

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NEIL DUPREE,)
)
) Petitioner,)
)
) v.) No. 22-210
)
KEVIN YOUNGER,)
)
) Respondent.)

Pages: 1 through 64

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5 v.) No. 22-210

6 KEVIN YOUNGER,)

7 Respondent.)

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9

10 Washington, D.C.

11 Monday, April 24, 2023

12

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

16

17 APPEARANCES:

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

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

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Tutt.

ORAL ARGUMENT OF ANDREW T. TUTT

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

25 I welcome the Court's questions.

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

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

20 Then your motion is purely legal.

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

1 stage.

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

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

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

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

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

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

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

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

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

1 investigation point that you think is preserved?

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

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

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

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

18 MR. TUTT: But --

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

1 judgment as a matter of law.

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

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

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

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

1 don't.

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

10 MR. TUTT: Well -- well, Your Honor, I
11 promise you picked the --

12 JUSTICE GORSUCH: I know it's not you,
13 counsel.

14 (Laughter.)

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

19 So --

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

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

1 excuse.

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

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

19 Or, if the jury accepts your
20 affirmative defense, I can then enter judgment
21 as a matter of law for the other side at that
22 point, and then all the evidence is in the
23 record, it's all fully complete for the court of
24 appeals, so the court of appeals can decide my
25 -- my JMOL ruling after trial, and if it rejects

1 it, it's got the full record available to it,
2 and it can affirm the jury verdict and we don't
3 have to go try it again.

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

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

15 JUSTICE GORSUCH: It was a denial of
16 summary judgment.

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

18 JUSTICE GORSUCH: It wasn't a grant of
19 summary judgment.

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

25 JUSTICE JACKSON: But, Mr. Tutt, why

1 -- why isn't it as easy? I -- I -- I mean, I --
2 I'm surprised by your answer to that question
3 because I'm looking at the district judge's
4 order, and it is clear from the order that the
5 court said he did not need to resolve disputes
6 concerning Younger's adherence to the process.

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

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

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

21 But the preceding paragraph is not
22 listing facts that are in dispute. And I want
23 to make very clear we don't dispute anything
24 that -- that Mr. Younger says he did or happened
25 to him. We don't dispute any facts in this

1 case. Nothing is disputed.

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

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

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

22 MR. TUTT: No, Your Honor, I -- I --
23 I -- I accept the help. I think you're --
24 you're agreeing with me that you would never
25 raise this at trial because the judge has

1 already said this claim is over, it's done, I
2 ruled on it, there's no facts to put to the
3 jury.

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

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

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

1 exhaustion defense, you want a remand to trial,
2 a second trial on exhaustion, right?

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

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

9 MR. TUTT: Yes, Your Honor, that --
10 that's their claim.

11 JUSTICE GORSUCH: And so -- so --

12 MR. TUTT: And so --

13 JUSTICE GORSUCH: -- the ultimate
14 outcome would be a trial on exhaustion?

15 MR. TUTT: Yes. And --

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

25 MR. TUTT: Let me give you -- let me

1 give you --

2 JUSTICE GORSUCH: Right?

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

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

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

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

23 JUSTICE GORSUCH: No, I understand
24 that point.

25 MR. TUTT: And so -- so --

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

3 MR. TUTT: -- to --

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

7 MR. TUTT: Your Honor --

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

13 MR. TUTT: Your Honor, the --

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

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

23 JUSTICE GORSUCH: We'll never know
24 what they would have done.

25 (Laughter.)

1 MR. TUTT: Well, Your -- Your Honor, I
2 just don't know of a -- of a situation where
3 this would actually happen, where you would try
4 to press a foreclosed or a doomed claim.

