all “final” decisions) must be appealed within the jurisdictional time limits—30 days under Federal Appellate Rule 4(a). Once the clock has run, the opportunity to appeal *that* decision is extinguished, and the trial proceedings that ensue supersede the summary-judgment proceedings. But none of this means that the legal arguments are forever lost when the trial occurs; the moving party may simply raise them through a Rule 50 motion. If the party fails to renew that motion after the verdict, however, the court of appeals is jurisdictionally barred from reviewing the legal arguments not preserved. In sum, this Court should hold that the denial of summary judgment is simply not appealable after a full trial—without exception.

Accordingly, the Sixth Circuit’s decision requires reversal. Jordan and Bright were denied summary judgment and did not bring an immediate appeal. Trial superseded the summary-judgment proceedings, making the denial of summary judgment not “final” and therefore not appealable. Following the jury’s verdict against them, Jordan and Bright did not renew their arguments for judgment as a matter of law. The Sixth Circuit therefore lacked jurisdiction to consider them.

## **ARGUMENT**

Ortiz’s argument proceeds in three parts. The first section is an overview of the guiding principles of federal practice relevant here, particularly the interplay of Rule 50 and Rule 56, and the limited nature of appellate jurisdiction. The second section applies these principles to resolve the circuit splits, showing that the denial of summary judgment is simply not appealable after a trial on the merits. No exception exists for questions of law, and no exception exists where the moving party failed to raise an immediate appeal (if one was permitted) before trial. The third section applies the rule to this case, demonstrating that the Sixth Circuit here, acting after a full trial and verdict, lacked jurisdiction to review Jordan and Bright’s arguments that they were entitled to summary judgment. In the end, this Court should reverse.

### **I. Relevant Principles of Federal Practice Through Trial and Appeal.**

The longstanding principles related to the ability of a judge to remove a case from a jury continue in modern trial practice at summary judgment (Rule 56), in motions for judgment as a matter of law (Rule 50), and on appeal.

#### **A. Traditional Principles.**

##### **1. The jury serves as a check on the judiciary.**

Various colonial congresses demanded protection of the right to jury trial, and the Declaration of

Independence listed denial of “the benefits of Trial by Jury” among the grievances warranting the creation of a new nation. Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. Cin. L. Rev. 873, 876 (2002) (quoting The Declaration of Independence, ¶ 20 (1776)). “The civil jury’s exclusion from the Constitution ignited a firestorm of protest that led at least seven states to insist on an amendment to the Constitution to protect the right of jury trial in civil litigation.” *Id.* This resulted in adoption of the Seventh Amendment, which provides that “the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII.

In particular, the jury served as “the democratic counterbalance to an unelected judiciary and an expression of America’s faith in its citizens.” Landsman, *supra*, at 877. “The framers of the Constitution were convinced that the best way to preserve democracy was for there to be a series of checks and balances between branches of government and within the institutions that comprised each branch.” *Id.* at 880. Indeed, “[i]f we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury. . . . The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.” Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1190 (1991).

**2. The trial judge is better able to assess legal questions on a full record developed through trial.**

These principles demanded that judges be cautious in taking the case away from the jury based on questions of law, and judges often deferred such decisions for a fuller development of the case. See *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659 (1935) (“At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved . . .”).

**3. Appellate courts do not interfere with the trial court or jury; they review the trial court’s final decisions.**

There were motions for new trial at common law, but “appellate courts did not figure in this process.” Landsman, *supra*, at 888. There was still a “prevailing ethos of respect for jury verdicts and an insistence that the judge who sat with the jury be the only one allowed to propose changes in its decision.” *Id.* at 889. These sentiments live on. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (“Appeal gives the upper court a power of review, not one of intervention.”); 9 J. Moore et al., *Moore’s Federal Practice*, § 50.91[1] (3d ed. 2010) (“[F]ederal appellate courts do not directly review jury verdicts.”).

**B. Modern Trial Practice.**

Under the federal rules, a trial judge may remove a case from a jury as a matter of law through two

procedures relevant here: motions for summary judgment under Rule 56 and motions for judgment as a matter of law under Rule 50.

