No. 09-737

In the Supreme Court of the United States

MICHELLE ORTIZ,

Petitioner,

v.

PAULA JORDAN AND REBECCA BRIGHT,

Respondents.

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

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

May a defendant official who does not take a collateral-order appeal on her legal defense of qualified immunity seek review of the issue on appeal from a final judgment against her?

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INTRODUCTION

The central question in this case is whether the Sixth Circuit had the authority to review Respondents' qualified-immunity defense on appeal. It unquestionably did. Respondents duly preserved their immunity defense for appellate review by presenting it to the district court at summary judgment.

In nonetheless arguing that appellate *jurisdiction* was lacking, Petitioner Michelle Ortiz confuses jurisdictional rules with claim-processing requirements and conflates the order on appeal (the final judgment) with the issue on review (qualified immunity). The Sixth Circuit had jurisdiction because Respondents timely appealed from the entry of final judgment in Ortiz's favor. Respondents did not need to appeal immediately after they were denied summary judgment on qualified-immunity grounds, because the right to take a collateral-order appeal is an option, not a duty. Nor did Respondents need to file a sufficiency-of-the-evidence motion under Rule 50(b), because their claim was a legal one—that qualified immunity attached to their conduct. More to the point, even if a Rule 50(b) motion was required, that requirement is not jurisdictional, and Ortiz forfeited her claim-processing objection by raising it for the first time in this Court.

The Court should affirm the Sixth Circuit's judgment.

STATEMENT OF THE CASE

A. Ortiz sued Respondents for alleged constitutional violations in connection with her assault by a state corrections officer.

Ortiz sued several state prison officials under 42 U.S.C. § 1983 after she was assaulted by a corrections officer while housed in an Ohio penitentiary. Pet. App. 1a-18a. The court dismissed all but two of the defendants—Respondents Paula Jordan, a case manager, and Rebecca Bright, an investigator. *Id.* at 7a. Ortiz alleged that Jordan violated her Eighth Amendment rights by failing to protect her from the officer's assault. *Id.* at 25a. And Ortiz claimed that Bright infringed her rights in two ways: (1) by placing her in solitary confinement while Bright was investigating the assault, in violation of Ortiz's due process rights, and (2) by denying her medical treatment in violation of the Eighth Amendment. *Id.*

Before trial, Respondents moved for summary judgment on qualified-immunity grounds, among others. *Id.* at 21a-22a. The district court denied summary judgment as to Jordan. *Id.* at 36a. Ortiz had not opposed Bright's summary judgment motion, *id.* at 13a n.5, but the district court dismissed only Ortiz's Eighth Amendment medical-treatment claim, *id.* at 43a, and allowed her due process claim against Bright to proceed, *id.* at 40a. Although the collateral-order doctrine permits an immediate appeal from a qualified-immunity denial, see *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), Respondents did not take one.

Following Ortiz's case in chief at trial, Respondents moved for judgment as a matter of law under Fed. R. Civ. P. 50(a), asserting that no constitutional violation occurred. J.A. 3. The court denied the motion as to both Jordan, *id.* at 8, and Bright, *id.* at 14. The court also denied Respondents' renewal of the motion at the close of all the evidence. *Id.* at 20.

The jury returned a verdict for Ortiz and awarded her $250,000 in compensatory damages and $100,000 in punitive damages against Jordan and $25,000 in compensatory damages and $250,000 in punitive damages against Bright. Pet. App. 7a. After the verdict, Respondents did not renew their motion for judgment as a matter of law under Rule 50(b).

B. Respondents appealed the final judgment.

Respondents appealed the jury's verdict and the award of money damages to the Sixth Circuit, asserting, among other things, that the verdict was improper as a matter of law because Ortiz had not established a constitutional violation. Br. of Defendants-Appellants 21-26, *Ortiz v. Voinovich*, No. 06-3627 (6th Cir.) ("Respondents' 6th Cir. Br."). Respondents further contended that even if the court found a constitutional violation, they were entitled to qualified immunity because the law was not clearly established. *Id.* at 37-39. Respondents raised other issues as well, including that the district court erred in refusing to grant Respondent Bright's unopposed summary judgment motion, *id.* at 19-20, and that the damages award was excessive, *id.* at 33-37.

Ortiz raised no procedural objections to Respondents' qualified-immunity defense, but instead opposed it on the merits. Br. of Plaintiff-Appellee 27-28, *Ortiz v. Voinovich*, No. 06-3627 (6th Cir.) ("Ortiz 6th Cir. Br."). Ortiz's only procedural objection in the Sixth Circuit was that Respondents had waived their argument that the district court erred in not granting Bright's unopposed summary judgment motion. *Id.* at 14-19.

C. The appeals court reviewed the entire trial record and determined that Respondents were entitled to qualified immunity.

The Sixth Circuit reversed the district court's decision. In examining Respondents' qualified-immunity defense, the appeals court recognized that "courts normally do not review the denial of a summary judgment motion after a trial on the merits," but it stated that an exception exists for the "denial of summary judgment based on qualified immunity." Pet. App. 8a (citing *Goff v. Bise*, 173 F.3d 1068, 1072 (8th Cir. 1999); *McIntosh v. Weinberger*, 810 F.2d 1411, 1431 n.7 (8th Cir. 1987)). The court considered the "evidence, as reflected by the jury's verdict and, therefore, viewed on appeal in the light most favorable to Ortiz." *Id.* at 2a.

On the merits, the court held as a matter of law that both Jordan and Bright were entitled to qualified immunity from suit. *Id.* at 10a-13a. As to Ortiz's Eighth Amendment claim against Jordan, the court concluded that, even viewing the facts in the light most favorable to Ortiz, "Jordan's conduct [did] not rise to the level of legal indifference." *Id.* at 10a. As to Ortiz's due process claim against Bright, the court held that Ortiz did not have a protected liberty

interest because "a temporary placement in solitary confinement is not an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* at 12a (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). The Sixth Circuit noted that Ortiz had also argued on appeal that her placement in solitary confinement was unconstitutional because Bright had a retaliatory motive. *Id.* But the court construed this argument as a "First Amendment retaliation claim," found that Ortiz did not present it to the district court, and held that she could not raise "a new theory at this stage of the proceedings." *Id.*

After the Sixth Circuit denied Ortiz's petition for en banc reconsideration, *id.* at 45a-46a, Ortiz successfully sought this Court's review, 130 S. Ct. 2371 (2010).