5 JUSTICE SOTOMAYOR: Can I -- can I
6 take you --

7 MR. TUTT: Yes, Your Honor.

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

14 MR. TUTT: Yes, Your Honor.

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

21 MR. TUTT: Yes, Your Honor.

22 JUSTICE SOTOMAYOR: Now I haven't
23 gotten into this part of the record, but maybe
24 your -- the other side will correct me or -- or
25 not, but I don't know if those two other

1 prisoners' situation was identical to this
2 prisoner, whether the IAU issues involved in
3 that proceeding -- in that ongoing proceeding
4 grievance were the same as the IAU.

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

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

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

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

1 -- the collateral order cases.

2 And so why is that important? It's
3 important to the other prisoners because Mr.
4 Younger doesn't dispute the fact that those
5 other prisoners were able to obtain relief by
6 going through the process even though there was
7 a pending IIU investigation.

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

16 JUSTICE SOTOMAYOR: No, I beg --

17 MR. TUTT: -- as a matter of law, but
18 --

19 JUSTICE SOTOMAYOR: -- I beg your
20 pardon.

21 MR. TUTT: Yes, Your Honor.

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

1 Yes, they went through, but there's no
2 concession that they went through on the issue
3 that -- that was at -- in question here, whether
4 or not an assault had happened.

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

11 JUSTICE SOTOMAYOR: Alright. Assume
12 that I disagree --

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

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

19 I'm -- I -- so assume my assumption.

20 MR. TUTT: Yes, Your Honor. It -- you
21 know, what I will say is the bigger -- the
22 bigger picture of this case, beyond the facts of
23 this case, are that at summary judgment, when
24 the two parties join issue on undisputed facts,
25 there -- it is a question that is teed up only

1 for the judge to resolve.

2 And when the judge resolves it against
3 you and you don't dispute the relevant fact --
4 so even saying that there is that subsidiary
5 fact dispute about whether there are similarly
6 situated prisoners, that could be resolved on
7 remand. So, if -- if -- if Mr. Younger is
8 correct, we -- we still lost because the IIU
9 investigation was undertaken. And so that's
10 still a purely legal --

11 JUSTICE BARRETT: Mr. --

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

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

19 I mean, your friend on the other side
20 says you shifted arguments on appeal anyway, so
21 you might have forfeited it.

22 MR. TUTT: Yes, Your Honor.

23 JUSTICE BARRETT: Why should we decide
24 any of that?

25 MR. TUTT: We have a tricky -- tricky

1 task on remand, but we -- but you can obviously
2 decide the QP for us and let us go and -- and
3 meet our burden on remand in the Fourth Circuit.

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

11 JUSTICE BARRETT: But we don't have to
12 decide that, right?

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

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

25 MR. TUTT: Yeah -- Your Honor, yes,

1 you can rule for us. As long as it says
2 reversed at the bottom, we --

3 (Laughter.)

4 JUSTICE BARRETT: You'll take
5 anything?

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

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

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

1 simple.

2 And so the idea that you'll have to
3 try a counterfactual fake trial on a foreclosed
4 issue that the judge has already said you lose
5 on really would be very, very difficult for
6 counsel to actually know that they've actually
7 preserved their issue.

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

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

23 MR. TUTT: So let me give you -- well,
24 let me give you three reasons why that -- it's a
25 little bit more difficult than that. And first

1 is that this rule that you have to re-raise this
2 issue in a JMOL, it goes against the grain of
3 what the structure of the final judgment rule is
4 for every other kind of interlocutory order.

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

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

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

25 And it's not as simple -- I mean, if

1 you were to adopt Mr. Younger's rule, it is not
2 as simple as adding one line apparently.
3 Apparently, you have to come to the court. You
4 have to try to get the evidence in. The judge
5 will say, what are you doing? Why are you
6 trying to try this issue? I told you you
7 already lose. You'll have to figure out exactly
8 how you can do it in a way where everybody
9 agrees, okay, I'm not going to say that you
10 waived this issue on appeal if you don't
11 actually try to try it.

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

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

23 MR. TUTT: And even if it's easy --
24 and I'll -- I'll grant you that, you know, if
25 this Court were to say all you've got to do is

1 add a line, it would be relatively easy, we --
2 we'd be able to do it -- it still has some cost.