### **1. Summary judgment under Rule 56.**

Under Rule 56, summary judgment should be rendered if the relevant pleadings and documents “show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). If the movant does not meet this standard, the district court must deny the summary-judgment motion and let the case proceed to trial. Though the grant of summary judgment takes the case away from the jury even before trial, it is generally understood to comply with the traditional (and constitutionally protected) view that juries remain arbiters of facts while judges decide law.

On the other hand, the denial of summary judgment “is strictly a pretrial order that decides only one thing—that the case should go to trial . . .” *Switz. Cheese Ass’n, Inc. v. E. Horne’s Mkt., Inc.*, 385 U.S. 23, 25 (1966). Accordingly, this Court has recognized and leading commentators on the subject have observed that district courts have discretion to deny summary judgment, even if the movant appears entitled to judgment as a matter of law, to allow fuller development of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.”) (citing *Kennedy v. Silas*

*Mason Co.*, 334 U.S. 249 (1948)); accord, e.g., 10A C. Wright & A. Miller, *Federal Practice and Procedure*, § 2728 (3d ed. 2010) (noting that a district court might exercise its discretion to deny summary judgment to “permit development of fuller record” where the court must pass on difficult or complicated “legal issues”).<sup>1</sup>

## **2. Judgment as a matter of law under Rule 50.**

Where summary judgment is denied, a party may still contend that it is entitled to judgment as a matter of law after the evidence is presented at trial. Rule 50(a) allows the party to argue for judgment as a matter of law before the case is submitted to the jury, and authorizes the district court to grant such motions at its discretion if “a party has been fully heard on an issue . . . and the court finds that a reasonable jury

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<sup>1</sup> There has been some disagreement on this point, as this Court’s *Anderson* and *Celotex* decisions in the famous “1986 trilogy” appeared to offer contradictory language. Compare *Anderson*, 477 U.S. at 255 (quoted above) with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that “the plain language of Rule 56(c) mandates the entry of summary judgment” where the standard is met). Yet “[a]ny remaining doubt . . . was eliminated by the 2007 ‘stylistic’ amendments to the Civil Rules, which abandoned the former mandatory [‘shall’] language of Rule 56 in favor of terminology that a court ‘should’ grant summary judgment . . . .” 11 Moore, *supra*, § 56.32[7]. “[I]t is now firmly established that we live in a world of discretionary summary judgment.” Bradley S. Shannon, *Should Summary Judgment Be Granted?*, 58 Am. U. L. Rev. 85, 100 (2008). This Court, however, recently approved an amendment to change the Rule 56 language back to its previous form (“shall”). That change will take effect on December 1, 2010, unless Congress enacts legislation to the contrary. As noted later, such a change would not alter the outcome of this case.

would not have a legally sufficient evidentiary basis to find for the party on that issue . . . .” Fed. R. Civ. P. 50(a).

Rule 50(b), by contrast, sets forth the procedural requirements for renewing this challenge after the verdict and entry of judgment:

(b) Renewing Motion for Judgment After Trial;  
Alternative Motion for New Trial.

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. In ruling on the renewed motion, the court may:

- (1) allow judgment on the verdict, if the jury returned a verdict;
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.

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

Renewing the motion through Rule 50(b) is necessary for a number of reasons, including fairness to the verdict winner. For example, after the motion is made, the verdict winner may seek to dismiss the suit without prejudice under Rule 41. *See Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 217 (1947) (“If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion.”). And if the district court grants the Rule 50(b) motion, the verdict winner (who just lost the judgment) has the opportunity to argue that it is entitled to a new trial. Fed. R. Civ. P. 50(d). “The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness.” *Johnson v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 48, 53 (1952).