SUMMARY OF ARGUMENT

This case presents a straightforward question of appellate reviewability: What does a party need to do in the district court to preserve a legal claim or defense for review on appeal? The simple answer is that it is enough for a party to move for summary judgment on the issue. If the subsequent trial does not moot the defense, the summary judgment denial merges into the final judgment and is preserved for review on appeal.

This clear-cut rule resolves this case. Ortiz's argument that appellate jurisdiction was lacking is mistaken because the order on appeal—the final judgment—must be distinguished from the issue on review—qualified immunity. The Sixth Circuit had jurisdiction under 28 U.S.C. § 1291 because Respondents properly appealed from a final judgment. And Respondents adequately preserved their qualified-immunity claim for appellate review when they moved for summary judgment on the defense. Because Respondents' qualified-immunity defense was legal rather than factual in nature, the facts adduced at trial did not moot the defense. It was therefore no different from other defenses—such as preemption, issue preclusion, or statute of limitations—that are preserved for review on appeal by a summary judgment denial irrespective of trial.

Ortiz mistakenly argues that Respondents were required to take a collateral-order appeal from the summary judgment denial. But the circuit courts are in broad agreement that the right to take a collateral-order appeal under 28 U.S.C. § 1291 is permissive, not mandatory, and that defendant

officials do not surrender qualified immunity by forgoing an immediate appeal.

Ortiz argues in the alternative that, absent a collateral-order appeal, Respondents needed to file a Rule 50(b) motion after the verdict, but this claim fails for two reasons. First, Ortiz neither raised this objection below nor included it in her question presented. Because Rule 50(b) is a claim-processing rule rather than a jurisdictional requirement, it is subject to forfeiture. If Ortiz wanted to preserve her objection, she should have presented it to the Sixth Circuit. Second, even if Ortiz did not forfeit her argument, she fundamentally misunderstands the nature of Rule 50. As *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405-06 (2006), makes clear, motions for judgment as a matter of law under Rule 50 are principally designed for challenges to the sufficiency of the evidence. Rule 50(b) is not a ticket that must be punched on all issues—even legal ones, such as Respondents' qualified-immunity defense—in order to proceed to appeal. In insisting otherwise, Ortiz would radically change settled rules of motion practice and appellate jurisdiction.

The appeals court's review of Respondents' qualified-immunity defense was therefore routine. This Court should affirm the Sixth Circuit.

ARGUMENT

A. Respondents adequately preserved their qualified-immunity defense for appellate review by invoking it multiple times, including at summary judgment.

The question here is not about jurisdiction; it is about reviewability. On Respondents' appeal from the district court's final judgment, the Sixth Circuit had the authority to review Respondents' qualified-immunity defense because it was a properly preserved legal issue.

1. A summary judgment motion suffices to preserve a legal claim for review on appeal.

Parties may appeal only from "final decisions of the district courts." 28 U.S.C. § 1291. "Final decisions" generally are those at the end of the case "that trigger the entry of judgment." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009). The collateral-order doctrine creates exceptions to this general rule, see *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949), but in the main "[p]ostjudgment appeals . . . suffice to protect the rights of litigants." *Mohawk Indus.*, 130 S. Ct. at 603.

The rule that only final judgments may be appealed necessarily means that "only final judgments *need* be appealed." *Kurowski v. Krajewski*, 848 F.2d 767, 772 (7th Cir. 1988) (emphasis added). "Until a judgment is rendered 'final' by entry of a separate document under Fed. R. Civ. P. 58, no one need appeal." *Id.* "Interlocutory orders therefore may be stored up and raised at the

end of the case." *Id.* (citing *United States v. Indrelunas*, 411 U.S. 216 (1973); *United States v. Clark*, 445 U.S. 23, 25-26 n.2 (1980)). In other words, "a party is free to accumulate issues," *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985), and "[a]n appeal from the final judgment brings up all antecedent issues," *In re Kilgus*, 811 F.2d 1112, 1115 (7th Cir. 1987); accord *Gloria Steamship Co. v. Smith*, 376 F.2d 46, 47 (5th Cir. 1967) ("[A]ll interlocutory orders are reviewable on appeal from the final decree.").

These final-order principles apply to the various decisions that district courts make during the course of litigation. See generally *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988). Under Rule 46, for instance, "[a] formal exception to a ruling or order is unnecessary"; "a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection." Fed. R. Civ. P. 46; see *Beech Aircraft*, 488 U.S. at 174. Likewise for evidentiary objections: A party must make "a timely objection or motion to strike" and "stat[e] the specific ground of objection," but "a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Fed. R. Evid. 103; see *Beech Aircraft*, 488 U.S. at 174. "In short, [the] rule is that [an appeals court] will entertain arguments on all objections and asserted errors prior to the final disposition of a case if a party indicates in its notice of appeal that it appeals either the final judgment or the final order in the case." *Caudill v. Hollan*, 431 F.3d 900, 906 (6th Cir. 2005).

This rule holds true for objections resolved at summary judgment. Ordinarily, "the denial of a

Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits." 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2715, p. 264 (3d ed. 1998). Once a final judgment is entered and an appeal is taken, "the party who unsuccessfully sought summary judgment may argue that the trial court's denial of the Rule 56 motion was erroneous." *Id.* at 264, 266 & n.26 (citing cases).