3 CHIEF JUSTICE ROBERTS: You can finish
4 your answer.

5 MR. TUTT: Thank you, Your Honor.

6 It still has some cost. And any cost
7 for a rule that truly has no purpose is -- is --
8 is too high a cost.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas?

11 Justice Alito?

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

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

23 JUSTICE ALITO: But, right now, it's
24 not clear?

25 MR. TUTT: It's not clear. It's not

1 in the rules.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 JUSTICE SOTOMAYOR: No.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?
6 Justice Kavanaugh?

7 Justice Jackson?

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

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

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

1 Rule 50, that they just weren't going to do it,
2 is that --

3 MR. TUTT: Yes, Your Honor. Yes,
4 that's exactly right.

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

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

16 JUSTICE JACKSON: All right.

17 MR. TUTT: We just don't -- know
18 what's gained.

19 JUSTICE JACKSON: Thank you.

20 MR. TUTT: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Saharia.

24

25

1 ORAL ARGUMENT OF AMY M. SAHARIA
2 ON BEHALF OF THE RESPONDENT
3 MS. SAHARIA: Mr. Chief Justice, and
4 may it please the Court:

5 When a court denies summary judgment
6 even on a question of law, it delays final
7 adjudication of a claim or defense until trial.
8 The claim or defense remains live. The only way
9 to finally adjudicate a claim or defense at
10 summary judgment is to grant summary judgment to
11 the moving or to the non-moving party.

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

19 Petitioner's attempt to avoid this
20 outcome by distinguishing between evidentiary
21 sufficiency arguments and questions of law has
22 no basis in the rules, and it has nothing else
23 commending it either.

24 A clear line for issue preservation
25 benefits litigants, district courts, and

1 appellate courts. Petitioner's rule, by
2 contrast, requires parties to predict in advance
3 whether an appellate court will deem an issue
4 legal or factual. His rule creates complexities
5 when an opinion is unclear as to whether it
6 rests on legal or factual grounds or both.

7 And in cases where factual disputes
8 foreclose judgment as a matter of law, like this
9 case, it would give parties a new trial even if
10 they did not follow any of the usual mechanisms
11 for obtaining a new trial.

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

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Would your view be

1 any different if the court had granted summary
2 judgment on exhaustion in your favor?

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

5 JUSTICE THOMAS: Why is that?

6 MS. SAHARIA: Because a grant of
7 summary judgment is a final adjudication of a
8 claim or defense, and it removes that claim or
9 defense from the case for purposes of trial.

10 JUSTICE THOMAS: Well, why wouldn't
11 the Petitioner simply argue that what you're
12 saying now is the other side of the coin, that
13 if it was denied Petitioner, then it was
14 actually in effect granting summary judgment to
15 you?

16 MS. SAHARIA: Because the rules have a
17 clear mechanism for a district court to decide
18 to do that, to decide to grant summary judgment
19 in favor of the non-moving party. It's Rule
20 56(f).

21 The district court did not do that
22 here. And that is an important choice. If a
23 district court had done that at that time, that
24 would have meant the district court was then
25 taking the risk that if it was reversed on

1 appeal, there would need to be a new trial on
2 the remaining factual disputes relevant to
3 exhaustion.

4 But, because the court did not take
5 that affirmative step of granting summary
6 judgment in our favor under Rule 56(f), it
7 simply kicked the can down the road to trial on
8 this claim or this defense.

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

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

1 JUSTICE KAGAN: So just to clarify,
2 you are saying that he needs to do something
3 more than have a sentence in his Rule 50 motion,
4 that he has to come forward at trial with his
5 evidence, with, like, I want to try this
6 affirmative defense and put it to the district
7 court at that time?

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

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

23 JUSTICE KAGAN: I mean, isn't Mr. Tutt
24 right that in a case like this, the court is
25 going to look at the person and say: What are

1 you talking about, I already ruled against you?