**3. Rule 50 motions mirror the standard for summary-judgment motions, but involve a full development of the record.**

Rule 50 employs the same standard as summary judgment, ultimately requiring a determination whether the movant is entitled to judgment as matter of law. *Anderson*, 477 U.S. at 250 (the standard for summary judgment “mirrors” the standard for a directed verdict under Rule 50(a)). But the trial judge has a greater ability to assess legal questions presented in a Rule 50 motion because of the fuller record: “Unlike on motion for summary judgment, the judge deciding a motion for judgment as a matter of law has seen the live, public, cross-examined testimony of a witness rather than more preliminary

and possibly less tested affidavit or deposition testimony.” 11 Moore, *supra*, § 56.30[b]. “In addition, at trial, the court may obtain information in the form of a jury verdict yet retain power to set aside or reverse the verdict, a balance of power absent at the summary judgment stage of trial.” *Id.* § 56.50.

### **C. Modern Appeal Practice.**

#### **1. Appellate jurisdiction arises only by statute.**

Federal courts have limited appellate jurisdiction only as conferred by statute. Two such statutes control: 28 U.S.C. §§ 1291 and 1292.

*First*, under 28 U.S.C. § 1291, jurisdiction exists over “final” decisions: “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where direct review may be had in the Supreme Court.” The effect of the statute is to “disallow appeal from any decision which is tentative, informal or incomplete.” *Cohen*, 337 U.S. at 546. “The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.” *Id.* “[T]he finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference.” *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987).

“Final decisions” under § 1291 also “include a small set of prejudgment orders that are ‘collateral to’ the merits of an action and ‘too important’ to be denied

immediate review.” *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (quoting *Cohen*, 337 U.S. at 546). That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are “effectively unreviewable” on appeal from the final judgment in the action. *Id.* at 605 (internal quotation marks omitted).

Prejudgment orders denying qualified immunity can fall into this small category of “collateral orders” that are immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Qualified immunity protects public officials unless they violated “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “Because qualified immunity is an immunity from suit rather than a mere defense to liability[,] it is effectively lost if a case is erroneously permitted to go to trial.” *Id.* (alterations and quotation marks omitted). Where the qualified-immunity question is purely one of law, the official is entitled to bring the immediate appeal. *Johnson v. Jones*, 515 U.S. 304, 316 (1995); *see also Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (“*Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an ‘abstract issue of law’ relating to qualified immunity—typically, the issue whether the federal right allegedly infringed was ‘clearly established.’”).

Of course, any such “final” decisions are subject to the applicable rules of procedure. Thus, a party has 30 days from the final decision to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A); *accord, e.g., Lora v. O’Heaney*, 602 F.3d 106, 112 (2d Cir. 2010) (holding

that Appellate Rule 4 applies to collateral orders). If the party fails to appeal the order within this the timeframe, the right to appeal that order is lost. *See Bowles v. Russell*, 551 U.S. 205, 213 (2007) (failure to file timely notice of appeal is a jurisdictional defect; the timeframe is set forth in 28 U.S.C. § 2107). Nonetheless, the legal arguments in pretrial motions may be preserved through appropriate motions at trial, particularly through Rule 50. *See, e.g., Iacobucci v. Boulter*, 193 F.3d 14, 22 (1st Cir. 1999) (holding that qualified-immunity defense, “if preserved, may be pressed at later stages, including in a timeous post-trial motion”).

*Second*, § 1292 authorizes the limited jurisdiction for appeals of “interlocutory” (non-final) decisions. 28 U.S.C. § 1292. Section 1292(a) lists three categories of immediately appealable interlocutory decisions (regarding injunctions, receivership, and admiralty cases). Section 1292(b) further authorizes the district court to certify that an order not otherwise appealable “involves a controlling question of law” so important to review that immediate appeal should be permitted. If the district court so certifies, the court of appeals has discretion to permit the appeal. *See generally Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 45–47 (1995) (discussing §§ 1291 and 1292).