These straightforward precepts have led most circuits to hold that legal claims denied at summary judgment are reviewable on appeal after a final judgment has been entered against the summary judgment loser. The Tenth Circuit's decision in *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994), exemplifies this approach. There the defendant oil company (Conoco) moved for summary judgment on issue-preclusion grounds, arguing that an earlier order from a state commission barred the plaintiffs' suit. The district court denied the motion, and a jury trial yielded a verdict for the plaintiffs. On appeal, Conoco reiterated its issue-preclusion argument, and the plaintiffs countered that "Conoco failed to preserve this issue because it did not raise the matter in its motions for a directed verdict or for judgment as a matter of law." *Id.* The Tenth Circuit disagreed. It explained that motions for judgment as a matter of law under Rule 50 "challenge the sufficiency of the evidence rather than the correctness of questions of law." *Id.* Because Conoco's issue-preclusion defense "was a legal question separate from the sufficiency of the evidence," the court held that Conoco could "raise the issue on appeal notwithstanding its omission from Conoco's Rule 50 motions." *Id.* at 841-42.

The Tenth Circuit's approach in *Ruyle*—treating a legal claim or defense as preserved for appeal if it was presented in a summary judgment motion—is widely followed. The Seventh Circuit has held repeatedly that "[d]efenses are not extinguished merely because presented and denied at the summary judgment stage. If the plaintiff goes on to win, the defendant can reassert the defense on appeal." *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995); accord *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719-20 (7th Cir. 2003). At least five other circuits similarly have held that legal claims are reviewable on appeal post-trial if they were denied at the summary judgment stage. See *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Becker v. Tidewater, Inc.*, 581 F.3d 256, 263 n.4 (5th Cir. 2009); *Barber v. Louisville & Jefferson County Metro. Sewer Dist.*, 295 F. App'x 786, 789 (6th Cir. 2008); *Goff v. Bise*, 173 F.3d 1068, 1072 (8th Cir. 1999); *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902-03 (9th Cir. 2004).

Critical to each of these decisions is the purely legal nature of the claim under review. All courts taking this approach agree that questions going to the sufficiency of the evidence are *not* preserved for appellate review by a summary judgment motion alone. See, e.g., *Chemetall*, 320 F.3d at 718-19. Rather, arguments resting on evidentiary sufficiency must be renewed post-trial under Rule 50. See Part C below. Thus, when Ortiz asserts that "the trial 'supersedes the earlier summary judgment proceedings,'" Ortiz Br. 17 (quoting *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994)), she is only partly right. *Evidentiary* disputes raised at summary judgment—such as the

fraudulent-representation issue in *Johnson International,* 19 F.3d at 434-35—are moot once the case goes to trial, because then the issue becomes one of evidentiary sufficiency. See *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 353 n.55 (7th Cir. 1988). But when the evidence adduced at trial does not moot a *legal* question, "denials of summary judgment are merged into a final judgment and then may be appealed." *Id.*

Good reasons exist for treating a legal claim, as opposed to a dispute about evidentiary sufficiency, as preserved for appellate review if it was denied at summary judgment. For one thing, the summary judgment motion puts the parties on ample notice that the issue exists and is contested. See *Rekhi*, 61 F.3d at 1318. The summary judgment motion also gives the district court a full opportunity to address the issue. *Id.* And very often the legal issue addressed at summary judgment does not depend on, or should even preclude, the factual development at trial. Once the district court has resolved a choice-of-law question, for instance, the course of the trial has been charted, and "it would make little sense" to raise the issue again in the district court. *Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569, 571-72 (7th Cir. 1995). The same is true of legal defenses such as issue preclusion, e.g., *Ruyle*, 44 F.3d at 841-42; claim preclusion, e.g., *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 906 (9th Cir. 1999); and preemption, e.g., *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 425 (4th Cir. 2005) (Motz, J., dissenting).

2. Ortiz's counter-arguments are not sound.

Ortiz offers several reasons for rejecting the distinction between legal and factual questions, none of which withstands scrutiny. First, she argues that "the denial of summary judgment cannot somehow retroactively become 'final' under § 1291 by stating (or acknowledging) that it involves questions of law." Ortiz Br. 22. Ortiz's argument assumes that the courts are treating the *summary judgment order* as the final appealable order under § 1291—that is, as an "'independently appealable event'"—even after the case has gone to trial. *Id.* (quoting *Iacobucci v. Boulter*, 193 F.3d 14, 22 (1st Cir. 1999)). Reasoning from that premise, she argues that jurisdiction is lacking for two reasons: (1) The summary judgment order is not "final," and (2) the thirty-day time period for appealing the summary judgment order has expired by the time a Rule 58 final order is entered. Ortiz Br. 22-23, 28.

But Ortiz conflates the final order being appealed with the issue being reviewed. The circuit courts are not treating summary judgment denials as "final decisions" triggering jurisdiction under § 1291. To be sure, courts on occasion have used the word "jurisdiction" in this regard, see, e.g., *Banuelos*, 382 F.3d at 902, and that loose word choice might explain Ortiz's confusion. "[J]urisdiction" is "a word of many, too many, meanings," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998) (internal quotations omitted), and courts are often "less than meticulous" in its use, *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). What the courts mean, however, is that § 1291 jurisdiction exists because of the final judgment

entry under Rule 58, and that the issue raised at summary judgment is preserved for appellate review. E.g., *Ruyle*, 44 F.3d at 841 ("Conoco clearly preserved for appeal the collateral estoppel issue" by moving for summary judgment); *Lenz v. Dewey*, 64 F.3d 547, 550 (10th Cir. 1995) ("Because the court's denial of their qualified immunity defense turned solely on issues of law, *error has been preserved for appeal*.") (emphasis added).

Ortiz's conflation of the final order being appealed with the issue on review also explains why many of her other arguments are misguided. For example, she argues that Respondents' appeal is time-barred because they did not appeal the summary judgment denial within thirty days. Ortiz Br. 28, 30. But Respondents did not appeal the summary judgment denial; they appealed the final judgment, and they raised qualified immunity as an issue for review. Ortiz also asserts that Respondents' approach "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)," and expands the collateral-order doctrine by effectively declaring summary judgment denials "final" under § 1291. Ortiz Br. 25-26. But this argument, too, conflates the order on appeal with the legal issue being appealed. And as explained below, it is Ortiz's proposed rule that will increase the number of collateral-order appeals by forcing defendant officials to take protective appeals whenever a qualified-immunity defense is denied at summary judgment.