2 MS. SAHARIA: I -- I -- I don't think
3 the district court necessarily would have come
4 to that conclusion at all. We don't know
5 because he didn't ask the court.

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

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

19 CHIEF JUSTICE ROBERTS: Counsel --

20 MS. SAHARIA: It might not have.

21 CHIEF JUSTICE ROBERTS: -- you know,
22 you said the judge just might change his mind,
23 and I'm sure there are recorded instances of
24 that happening.

25 MS. SAHARIA: There are, Your Honor.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: But -- but,
3 surely, it is in a distinct minority of cases.
4 And your rule adds a lot of complexity to
5 address that small minority, and I wonder if
6 that makes sense.

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

23 JUSTICE KAGAN: I take it --

24 JUSTICE SOTOMAYOR: The problem --

25 JUSTICE KAGAN: -- this position puts

1 a lot of pressure on the district court to allow
2 you to put on whatever you want to put on,
3 right?

4 I mean, we couldn't really give you
5 the legal ruling that you want without district
6 courts feeling, okay, I guess the rules have
7 changed, I have to allow people to put on
8 evidence of a whole batch of things that I
9 think, you know, can -- I have and I can dismiss
10 and I have dismissed as a matter of law.

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

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

1 want to litigate those remaining factual
2 disputes.

3 Defendants in this situation who have
4 a procedural defense like exhaustion, a weak one
5 like this defense, oftentimes don't want to try
6 that defense to a jury because it detracts from
7 the credibility of their defense on the merits.

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

10 MS. SAHARIA: No, I -- I agree that
11 there is such a thing.

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

21 What is the point of saying that
22 the -- the party that was unsuccessful at
23 summary judgment has to raise the issue again?

24 MS. SAHARIA: The point is that the --
25 the parties' arguments might change that are --

1 they may have better or -- better or different
2 arguments to convince a district court at that
3 time.

4 And the district court might just
5 think about that legal issue differently after
6 sitting through the trial. When a -- when a
7 court denies summary judgment --

8 JUSTICE ALITO: Well, it might just
9 have a change of heart. What -- what -- if --
10 if nothing that occurs at trial has a bearing on
11 this purely legal issue --

12 MS. SAHARIA: I think, in --

13 JUSTICE ALITO: -- anything -- is
14 there anything to prevent the district court
15 from revisiting what the district court did
16 earlier if it believed, well, I thought about
17 this some more and I was wrong or I've done more
18 research on it?

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

25 JUSTICE SOTOMAYOR: I -- I'm sorry.

1 Let's go back to when a district court will
2 change its mind. In my experience, it's when
3 something new is brought to its attention,
4 whether it's a decision by another court or it's
5 a new factual situation or answer.

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

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

20 Are you disputing that recitation by
21 me?

22 MS. SAHARIA: No. That was the basis
23 of the district court's opinion.

24 JUSTICE SOTOMAYOR: All right. So
25 that is not dependent on facts. And what do you

1 think would have caused the district court to
2 change its mind --

3 MS. SAHARIA: Sure. If --

4 JUSTICE SOTOMAYOR: -- on that legal
5 issue if it had been raised again at -- at -- at
6 -- before the conclusion of the trial or -- and
7 after? Go ahead.

8 MS. SAHARIA: If Petitioner had come
9 forward with evidence that prison officials tell
10 inmates that notwithstanding the fact that the
11 warden is required to dismiss their complaint
12 and the -- and the --

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

20 MS. SAHARIA: But they would not have
21 been at trial if they had --

22 JUSTICE SOTOMAYOR: Yeah, but --

23 MS. SAHARIA: -- presented their
24 defense.

25 JUSTICE SOTOMAYOR: -- that -- that's

1 really not the issue before us. The issue
2 before us is whether -- and what they -- whether
3 they can appeal. What harm does that do to you?