## **2. Courts agree on the general rule that the denial of summary judgment is not appealable after trial.**

The circuits agree, as a general rule, that denials of summary judgment are not appealable after a full trial on the merits. *Price v. Kramer*, 200 F.3d 1237, 1243 (9th Cir. 2000) (noting that this is the “prevailing view

among the federal circuits”); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1234 (4th Cir. 1995) (same). The denial of summary judgment is simply not “final” under § 1291, because the trial “supersedes the earlier summary judgment proceedings.” *Johnson Int’l Co. v. Jackson Nat’l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994).

Yet some circuits have crafted an exception to allow the appeal of summary-judgment denials after trial for questions of law. See, e.g., *Banuelos v. Constr. Laborers’ Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004) (allowing appeal “where the district court made an error of law that, if not made, would have required the district court to grant the motion”); *Chemettal GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 720 (7th Cir. 2003) (same); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (same).

Despite the finality requirement in § 1291, these courts nonetheless conclude that raising questions of law at the summary-judgment stage should preserve them for post-trial appeal. On this point, we are first guided by this Court’s decision in *Unitherm*, which holds that even a Rule 50(a) motion—made on a full trial record—is insufficient to preserve such questions of law for appeal.

**3. *Unitherm*: Even a Rule 50(a) motion is insufficient to preserve questions of law for appeal.**

In *Unitherm*, the case proceeded to trial, and the defendant moved for judgment as a matter of law under Rule 50(a). 546 U.S. at 398. The district court denied the motion, and the jury returned a verdict for

the plaintiff. *Id.* The defendant neither renewed its motion under Rule 50(b), nor moved for a new trial on liability under Rule 59. *Id.*

The defendant appealed, and the court of appeals concluded that the Rule 50(a) motion preserved the defendant's argument that the evidence was insufficient as a matter of law. *Id.* at 399. The court of appeals agreed with the defendant's argument, vacated the jury's judgment in favor of the plaintiff, and remanded for a new trial. *Id.*

This Court held that the court of appeals lacked jurisdiction and reversed. The Court stated that it "has addressed the implications of a party's failure to file a postverdict motion under Rule 50(b) on several occasions and in a variety of procedural contexts," *id.* at 400, expressly noting that such a failure left the appellate court without "power" to consider the appeal: "In the absence of such a motion' an 'appellate court is without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.'" *Id.* at 400–01 (quoting *Cone*, 330 U.S. at 218) (alterations omitted).

This Court emphasized that the Rule 50(b) motion is required because of "the benefit of postverdict input from the district court." *Id.* at 401 n.3. As the Court explained, a "postverdict motion is necessary because 'determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for 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 (quoting *Cone*, 330 U.S. at 216) (alteration omitted). The Court further noted that

even in cases where an appellate court may direct the entry of judgment when it reverses the district court's denial of a Rule 50(b) motion, the district judge's first assessment of the questions of law is key: "[I]n such circumstances, the district court will have had an opportunity to consider the propriety of entering judgment or ordering a new trial by virtue of the postverdict motion." *Id.* at 401 n.3. The Court reiterated the well-established view that "the 'requirement of a timely application for judgment after verdict is not an idle motion' because it 'is . . . an essential part of the rule, firmly grounded in principles of fairness.'" *Id.* at 401 (quoting *Johnson*, 344 U.S. at 53).

The Court further held that "the necessity of a postverdict motion under Rule 50(b), and the benefits of the district court's input at that stage, apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial." *Id.* at 402. "In short," the Court stated, the defendant "never sought a new trial before the District Court, and thus forfeited its right to do so on appeal." *Id.* at 404.

The *Unitherm* Court made no distinction between judgment as a matter of law for questions of "law" (e.g., whether the evidence is legally insufficient) versus questions of "pure law." *Cf.* Br. of Resp'ts in Opp'n to Pet. for Cert. at 15 (suggesting a distinction). To the contrary, the holding was plain: The Court's prior decisions "unequivocally establish that the precise subject matter of a party's Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." *Unitherm*, 546 U.S. at 404. Indeed, references to "sufficiency of the

evidence” in the Rule 50 context are made to clarify that the question is one of *law* in contrast to a challenge to the *weight* of the evidence: “All this ‘legal’ sufficiency of the evidence is distinguished from the discretion courts hold to grant a new trial under Rule 59 if they find that the verdict is against the weight of the evidence.” Steven A. Childress, *Revolving Trapdoors: Preserving Sufficiency Review of the Civil Jury After Unitherm and Amended Rule 50*, 26 Rev. Litig. 239, 244 (2007); *see also, e.g., Redman*, 295 U.S. at 659 (“Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court.”).