Ortiz also argues—and two circuits agree—that distinguishing between legal and factual claims would require the courts "to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'legal' or 'factual.'" *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995); accord *Varghese*, 424 F.3d at 423 (4th Cir.); *Black v. J.I. Case*, 22 F.3d 568, 571 & n.5 (5th Cir. 1994). It is true that "the distinction between questions of fact and questions of law" is sometimes "vexing." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). But the line is a familiar one, and, as shown above, at least seven circuits have shown no difficulty managing it in this context.

The distinction between legal and factual claims is critical in related contexts as well. For example, this Court held in *Johnson v. Jones*, 515 U.S. 304, 313 (1995), that a defendant official may not bring a collateral-order appeal from a summary judgment denial of her qualified-immunity defense if the denial "determines only a question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial." Instead, *Johnson* explained, *Mitchell* allows collateral-order appeals only on "issues of law." *Id.* at 317. Because the defendant officials in *Johnson* were contesting an issue of fact—whether they were involved in an assault on the plaintiff—they could not take an immediate appeal from the summary judgment denial. *Id.* at 313.

The *Johnson* "law-fact divide" has been settled law for fifteen years, and although it may occasionally involve close questions, it has provided a workable rule for the mine run of qualified-immunity

cases. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009). And the same law-fact distinction also may affect the standard of review: In diversity cases, the Sixth Circuit applies a state law standard of review to Rule 50 sufficiency-of-the-evidence challenges, but not to legal questions. See *K & T Enter. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996). Ortiz offers no reason why the law-fact distinction would be less workable in the context of appellate reviewability.

Ortiz further contends that the law-fact distinction is "nonsensical" because "every summary-judgment decision is a question of law." Ortiz Br. 22-23. The short answer to this argument is that *Johnson* resolves it. 515 U.S. at 313. And the law-fact divide for summary judgment decisions makes sense in most cases: A legal issue generally can be resolved "'with reference only to undisputed facts,'" whereas an "evidence sufficiency" claim necessarily will hinge on the facts adduced at trial. *Id.* at 313-14 (quoting *Mitchell*, 472 U.S. at 530 n.10).

Finally, Ortiz argues that treating legal issues denied at summary judgment as preserved for appellate review would undermine district courts' "discretion to deny summary judgment so that a case may proceed to trial." Ortiz Br. 26. But legal issues are about whether the issue is even appropriate for jury determination—that is, whether the prevailing party has a "substantive entitlement" to a judgment in its favor, "no matter how much evidence" the opposing party introduces. *Rekhi*, 61 F.3d at 1318. A district court has no discretion to give the jury an issue that is barred by the statute of limitations, qualified immunity, preemption, or the like. Ortiz's

paean to the civil jury and the Seventh Amendment, Ortiz Br. 4-5, 7-9, is misplaced for the same reason.

Like other legal questions decided during the course of the district court proceedings, then, a legal claim or defense denied at summary judgment may be stored up by the losing party and raised on appeal. Respondents properly adhered to those procedures here.

3. Respondents preserved their qualified-immunity defense at summary judgment and throughout the district court proceedings.

Respondents amply preserved qualified immunity as an issue for appellate review. In the district court, Respondents raised the defense at summary judgment. They also moved for judgment as a matter of law at the close of Ortiz's case and again at the close of all the evidence, arguing that no constitutional violation occurred. J.A. 3, 20. All parties were therefore well aware that qualified immunity was a contested issue in the case.

On appeal, all parties again treated qualified immunity as an issue preserved for review. Respondents' notice of appeal cited the final judgment, among other orders. J.A. 22-23. Then, in their opening brief, Respondents identified one of the "Issues Presented for Review" as "[w]hether Defendants are protected by qualified immunity." Respondents' 6th Cir. Br. 2. In response, Ortiz did not contend that Respondents waived their qualified-immunity defense; instead, she noted that "the doctrine of qualified immunity was addressed by the parties in the respective Motion[s] for Summary

Judgment," and she maintained that the district court's ruling was correct. Ortiz 6th Cir. Br. 27-28. Ortiz's only waiver argument concerned a different claim: She asserted that Respondents had waived their argument that Bright was entitled to summary judgment because Ortiz never opposed her motion. *Id*. at 14-19.

The Sixth Circuit likewise treated qualified immunity as an appropriate issue for appellate review. The court acknowledged that "courts normally do not review the denial of a summary judgment motion after a trial on the merits," but it said that "denial of summary judgment based on qualified immunity is an exception to this rule." Pet. App. 8a. The Sixth Circuit's phrasing might have been imprecise, but its meaning is clear from what the court did: It looked at the record as a whole in reviewing the preserved legal *issue* of qualified immunity. *Id*. at 2a-5a, 9a-12a.

It was appropriate for the Sixth Circuit to treat Respondents' defense as preserved for appellate review because the immunity claims here were legal in nature. Generally the question "[w]hether a government official is entitled to qualified immunity is a legal question for resolution by the court, not a jury." *Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008). Of course, some qualified-immunity claims hinge on factual questions that can be resolved only on the basis of trial evidence, see *Johnson*, 515 U.S. at 313, but Ortiz has never argued that Respondents' qualified-immunity defense was fact-based rather than law-based. On the contrary, she obtained certiorari review on the assumption that Respondents could have taken a collateral-order

appeal, which they could do only if their defense was law-based. See Ortiz Cert. Pet. 7 (citing *Johnson*, 515 U.S. at 304); *id.* at 15, 20-21.