4 MS. SAHARIA: What harm that does to
5 us is that if Petitioner had raised this defense
6 at trial, we would have asked the district court
7 to put on our evidence with respect to the
8 issues of thwarting and opacity, which are
9 highly fact-bound.

10 JUSTICE SOTOMAYOR: But why? Why?
11 The district court had already ruled and said
12 those were irrelevant to the trial. Why would
13 the district court even let you do that when it
14 says, on the legal issue, I disagree with you?

15 MS. SAHARIA: To --

16 JUSTICE SOTOMAYOR: The initial --

17 MS. SAHARIA: -- to avoid a second
18 trial, if a district court got that legal
19 question wrong.

20 JUSTICE SOTOMAYOR: I -- I have grave
21 doubts that a district court would have thought
22 that a separate trial on exhaustion should stop
23 it from ruling on the main game, which was
24 whether or not this prisoner had been assaulted
25 --

1 JUSTICE JACKSON: And why wouldn't
2 that evidence --

3 JUSTICE SOTOMAYOR: -- on the order of
4 prison officials.

5 JUSTICE JACKSON: -- why wouldn't the
6 evidence you're talking about or that
7 presentation be happening in the context of the
8 initial summary judgment motion? I don't
9 understand why -- I mean, summary judgment
10 requires the presentation of evidence as well.

11 So, to the extent they were making
12 arguments about exhaustion at summary judgment,
13 then whatever evidence they had related to that
14 they would have put on, and you would have put
15 on evidence in response to it.

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

19 MS. SAHARIA: Well, exhaustion is an
20 affirmative defense. And if the court -- of
21 course, if the court had not decided anything at
22 summary judgment, there would have been a trial
23 --

24 JUSTICE JACKSON: Let me ask it this
25 way.

1 MS. SAHARIA: -- on exhaustion --

2 JUSTICE JACKSON: What if -- what if
3 the very same evidentiary presentation that
4 you're saying could have happened at trial
5 actually took place beforehand in the context of
6 the summary judgment motion?

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

16 Would it still be your argument that
17 they hadn't preserved it, that they would have
18 had to try to put that same evidence in at
19 trial?

20 MS. SAHARIA: I'm not -- is -- is Your
21 Honor asking if the judge were the one sitting
22 as a fact-finder or whether the -- the judge is
23 just --

24 JUSTICE JACKSON: Well, at the summary
25 judgment stage, the parties come forward with

1 evidence. This is pretrial.

2 MS. SAHARIA: Correct. That happened
3 in this case.

4 JUSTICE JACKSON: Okay. So I guess
5 what I'm saying is you seem to suggest that the
6 problem is that the judge did not have a chance
7 or that evidence related to this wasn't
8 presented at trial, and so the reason why we --
9 this isn't preserved is because that opportunity
10 to have the jury weigh in on the evidence was
11 not allowed in this situation.

12 Am I wrong about the problem that
13 you're --

14 MS. SAHARIA: That is one problem.
15 The fundamental problem here is that the
16 district court denied summary judgment and did
17 not finally adjudicate this defense, and it was
18 incumbent on the defendant as a result to raise
19 it at trial.

20 JUSTICE BARRETT: Counsel, I --

21 JUSTICE JACKSON: Go ahead.

22 MS. SAHARIA: Sorry.

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

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

2 JUSTICE BARRETT: Am I reading that
3 correctly?

4 MS. SAHARIA: That's correct, Your
5 Honor. And to the extent that Petitioner
6 suggests that it's well-established that
7 12(b)(6) denials are reviewable on appeal,
8 that's just not correct.

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

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

22 Petitioner cited not one case where
23 any court of appeals has reviewed the denial of
24 a 12(b)(6) motion. He points in his reply brief
25 to this Court's decision in the Hughes Aircraft

1 case. But, there, the question was one of
2 subject matter jurisdiction. And, of course,
3 subject matter jurisdiction's always reviewable
4 --

5 JUSTICE GORSUCH: Counsel --

6 MS. SAHARIA: -- on appeal.

7 JUSTICE GORSUCH: -- counsel, we used
8 to live in a world of trials. Now nobody wants
9 to try -- everybody wants to do everything on
10 the papers.