The *Unitherm* Court also made clear that its holding was jurisdictional, noting that, absent a Rule 50(b) motion, the district court “was without the power” to grant relief and that, “[c]onsequently, the Court of Appeals was similarly powerless.” 546 U.S. at 405; Childress, *supra*, at 260 (“The Court’s reasoning necessarily abrogates even plain error review.”).

The Court further noted that the district court’s discretion to deny a Rule 50(a) motion supported the conclusion that such a motion was insufficient to preserve arguments for appeal: “[T]he District Court’s denial of [the defendant’s] preverdict motion cannot form the basis of respondent’s appeal, because the denial of that motion was not error”—“[i]t was merely an exercise of the District Court’s discretion” to let the case proceed to the jury. *Unitherm*, 546 U.S. at 406. “The only error here,” stated the Court, “was counsel’s failure to file a postverdict motion pursuant to Rule 50(b).” *Id.*

Thus, the relevant and longstanding principles can be distilled: Appeals are authorized over “final” decisions, and the means to preserve arguments for judgment as a matter of law after a full trial is through a Rule 50(b) motion. Without that renewed motion after the verdict, any argument that would take the case away from the jury cannot be considered on appeal. As discussed in the next section, these principles conclusively resolve the circuit splits presented here.

## **II. The Denial of Summary Judgment Is Not Appealable After Trial.**

The broad circuit split presented is over the following question: Is the denial of summary judgment appealable after a full trial where the appeal involves a question of law? The related question is whether the denial of summary judgment is appealable after trial where the party chose not to appeal before the trial (that is, where the party had a right to immediate appeal under the collateral-order doctrine). As noted below, the answer to each question is the same: The denial of summary judgment is simply not appealable after a trial. “Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal . . . .” *Holley v. Northrop Worldwide Aircraft Servs., Inc.*, 835 F.2d 1375, 1377 (11th Cir. 1988). If a party wishes to preserve its legal arguments for appeal, it need simply make the proper Rule 50 motions.

**A. There Is No Exception for “Questions of Law.”**

No statute authorizes appellate jurisdiction of summary-judgment denials after trial. The summary-judgment decision does not “merge” into the final judgment and become appealable under § 1291; rather, the trial supersedes the summary-judgment proceedings. *See Iacobucci*, 193 F.3d at 22 (holding that party cannot assign error to denial of summary judgment because “an order denying summary judgment typically does not merge into the final judgment and therefore is not an independently appealable event if the case thereafter proceeds to trial”); *Andrews Farms v. Calcot, Ltd.*, No. 07-464, 2010 U.S. Dist. LEXIS 20887, at \*29 (E.D. Cal. Feb. 16, 2010) (“The denial of a summary judgment motion has no preclusive effect, does not merge into a final judgment, and is an interlocutory, unappealable order that can be reviewed by the district court at any time before final judgment is entered.”). This makes perfect sense. Otherwise, the appeals court would have to review two sets of evidence: that before the district court pretrial when it denied the motion, and the evidence presented at trial. *Black v. J.I. Case*, 22 F.3d 568, 572 (5th Cir. 1994). Indeed, if such rulings did “merge” into the final judgment, *every* denial of summary judgment would become appealable after the trial—a view no court endorses.