Ortiz is right to assume that each Respondent's immunity defense is law-based. First, as to Bright, the merits question is whether she offended due process by placing Ortiz in solitary confinement during the course of the investigation. Pet. App. 11a. The Sixth Circuit correctly explained that this Court's decision in *Sandin* "doom[ed]" Ortiz's due process claim by holding that "'discipline in segregated confinement did not present the atypical, significant deprivation in which a State might conceivably create a liberty interest.'" Pet. App. 11a (quoting *Sandin*, 515 U.S. at 486). In other words, Ortiz did not have a clearly established right not to be placed in solitary confinement, see *Lekas v. Briley*, 405 F.3d 602, 607-08 (7th Cir. 2005), and no facts adduced at trial could affect that legal conclusion. Moreover, to the extent Ortiz argued on appeal that Bright imposed solitary confinement for an unconstitutionally retaliatory purpose, the Sixth Circuit construed Ortiz's argument as a First Amendment retaliation claim and held that she was raising a "new theory" not pressed below. Pet. App. 12a. Ortiz did not challenge that holding by presenting it as a question in her petition for certiorari. See Sup. Ct. R. 14.1(a).

Second, as to Jordan, the Eighth Amendment question is whether she showed "deliberate indifference" to a substantial danger posed to Ortiz. Pet. App. 9a; see *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (outlining the deliberate-indifference standard). That question can be resolved as a matter

of law without resort to disputed factual issues. See, e.g., *Hernandez v. Tex. Dep't of Protective & Reg. Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (finding qualified immunity on collateral-order appeal where "the only issue on appeal [was] whether the social workers' conduct constituted deliberate indifference"). And it was here: The Sixth Circuit concluded that the steps Jordan took "were a reasonable approach to the risk at hand," and "Jordan's conduct d[id] not rise to the level of deliberate indifference." Pet. App. 10a-11a.

The Sixth Circuit's review of Respondents' qualified-immunity defense was therefore unremarkable. The appeals court treated the legal defense as properly preserved by Respondents' summary judgment motion—the same way other courts have treated claims such as preemption and issue preclusion. And Respondents' decision not to take a collateral-order appeal from the summary judgment denial does not affect the analysis.

B. Respondents did not forfeit their qualified-immunity defense by forgoing a collateral-order appeal.

The Court can resolve this case by simply explaining, as laid out above, that Respondents' summary judgment motion preserved their qualified-immunity defense for appeal. But Ortiz obtained this Court's review based on a key premise: that the immunity defense is unreviewable because Respondents did not take a collateral-order appeal after their summary judgment motion failed. Ortiz's question presented makes this premise explicit; it depends on whether "the party chose not to appeal the order before trial." Ortiz Br. i. This assumption

was also critical to Ortiz's certiorari petition, see Ortiz Cert. Pet. 7, 15, 20-21, and is implicit in her merits brief, see Ortiz Br. 15, 30, even though she now appears to admit that qualified immunity is not necessarily lost by failure to take a collateral-order appeal, see *id*. at 29 & n.3.

The parties agree that Respondents could have taken a collateral-order appeal after they were denied qualified immunity at summary judgment. See *Mitchell*, 472 U.S. at 530 ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."). "But 'could have' is not 'should have.'" *Rivero v. City & County of San Francisco*, 316 F.3d 857, 863 (9th Cir. 2002). A wealth of case law establishes that a qualified-immunity defense is not waived by the decision not to appeal it immediately.

1. It is well settled that collateral-order appeals are a right, not a duty.

To the extent collateral-order appeals resemble interlocutory appeals authorized by statute, it is beyond dispute that such appeals are "permissive, not mandatory." *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976). In *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980), a federal statute—28 U.S.C. § 1252—allowed interlocutory appeals from decisions holding a federal law unconstitutional.[1] This Court held that the statute's "permissive

[1] Congress repealed 28 U.S.C. § 1252 as part of the reforms that reduced this Court's mandatory docket. Pub. L. No. 100-352, 102 Stat. 662 (1988).

language . . . plainly did not require the Government to appeal before final judgment was entered." *Id.* The ability to take an interlocutory appeal from an injunction order under 28 U.S.C. § 1292(a)(1) is similarly permissive: "[A] party may forgo an interlocutory appeal and present the issue to [the appeals] court after final judgment." *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 796 (6th Cir. 1998); *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 468 (9th Cir. 1989); 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2962, p. 433 (2d ed. 1995); 18 *Moore's Federal Practice—Civil* § 134.24 (3d ed. 2008). "When an appeal is not taken, the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment." *Baldwin*, 540 F.2d at 1364. This principle is so entrenched that the Seventh Circuit has called "'frivolous' an argument that failure to take an interlocutory appeal forfeits the litigant's position." *In re UAL Corp.*, 468 F.3d 444, 453 (7th Cir. 2006) (citation omitted).

Collateral-order appeals on qualified-immunity grounds are equally permissive, not mandatory. The circuits are in broad agreement that "public officials who could appeal before trial to present claims of official immunity need not do so." *Id.* at 453-54; see, e.g., *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 492-93 (3d Cir. 1997); *Kiser v. Garrett*, 67 F.3d 1166, 1169 (5th Cir. 1995); *Purtell*, 527 F.3d at 622 n.2 (7th Cir.); *McIntosh v. Weinberger*, 810 F.2d 1411, 1431 n.7 (8th Cir. 1987), *vacated and remanded on other grounds sub nom. Turner v. McIntosh*, 487 U.S. 1212 (1988); *DeNieva v. Reyes*, 966 F.2d 480, 484 (9th Cir. 1992); *Medina v. Bruning*, 56 F. App'x 454, 454-55 (10th Cir. 2003); see also 15A Wright, Miller &

Cooper, *Federal Practice and Procedure* § 3911, p. 359 & n. 78 (2d ed. 1992) (citing cases). Simply put, "the rule *permitting* a defendant to take an interlocutory appeal after a denial of a motion based on qualified immunity is not a rule *requiring* the defendant to take that appeal." *Rivero*, 316 F.3d at 863 (emphasis added).

2. Sound reasons support the rule that collateral-order appeals are not mandatory.

This widely accepted rule is sound because it vindicates the purposes underlying the qualified-immunity doctrine. The doctrine confers a limited immunity because "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The "ultimate purpose of qualified immunity is to protect the state and its officials from overenforcement of federal rights." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997).