11 MS. SAHARIA: I go to trial, Your
12 Honor.

13 JUSTICE GORSUCH: I -- I miss it too.
14 It's a lot of fun, isn't it?

15 MS. SAHARIA: It sure is.

16 JUSTICE GORSUCH: Yeah.

17 JUSTICE SOTOMAYOR: More fun than
18 here.

19 (Laughter.)

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

22 MS. SAHARIA: There's only one judge
23 at trial.

24 JUSTICE GORSUCH: Yeah.

25 (Laughter.)

1 JUSTICE GORSUCH: Touché. I -- I -- I
2 take your point fully that the -- the district
3 court denied summary judgment rather than
4 granted summary judgment and could have granted
5 summary judgment if the judge had wanted to do
6 so. It chose not to under Rule 56(f). I get
7 that.

8 I understand all of your points about
9 this case has nothing being finally resolved.
10 However, the QP we took assumed that there's a
11 pure legal question, right? And that probably
12 isn't this case, is your argument, which might
13 counsel for a DIG, but the Court hates to do
14 that, okay?

15 And what's wrong with saying, like the
16 Seventh Circuit has, that most questions are
17 going to be fact-bound or have a fact component
18 to them and are not reviewable, but there are
19 some discrete questions of law that are
20 reviewable even if not presented in a Rule 50
21 motion?

22 For example, as I think you've
23 conceded, if the court had granted a Rule 56(f)
24 decision in -- in -- in your favor, that -- that
25 would have been reviewable, you say.

1 MS. SAHARIA: Correct.

2 JUSTICE GORSUCH: So -- so can we
3 answer the QP and say, yeah, there are some
4 discrete legal questions that can be reviewed on
5 appeal? Whether this case, as Justice Barrett
6 said, it falls into that category or does not,
7 we do not suggest any view at all.

8 MS. SAHARIA: That would be a somewhat
9 strange holding --

10 JUSTICE GORSUCH: It -- it would -- it
11 would in this case.

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

23 But where what Petitioner is asking
24 for is for the Fourth Circuit on remand to not
25 only decide the question of law but to decide

1 the sufficiency of the evidence on the alternate
2 issues of thwarting and opacity, he wants the
3 court to look at the summary judgment record and
4 determine whether the evidence was sufficient,
5 which is exactly what this Court said in Ortiz
6 not --

7 JUSTICE BARRETT: You want us to do
8 that, though, right? Like you're not opposed to
9 the rule Justice Gorsuch is articulating, right?
10 Like there might be some purely legal question,
11 like whether a cause of action even exists, that
12 might be appealable without a Rule 50 motion.

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

22 MS. SAHARIA: Yes. And that's what
23 the Court did in Ortiz v. Jordan. The Court --
24 this Court made that decision in Ortiz v. Jordan
25 and didn't remand it back to the -- to the lower

1 court.

2 JUSTICE KAVANAUGH: Rule 1 of the
3 federal rules, as you know, says that they
4 should be construed, administered, and employed
5 to secure the just, speedy, and inexpensive
6 determination of every action and proceeding.

7 So, if that's our kind of north star,
8 the other side makes a big point that this would
9 not serve those purposes at all and would be
10 counter -- contrary to those purposes.

11 Do you want to respond to that?

12 MS. SAHARIA: Sure. Clear rules for
13 issue preservation serve those purposes. It's
14 by -- it's why, by the way, we require parties
15 to get up at the charge conference and object to
16 every single jury instruction, even if the legal
17 issues have been exhaustively litigated before
18 the charge conference.