Once the trial supersedes the summary-judgment proceedings, the denial of summary judgment cannot somehow retroactively become “final” under § 1291 by stating (or acknowledging) that it involves questions of law. Indeed, the “exception” itself is somewhat nonsensical, as every summary-judgment decision is a

question of law. *See* Fed. R. Civ. P. 56(c) (the movant must show that it is “entitled to judgment as a matter of law”); *Chesapeake Paper Prods. Co.*, 51 F.3d at 1235 (rejecting this exception “because all summary judgment decisions are legal decisions . . .”). The decision becomes no more “final” under § 1291 for “pure” questions of law. And creating such a novel new class of appealable claims is wholly unnecessary, especially because the claims can be vindicated through Rule 50. *Cf. Mohawk Indus.*, 130 S. Ct. at 605 (“As long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under § 1291.”) (alterations and internal quotations omitted).

Courts that have created this “legal-question” appealability exception often attempt to justify it as a matter of policy without considering what statutory authority provides jurisdiction in the court of appeals. They simply contend that review is sensible, noting that there is fair notice of the issue to be considered and that appellate courts are well-equipped to address questions of law. *See, e.g., Chemetall GMBH*, 320 F.3d at 720 (recognizing the rule that denials of summary judgment are generally not appealable but stating that “if the legal question can be separated from the factual one, then we see no bar to reviewing the legal question notwithstanding the party’s failure to raise it in a motion for judgment as a matter of law at trial”).

Simply put, no statute authorizes such an exception. This ends the inquiry: The courts of appeals lack the power to consider such post-trial appeals. *Cf. Barry v. Mercein*, 46 U.S. 103, 113 (1847)

(“The [appellate] court derives all of its power from this statute, and the limitations of it are to be precisely followed, *expressio unius exclusio est alterius*.”).

Worse yet, an exception allowing this type of appeal is not a sensible policy: It undercuts the fundamental principles in the structure of federal rules and statutes in at least three additional ways.

*First*, the exception renders Rule 50 meaningless, allowing parties to circumvent the requirement that the legal arguments for judgment be presented to the district court after the verdict. The same reasons courts rely on to justify the “legal-question” exception are precisely those that the defendant in *Unitherm* argued should allow appellate review of its Rule 50(a) motion, which also (by definition) sought judgment on legal grounds. Each of those arguments is even weaker in this context, where the moving party contends that the arguments are preserved through a *pretrial* motion for summary judgment. *See* 11 Moore, *supra*, § 56.50 (“A judge taking a case away from the jury at the summary judgment stage does so with less information than the judge doing so at trial or after a verdict.”).

That remains true where argument for judgment as a matter of law on appeal turns on a question of “pure” law. The benefits of having the district court review that question on a fuller record still exist—including where the question involves qualified immunity, because the inquiry still depends on the facts of the case. *See Mitchell*, 472 U.S. at 528 n.9 (“We emphasize at this point that the appealable issue is a purely legal one: whether *the facts alleged* . . . support a claim of violation of clearly established law.”) (emphasis

added); *id.* at 549–50 (Brennan, J., dissenting) (“[R]esolution of even the most abstract legal disputes is advanced by the presence of a concrete set of facts. . . . Simply put, an appellate court is best able to decide whether given conduct was prohibited by established law if the record in the case contains a full description of that conduct.”); *see also* *Behrens*, 516 U.S. at 313 (noting that a party bringing a qualified-immunity appeal can argue “that *all of the conduct* which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of ‘objective legal reasonableness.’”) (emphasis added).

Moreover, failing to preserve summary-judgment arguments through a Rule 50(b) motion in the district court deprives the verdict winner of notice and opportunity to preserve its own rights. *Weisgram v. Marley Co.*, 528 U.S. 440, 451 (2000) (“Part of the Court’s concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which *should be passed upon by the district court, rather than the court of appeals*, because of the trial judge’s first-hand knowledge of witnesses, testimony, and issues—because of his ‘feel’ for the overall case.”) (emphasis added); *see also* 11 Moore, *supra*, § 56.30[c] (“On occasion, the intervening time period between the deadline for submitting dispositive motions and the close of evidence reveals additional material that may carry the day in seeking or opposing judgment as a matter of law.”).