To that end, the qualified-immunity defense provides two shields for defendant officials who do not unreasonably violate clearly established rights: It "is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Iqbal*, 129 S. Ct. at 1945 (quoting *Mitchell*, 472 U.S. at 526). In other words, "the right not to pay damages and the right to avoid trial are distinct aspects of immunity." *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). The right to appeal collateral orders exists to protect the

latter privilege—the "right not to stand trial." *Mitchell*, 472 U.S. at 527 (emphasis omitted). And it stems from a different source than qualified immunity itself: Whereas the qualified-immunity doctrine "has its source in a federal statute (§ 1983)," "the right to immediate appellate review of that ruling in a federal case" is a "federal procedural right" that "has its source in § 1291." *Fankell*, 520 U.S. at 919, 921. The *Fankell* Court accordingly held that defendant officials do not have a right under § 1983 to an interlocutory appeal in *state* court from a denial of qualified immunity. *Id.* at 920-22. Instead, the qualified-immunity claim "will be reviewable" on appeal from the trial court's final judgment, and "the postponement of the appeal until after final judgment will not affect the ultimate outcome of th[e] case." *Id.* at 921. And it is that outcome—whether or not the official is liable for damages—that ordinarily matters most to the defense.

Practical considerations buttress these doctrinal reasons for making such appeals optional, for a defendant may have "good reasons" to "elect to not appeal before trial." *Matherne v. Wilson*, 851 F.2d 752, 756 (5th Cir. 1988). To begin with, appeals in federal courts can be resource-intensive, increasing the litigation costs to both parties. See *Abel v. Miller*, 904 F.2d 394, 396 (7th Cir. 1990). They can also take a long time. In 2009, the median time period for a federal appeal—from filing of the notice of appeal until disposition—was 12.2 months. Federal Court Management Statistics, available at http://www.uscourts.gov/cgi-bin/cmsa2009.pl (last visited Aug. 4, 2010). A defendant official might reasonably decide that a short trial is preferable to a

lengthy collateral-order appeal, particularly if she likes her odds at trial. See *Kurowski*, 848 F.2d at 773. Whatever the defendant's reasons for forgoing the immediate appeal, the broader point is that waiving her procedural right under § 1291 should not affect her ultimate immunity from damages liability. See *Matherne*, 851 F.3d at 756.

A rule that would treat the qualified-immunity defense as waived if the defendant does not take a collateral-order appeal also would serve "no interest of either the judicial system or the adverse party." *Kurowski*, 848 F.2d at 773. Such an approach would strain the collateral-order doctrine by "induc[ing] public officials to file more interlocutory appeals" for fear of losing the defense, *id.*, thereby "turn[ing] the policy against piecemeal appeals on its head," *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 236 (5th Cir. 1982); see also *Federal Practice and Procedure* § 3911, p. 359.

An increase in the number of collateral-order appeals in the qualified-immunity context would have several adverse effects. First, "[s]uch appeals come at great cost to the judicial system because they may prolong litigation and require appellate courts to cope with each case more than once." *Kurowski*, 848 F.2d at 773. After all, "[m]ost interlocutory appeals end in affirmance . . . because district judges dispose correctly of the vast majority of motions," and increased appeals therefore would not result in a significantly greater number of corrected errors. *Id.* Second, increased collateral-order appeals "could ossify civil rights litigation," because "[a] sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs'

costs, so that some will abandon their cases even though they may be entitled to prevail." *Abel*, 904 F.2d at 396. Third, all litigants are prejudiced by the delay of an appeal if the case returns for trial. "During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined." *Apostol*, 870 F.2d at 1338.

The more sensible rule, then, is the one that *Fankell* suggests and most circuits have long followed: A defendant official does not waive her qualified-immunity defense by saving it for appeal after final judgment rather than taking a collateral-order appeal. Respondents here chose not take a collateral-order appeal and instead to try their luck in a short trial. (The trial lasted less than three full days, from September 12 to 15, 2005.) That decision should not and does not mean that Respondents abandoned their qualified-immunity defense for appeal. As explained above, Respondents raised the defense two more times—at the close of Ortiz's case and at the close of all the evidence. The defense was therefore preserved for appellate review.

C. Respondents were not required to move for judgment as a matter of law under Rule 50(b) in order to preserve their qualified-immunity defense.

Ortiz's final major argument is that, once Respondents decided to forgo a collateral-order appeal, the only way they could preserve their qualified-immunity defense was by moving for judgment as a matter of law after the verdict under Rule 50(b). Ortiz Br. 29. The Court need not reach

this argument because the above analysis suffices to answer the question presented: The immunity defense was preserved for appellate review even though Respondents did not take a collateral-order appeal.

In any event, Ortiz's argument is both wrong and not even properly before the Court. Ortiz abandoned her Rule 50 argument in the court below and did not include it in her question presented. The requirement of a Rule 50(b) filing is a claim-processing rule, not a jurisdictional requirement, and Ortiz forfeited her objection by failing to raise it in the Sixth Circuit. Even if Ortiz's argument is adequately presented, however, it misapprehends basic principles of civil procedure. When legal arguments are at stake and otherwise adequately preserved, Rule 50 motions for judgment as a matter of law are not required. Respondents therefore had no obligation to seek relief under Rule 50(b).

1. Ortiz forfeited her Rule 50 objection.

Relying almost exclusively on *Unitherm*, Ortiz argues that Respondents' immunity claim fails for lack of a Rule 50(b) motion. Ortiz Br. 16-20. *Unitherm* held that a party who files a Rule 50(a) motion for judgment as a matter of law but does not renew the motion under Rule 50(b) may not raise a sufficiency-of-the-evidence challenge on appeal. 546 U.S. at 406. Even assuming that *Unitherm* applies to this case—and, for the reasons explained in Part C.2 below, it does not—Ortiz neither raised this objection in the Sixth Circuit nor included it in her petition for certiorari. She therefore can rely on it now only if the rule is jurisdictional and nonforfeitable. It is not.