19 It's why we require a Rule 50(b)
20 motion even after a Rule 50(a) motion. These
21 rules are essential part of the rules. They
22 ensure clarity of the record for -- for the
23 appellate court. And they -- they allow the
24 parties one final opportunity to litigate these
25 key legal issues, such as the jury instructions,

1 such as Rule 50, with the benefit of the entire
2 trial, the main event.

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

7 But there is no such rule. And given
8 that there is no such rule, this just looks --
9 your position just looks as though it's a trap
10 for the unwary.

11 MS. SAHARIA: Well, it's -- it's --
12 his rule is more of a trap for the unwary
13 because it will require parties in advance to
14 figure out whether there -- what side of the
15 line their issue falls on, which is why the
16 circuits on his side of the split still tell
17 parties in their published opinions to preserve,
18 because it's the prudent thing to do.

19 I think the court is entitled to
20 presume some baseline level of competence from
21 lawyers who are practicing in the federal courts
22 that they will read this Court's decisions on an
23 issue as critical as how to preserve issues for
24 appeal. And so the idea that some parties might
25 not read this Court's cases, I don't think, is a

1 sufficient ground for this Court to construe the
2 rules one way or the other.

3 Now --

4 JUSTICE ALITO: Well, whether the --
5 the Petitioner is entitled to succeed for -- on
6 -- on the ground that your client didn't exhaust
7 is not a pure legal issue, but why isn't the
8 question that the -- that was the basis the
9 whole -- why wasn't the district court's holding
10 that the IIU investigation made the ARP process
11 not available to Mr. Younger a pure legal
12 question?

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

15 JUSTICE ALITO: Well, why is it -- why
16 is it not over the line?

17 MS. SAHARIA: Because Petitioner's
18 arguments for why he's correct on that issue
19 depend on facts about the fact that there are --
20 there are certain inmates that have received
21 relief even while one of those investigations
22 was pending.

23 So even his argument on that abstract
24 legal question does not point the court to a
25 regulation or a law. There is no regulation or

1 law that says in this circumstance that an
2 inmate can receive relief.

3 His argument on that question depends
4 very much on factual evidence, anecdotal
5 evidence of inmates receiving relief in that
6 circumstance.

7 JUSTICE JACKSON: And -- and -- and so
8 the trial that you are positing would be trying
9 those facts? I guess I'm trying to understand
10 -- so Justice Alito raises the question: Don't
11 we have a legal issue here? You say no, it
12 still turns on facts.

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

16 MS. SAHARIA: Sure, I can give the
17 Court a very concrete example. Petitioner
18 points to the example of another inmate, Mr.
19 Lee, who was assaulted at the same time who
20 received relief from the IIU investigation. He
21 put his file into evidence at the summary
22 judgment record.

23 I don't see anything in that file --
24 it's at JA 200 to 204 -- that suggests that Mr.
25 Lee took the middle step, the futile appeal to

1 the Commissioner of Corrections, that Petitioner
2 claims our client needed to do.

3 So that is a --

4 JUSTICE JACKSON: Right. But we're
5 not trying whether or not Lee did it or not. We
6 can assume -- we can -- we can assume all of the
7 facts that relate to how other inmates actually
8 litigated their or -- or processed their claims.

9 Can't the court of appeals do that and
10 then just answer the legal question, does the
11 fact of the investigation mean that it's
12 available or unavailable?

13 MS. SAHARIA: The Court could decide
14 that particular question, but there's still all
15 of these remaining factual issues in the case
16 relating to opacity, thwarting, and as I take
17 his position, the Fourth Circuit would have to
18 decide on the basis of the record at summary
19 judgment whether there were disputes of fact to
20 determine whether or not he would be entitled to
21 the relief that he seeks.

22 And that's the kind of analysis that
23 this Court said in *Ortiz v. Jordan* appellate
24 courts should not be doing with respect to
25 summary judgment rulings. If he had posed that

1 question to the district court in the first
2 instance at trial, we would already know the
3 answer to all of these questions.

4 JUSTICE JACKSON: And you're saying
5 the fact that he posed it to the district court
6 at summary judgment was not enough, it -- it had
7 to come in in the trial?