*Second*, an exception for such “legal-question” appeals undermines the limited—but established—means to attempt to challenge summary

judgment denials, such as by seeking to certify the issue for interlocutory appeal under § 1292(b). Indeed, allowing these appeals in the normal course effectively declares the summary-judgment decision “final” (otherwise it could not be appealed) even if it is not a collateral order. That further violates the principle that categories of orders that are deemed “final” as collateral orders should be expanded not “by court decision, but by rulemaking under [28 U.S.C.] § 2072.” *Swint*, 514 U.S. at 48; *see also id.* (noting that § 2072(c) authorizes this Court to prescribe rules “defining when a ruling of a district court order is final for purposes of appeal under section 1291”). “Congress’ designation of the rulemaking process as the way to define or refine when a district court ruling is ‘final’ and when an interlocutory order is appealable warrants the Judiciary’s full respect.” *Id.* *See generally, Metro. Life Ins. Co. v. Hoyt*, 121 F.3d 351, 356 (8th Cir. 1997) (noting that allowing such appeals “condones a litigation strategy that disregards the Federal Rules of Civil Procedure 50(a) and 50(b), and 28 U.S.C. § 1292(b)”).

*Third*, the exception conflicts with the recognition that the district court has discretion to deny summary judgment so that a case may proceed to trial. Where courts of appeals review such denials after trial, the district court’s discretion is no longer meaningful. *Black*, 22 F.3d at 572. Just as with the denial of a Rule 50(a) motion, that discretionary decision is not suited for review. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 19, *Unitherm*, 546 U.S. 394 (2006) (No. 04-597) (stating that district court’s exercise of discretion to deny a Rule 50(a) motion and defer the decision cannot be “error” and that, “absent identified *error* by the trial court, there

would be no basis for the court of appeals to disturb the judgment”).<sup>2</sup>

That orders denying summary judgment are not appealable after trial is further confirmed by the simplicity with which parties may avoid this entire predicament. They simply must follow the Rules and renew their Rule 50 motion after the verdict, raising the questions of law that they wish to press on appeal. *See Black*, 22 F.3d at 571 n.4 (noting that an exception for legal questions “would benefit only those summary judgment movants who failed to properly move for judgment as a matter of law at the trial on the merits” under Rule 50).

This Court should therefore hold that the denial of summary judgment is not appealable after trial, even if the issue is one of law or “pure” law. The only remaining question is whether the summary-judgment denial should somehow become appealable after trial where a party had the opportunity to appeal the denial of summary judgment before trial but failed to do so.

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<sup>2</sup> As shown, the discretionary nature of summary judgment is merely one of many reasons supporting the conclusion that the denial of summary judgment is not appealable after trial. But that conclusion would be true even if the denial of summary judgment were not discretionary. Thus, whatever debate may ensue if Rule 56 language returns from *should* to *shall* at the end of this year, the outcome of this case will be unaffected. Any such change certainly cannot make a summary-judgment denial “final” after trial under § 1291.

**B. There Is No Exception Where the Moving Party Chose Not to Appeal Before Trial.**

No statute authorizes post-trial summary-judgment appeals where the aggrieved party chose not to appeal before the trial. Where the denial of summary judgment is a “final” collateral order, the moving party may choose to appeal it immediately under § 1291. That means that the party has 30 days to appeal. Fed. R. App. P. 4(a). When that jurisdictional time period lapses, there is no longer authority to appeal the order. *E.g., Lora*, 602 F.3d at 112 (“We see no reason to bend Rule 4 in order to expand the availability of interlocutory appeals to parties who have failed to timely appeal from an appealable collateral order.”). And here, too, the trial simply supersedes the summary-judgment process. *See* 15A Wright & Miller, *Federal Practice and Procedure*, § 3914.10 (3d ed. 2010) (“Once trial has been had, the availability of official immunity . . . should be determined by the trial record, not the pleadings nor the summary judgment record.”). At that point, there is no longer a “final” decision susceptible to appeal under § 1291.