Because there are "important distinctions between jurisdictional prescriptions and claim-processing rules," this Court's recent cases have "encouraged federal courts and litigants to 'facilitat[e]' clarity by using the term 'jurisdictional' only when it is apposite." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010) (citations omitted). Specifically, "'[j]urisdiction' refers to 'a court's adjudicatory authority.'" *Id.* at 1243 (quoting *Kontrick*, 540 U.S. at 455). "The label 'jurisdictional'" is reserved "only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455.

Whether a particular rule is jurisdictional depends on what Congress has said about the requirement. "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). "But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516. Thus, "limits enacted by Congress" are jurisdictional, but "court-promulgated rules" are not. *Bowles v. Russell*, 551 U.S. 205, 211-12 (2007); accord *United States v. Mitchell*, 518 F.3d 740, 744 (10th Cir. 2008); *Metro. Life Ins. Co. v. Price*, 501 F.3d 271, 278 (3d Cir. 2007).

Under this approach, the requirement of a Rule 50(b) motion for legal insufficiency of the evidence

claims is nonjurisdictional. The Federal Rules of Civil Procedure are not a congressional enactment; they are promulgated by this Court under authority that Congress delegated in the Rules Enabling Act, 28 U.S.C. § 2072. See generally 4 Wright & Miller, *Federal Practice and Procedure* § 1001 (3d ed. 2002). Rule 50 has never been amended by Congress and has no statutory equivalent. See *id.* (explaining that Congress has enacted legislation pertaining to a few other rules, including Rule 4). And "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). Because Congress has not clearly stated that a motion for judgment as a matter of law under Rule 50(b) is a threshold jurisdictional requirement for appeal, then, the rule is a claim-processing provision. A Sixth Circuit decision to the contrary, see *Allison v. City of East Lansing*, 484 F.3d 874, 876 (6th Cir. 2007), is ill-considered and "open to question because of the Supreme Court's subsequent decision in *Bowles v. Russell* . . . that *only* rules that implement statutory limits can be jurisdictional," *Kelley v. City of Albuquerque*, 542 F.3d 802, 817 n.15 (10th Cir. 2008).

Ortiz nevertheless insists that "[t]he *Unitherm* Court . . . made clear that its holding was jurisdictional" because it said "the district court 'was without the power' to grant relief." Ortiz Br. 20 (quoting *Unitherm*, 546 U.S. at 405). But the *Unitherm* Court *never* used the word "jurisdictional" to describe the rule it was clarifying. After cautioning in *Kontrick*, 540 U.S. at 455, and *Eberhart v. United States*, 546 U.S. 12, 18 (2005) (per curiam), that the courts should be more careful in

using the term, the *Unitherm* Court's word choice must be taken as quite deliberate.

Because Rule 50 is nonjurisdictional, its requirements can be forfeited, as they were here. "[A] claim-processing rule . . . even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456. Ortiz waited too long to raise her Rule 50(b) objection because she never presented it to the Sixth Circuit. On the contrary, while she made procedural objections in other respects, she responded to Respondents' immunity claim only on the merits. Ortiz 6th Cir. Br. 14-19, 27-28.

What is more, Ortiz did not properly present her *Unitherm* argument to this Court. She did not include it in her question presented, and her petition for certiorari referenced Rule 50(b) only as a supporting argument. Ortiz Cert. Pet. 8, 18. It was *Respondents* who first cited *Unitherm* when they explained in their brief in opposition that the case applies only to sufficiency-of-the-evidence motions, Cert. Opp. 15. Ortiz then seized on *Unitherm* for the first time in her reply brief at the certiorari stage, when the case suddenly became the centerpiece of her argument. Ortiz Cert. Reply 1-8, 11. At that point, Respondents had no opportunity to note that Ortiz's arguments had dramatically shifted to focus on *Unitherm* rather than the lack of a collateral-order appeal.

Given that Ortiz forfeited any objection she might have levied concerning the absence of a Rule 50(b) motion, the Sixth Circuit was free to evaluate fully Respondents' qualified-immunity defense,

regardless whether such a motion was required. See *Norwood v. Vance*, 591 F.3d 1062, 1067-78 (9th Cir. 2010).

2. No post-judgment motion, including one under Rule 50(b), is required to preserve a legal claim—as opposed to a sufficiency-of-the-evidence claim—for appellate review.

Finally, even if Ortiz did not forfeit her *Unitherm* objection, that objection is baseless. Ortiz insists that a party must file a post-verdict Rule 50(b) motion for judgment as a matter of law on *all* claims, whether legal or factual, in order for the argument to be "considered on appeal." Ortiz Br. 21. But Ortiz's view—founded on a misapprehension of both the nature of Rule 50 and this Court's decision in *Unitherm*—would radically upend long-held understandings of motions practice and appellate jurisdiction.

It is hornbook law that a post-judgment motion is not a prerequisite to appeal. See *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 940 (7th Cir. 2006); 12 *Moore's Federal Practice—Civil* § 59.55 (3d ed. 2005). "The settled rule in federal courts . . . is that a party may assert on appeal any question that has been properly raised in the trial court," 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2818, p. 186 (2d ed. 1995), and "a party has no obligation to raise a legal issue post-trial in order to preserve it for appeal." *Estate of Blume v. Marian Health Ctr.*, 516 F.3d 705, 707 (8th Cir. 2008).

This settled rule is consistent with the limited scope of Rule 50. Motions for judgment as a matter

of law under Rule 50 test whether a "legally sufficient evidentiary basis" exists for a "reasonable jury" to find for the nonmoving party. Fed. R. Civ. P. 50(a). A party may file a Rule 50(a) motion—formerly known as a directed verdict motion—"at any time before the case is submitted to the jury." *Id.* If the motion is denied and verdict goes for the nonmoving party, "the movant may file a renewed motion for judgment as a matter of law"—what used to be called a motion for judgment notwithstanding the verdict—"[n]o later than 28 days after the entry of judgment." Fed. R. Civ. P. 50(b).