8 MS. SAHARIA: Well, the district court
9 said there were factual disputes at summary
10 judgment. And if he had gone to the district
11 court at trial and said: I think your ruling
12 forecloses my defense, the district court might
13 have said: You're right, we're done with that
14 defense, in which case we -- he would have an
15 appeal.

16 But the district court might have
17 said: I want to try those factual disputes, so
18 we can foreclose a second trial if I was wrong
19 about that legal question.

20 JUSTICE ALITO: Well, if we were to --
21 if we were to rule against you along the lines
22 that Justice Gorsuch mentioned as a possible,
23 it's not -- I mean, we may well not do that, but
24 if we were to rule against you on that ground, I
25 bet that on remand to the Fourth Circuit you

1 would argue that the issue was waived because it
2 wasn't raised in the Fourth Circuit brief and it
3 was waived because they didn't make a -- an
4 evidentiary proffer at trial.

5 Wouldn't you make those arguments?

6 MS. SAHARIA: We would make every
7 available argument, yes, Your Honor.

8 JUSTICE ALITO: So, you know, we're
9 not -- I mean, that -- that wouldn't decide, but
10 you say that all those things would have to be
11 tried. Maybe they wouldn't have to be.

12 MS. SAHARIA: I -- I think I'm
13 struggling to -- to understand exactly what the
14 question is, but I do think it would be a -- a
15 somewhat strange holding for the Court to say
16 there are some questions of law that do not need
17 to be preserved, but we're not going to decide
18 whether this case is -- is -- is one of them and
19 we're going to let the Fourth Circuit figure
20 that out in the first instance.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas?

23 Justice Alito, anything further?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 Okay. Thank you, counsel.

6 MS. SAHARIA: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Tutt,
8 rebuttal?

9 REBUTTAL ARGUMENT OF ANDREW T. TUTT

10 ON BEHALF OF THE PETITIONER

11 MR. TUTT: Thank you, Mr. Chief
12 Justice.

13 A few simple points. Appellate courts
14 should correct legal errors that are apparent on
15 the face of the record. Cases should come out
16 the right way, not the -- not the wrong way. We
17 shouldn't waste everyone's time with pretend
18 trials about issues the district court has
19 already conclusively rejected at summary
20 judgment.

21 I had -- I had a whole rebuttal
22 prepared for opposing counsel to back off on the
23 idea of you have to press it at trial since that
24 would be an invitation to have all kinds of
25 forfeitures of issues because there's just no

1 one way to sort of press things in a way that
2 would ensure preservation, so you would end up
3 with the worst of all possible worlds.

4 You'd have counterfactual fake trials
5 where district courts would all decide that you
6 weren't allowed to put on your evidence in
7 different ways because each of them is not going
8 to want to waste the jurors' time.

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

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

1 sit here for a couple of days as we have this --
2 this trial on this issue that the defendant
3 cannot win.

4 We just think that that would be
5 preposterous. It would never happen. It is not
6 how it is done. The only question, really, in
7 this case is, should there be one sentence at
8 the JMOL stage, or should there not be one
9 sentence at the JMOL stage?

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

21 I -- I don't see how any -- any right
22 of Mr. Younger's is prejudiced by this rule. It
23 just means we're going to have to go and
24 actually try this issue that he already won
25 because he won even bigger in the first case --

1 at an earlier stage in the case.

2 I'd just like to say we think that
3 this case, as Justice Barrett has pointed out,
4 can be resolved in a very simple way. We do
5 think the Court can actually say what a purely
6 legal issue is.

7 So we think the Court say -- says
8 there is such a thing as a purely legal claim
9 that can be denied at summary judgment and that
10 can be appealed, and we think that that kind of
11 claim would be a claim that can be resolved with
12 reference to the undisputed facts and decide the
13 case on that basis and that's it and say
14 reversed at the end.

15 Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

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

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Official

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