Indeed, reviewing such a post-trial appeal would undercut the heart of the collateral-order doctrine itself, which defines “final” collateral orders as those that are “effectively *unreviewable*” after trial. *See Mitchell*, 472 U.S. at 525 (“A major characteristic of the denial or granting of a claim appealable under *Cohen*’s ‘collateral order’ doctrine is that unless it can be reviewed before the proceedings terminate, it never can be reviewed at all.”) (alterations and internal quotation marks omitted); *Price v. Kramer*, 200 F.3d 1237, 1244 (9th Cir. 2000) (“The defendants’ complaint to us now—that in retrospect the officers should have

been immune from suit at the time of the pretrial order—is long past due and unreviewable on this appeal.”<sup>3</sup>

In this context, too, the proper approach is straightforward: Even if one forgoes interlocutory appeal of a collateral order, one can preserve the legal arguments for appeal through a Rule 50 motion renewed after the verdict: “[W]hen appropriate, judgment as a matter of law may be granted on purely legal issues unrelated to the sufficiency of evidence at trial.” 9 Moore, *supra*, § 50.05 (citing *Neely v. Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317, 327 (1967)). “For example, a moving party may assert entitlement to judgment as a matter of law based on qualified or official immunity.” *Id.*; see also *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 93 (1st Cir. 2003) (“[A] defendant determined to persist in challenging the court’s denial

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<sup>3</sup> None of this discussion presupposes that counsel blunders by failing to immediately appeal the summary-judgment ruling. Parties who lose qualified-immunity arguments at the summary-judgment stage may purposely forgo the immediate appeal, especially where they believe they can simply end the matter through a short trial. Indeed, for these reasons, parties may skip the summary-judgment process altogether. See 11 Moore, *supra*, § 56.32[4] (“If counsel expects the same result from a short trial as it hopes to achieve via summary judgment motion, forgoing the motion may better discharge the lawyer’s responsibility to the court.”). And such appeals may be futile, as “[m]ost pretrial orders of district judges are ultimately affirmed by appellate courts.” *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 434 (1985). The point is that—regardless of the reasons for failing to appeal—a party choosing to forgo such a limited collateral-order appeal should not have these appeal rights reappear based on nothing more than the case simply proceeding in the normal course. Certainly nothing in § 1291 suggests that conclusion.

of qualified immunity cannot rest on the objection lodged at the summary judgment stage. . . .”).

Thus, this Court should also hold that the denial of summary judgment is not appealable after a full trial where the party chose not to appeal before the trial.

\* \* \*

In the end, the rule that resolves the circuit splits is the same that every circuit has recognized as generally governing: The denial of summary judgment is not appealable after a full trial on the merits. Period. As shown below, this simple rule has simple application in Michelle Ortiz’s case.

### **III. The Sixth Circuit’s Decision Below Must Be Reversed for Lack of Jurisdiction.**

Respondents Jordan and Bright moved for summary judgment asserting that they were entitled to qualified immunity. The district court denied the motion. To the extent they wished to immediately appeal that determination by raising a pure question of law, *Johnson*, 515 U.S. 304, they had that option, and they had 30 days to pursue it. Fed. R. App. P. 4(a). They did not do so. Instead, they went to trial.

The trial then superseded the summary-judgment stage. By definition, the denial of summary judgment was therefore not “final” and not appealable under § 1291. And nothing could retroactively make it so. The Sixth Circuit lacked jurisdiction to consider this non-final pretrial decision.

Jordan and Bright, of course, could still argue to the district court that they were entitled to judgment as a matter of law. And indeed they did so at the close of evidence through an oral Rule 50(a) motion. To the extent that they wished to preserve the issue for appeal, however, they were required to renew it through Rule 50(b) to give the district court the opportunity to rule on it after the verdict. *Unitherm*, 546 U.S. 394. They did not do so, leaving the district court powerless to grant judgment as a matter of law, in turn leaving the Sixth Circuit powerless to consider the issue on appeal. *See id.* at 405. The Sixth Circuit thus acted without jurisdiction when it overturned Ortiz's judgment and eliminated the jury's verdict in her favor.

### CONCLUSION

The Sixth Circuit's decision should be reversed.

Respectfully submitted,

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