Rule 50 motions "thus challenge the sufficiency of the evidence rather than the correctness of questions of law." *Ruyle*, 44 F.3d at 841; see also 9B Wright & Miller, *Federal Practice and Procedure* § 2521, p. 222 (3d ed. 2008) (explaining that Rule 50 motions are designed for "challenges to the sufficiency of the evidence"). So if a party objects to the evidentiary sufficiency of her opponent's case, she must first seek judgment as a matter of law under Rule 50(a) and then renew the motion under Rule 50(b) after the verdict. *Hertz v. Woodbury County*, 566 F.3d 775, 780-81 (8th Cir. 2009). A party may also raise a purely legal issue in a Rule 50 motion, but she does not have to. See *K & T Enter.*, 97 F.3d at 175. Rather, "where the trial court's denial of a summary judgment motion is not based on the sufficiency of the evidence, but on a question of law, the rationale behind Rule 50 does not apply, and the need for such an objection is absent." *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004).

A range of legal issues "may be raised on appeal without making a Rule 50 motion as a foundation." 9B Wright & Miller, *Federal Practice and Procedure* § 2536, p. 542 (3d ed. 2008). "For example, when a party has been denied summary judgment, the failure to move for judgment as a matter of law will not preclude that party from seeking appellate review of the denial of summary judgment." *Id.* at 543 (citing *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226 (10th Cir. 1995)). Thus, "[a] party who properly raises an issue of law before the case goes to the jury 'need not include the issue in a motion for a directed verdict in order to preserve the question on appeal.'" *Ruyle*, 44 F.3d at 841 (quoting *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987)).

Unitherm does not change this hornbook rule, because the decision, like Rule 50 itself, relates only to motions challenging the sufficiency of the evidence. From the outset of the opinion, the *Unitherm* Court spoke of the requirements for parties who "believe[] the evidence is legally insufficient to support an adverse jury verdict" and the ability of appeals courts "to review the sufficiency of the evidence" absent a Rule 50(b) motion. 546 U.S. at 396. This explicit focus on evidentiary insufficiency permeated the Court's recitation of the facts, *id.* at 398, its analysis of the applicable legal principles, *id.* at 399, 400, 402 n.4, 404-06, and its statement of the holding, *id.* at 406 ("[S]ince respondent failed to renew its preverdict motion as specified in Rule 50(b), there was no basis for review of respondent's sufficiency of the evidence challenge in the Court of Appeals."). It was also implicit in the Court's principal rationale—the need for "postverdict

input" from the trial judge who "'saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'" *Id*. at 401 & n.3 (quoting *Cone v. W. Va. Pulp & Paper Co*., 330 U.S. 212, 216 (1947)). This reasoning applies to claims founded on the evidence, but not to legal claims.

For these reasons, lower courts and a prominent treatise have concluded that *Unitherm* requires renewal under Rule 50(b) for insufficiency of the evidence claims only, not for legal claims. See *Fuesting*, 448 F.3d at 939; *Metcalf v. Bochco*, 200 F. App'x 635, 637 n.1 (9th Cir. 2006); see also 9B Wright & Miller, *Federal Practice and Procedure* § 2537, p. 619 (3d ed. 2008) (calling this reading of *Unitherm* "eminently appropriate"). If it were otherwise, *Unitherm* would have called into question "a right of appellate review that is stated in the Federal Rules of Evidence, manifested in the precedents of numerous court of appeals decisions, and observed in the leading treatises." *Fuesting*, 448 F.3d at 941.

In the wake of *Unitherm*, then, the rule remains that "[a] renewed motion for judgment as a matter of law under Rule 50(b) is not a condition precedent to appeal from a final judgment." 9B Wright & Miller, *Federal Practice and Procedure* § 2540, p. 654 (3d ed. 2008).

> If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter

> of law or a motion for a new trial, although it always is a better practice for the parties to give the trial court an opportunity to correct its errors in the first instance by making either or both of the post-verdict motions.

Id. at 654-44. In the qualified-immunity context, this rule echoes the *Johnson* divide between fact- and law-based summary judgment denials, because the former category raises a sufficiency question—"whether the evidence could support a finding that particular conduct occurred"—while the latter does not. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

Here, no one disputes that Respondents' qualified-immunity defense was law-based; in fact, Ortiz obtained this Court's review on that very assumption. Ortiz Cert. Pet. 7, 15, 20-21. The merits question with respect to both Respondents was not whether certain conduct occurred, but rather whether the conduct that did occur crossed a constitutional line. See *Behrens*, 516 U.S. at 313. And Respondents duly preserved their legal defense by moving for summary judgment. Although not required to do so, they gave the district court an opportunity to reconsider its ruling by raising their qualified-immunity claim again in two Rule 50(a) motions. Perhaps, as Wright and Miller advise, it would have been better practice also to file a Rule 50(b) motion, but Respondents were not required to do so in order to raise the issue on appeal.

Ortiz argues that the absence of a Rule 50(b) motion on a legal claim deprives the verdict winner of other procedural options, including a voluntary dismissal under Rule 41. Ortiz Br. 13. Once the

defendant has answered the complaint, however, a plaintiff cannot voluntarily dismiss without the defendant's stipulation or a court order, neither of which is likely after judgment has been entered. Fed. R. Civ. P. 41. And to the extent Ortiz's larger point is a lack of notice, Ortiz Br. 25, that objection fails given that the legal issue has been presented at summary judgment. See *Rekhi*, 61 F.3d at 1318.

Ortiz's view—that Rule 50(b) motions are required on *all* issues—finds no grounding in the text or purpose of either Rule 50 or *Unitherm*. In fact, taken to its logical conclusion, Ortiz's position is that the Sixth Circuit did not have jurisdiction over *any* claim in this case because there was no Rule 50(b) motion. That untenable position runs contrary to the wealth of settled authority discussed above.

CONCLUSION

The Court should affirm the decision of the Sixth Circuit.

Respectfully submitted,

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