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

PETITIONER'S REPLY BRIEF ON THE MERITS

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The question presented here asks about the appealability of the summary-judgment *order*, and Respondents conceded below that the Sixth Circuit reviewed that order. Respondents nevertheless urge that the question is actually whether the qualified-immunity *issue* was preserved through an appeal of the post-trial judgment. Presumably, Respondents seek to rewrite the question presented because the summary-judgment order was a collateral, "final" order that they could have appealed only within 30 days under Appellate Rule 4. The post-trial appeal of that order was therefore jurisdictionally time-barred. That ends the inquiry, and the Court need go no further.

But even if the Court entertained Respondents' question, Ortiz would still prevail. Respondents advance a rule requiring a Rule 50 motion only for issues that turn on trial evidence (such that trial supersedes the summary-judgment evidence). Because the qualified-immunity issue turned on the trial evidence here, reversal would be required under their interpretation of the question as well.

I. Respondents appealed the summary-judgment *order*, and the court below lacked jurisdiction to consider that appeal.

A. As Respondents conceded, the Sixth Circuit reviewed the order denying summary judgment on qualified-immunity grounds.

Respondents suggest that Ortiz misapprehends the difference between an "order" of summary judgment and an "issue" raised at summary judgment. But any confusion lies with the Respondents; the question presented is whether *an order* denying summary judgment may be appealed in these circumstances. To the extent Respondents wished to preserve the *issue* of qualified immunity as a defense to liability, they could have done so through Rule 50(b) (though they did not).

The Sixth Circuit here explicitly stated that it was reviewing the summary-judgment order: "Although courts normally do not review the denial of a summary judgment motion after a trial on the merits, denial of summary judgment based on qualified immunity is an exception to this rule and, just as in interlocutory appeals of qualified immunity, the standard of review is *de novo*." Pet. App. 8a.

Respondents conceded this point, stating in their en banc papers that the Sixth Circuit "properly reversed the District Court's denial of [their] motion for summary judgment and determined that Jordan and Bright were entitled to qualified immunity." JA 25. Their assertion now that the Sixth Circuit reviewed only the post-trial judgment, and not the earlier summary-judgment order, is simply incorrect and need

not be considered. *See, e.g.*, *Beacon Mut. Ins. Co. v. OneBeacon Ins. Group*, 376 F.3d 8, 18 (1st Cir. 2004) (holding that argument was abandoned where party conceded contrary point in earlier proceedings).

Consistent with this backdrop, this Court granted certiorari on the following question: May a party appeal *an order* denying summary judgment after a full trial on the merits if the party chose not to appeal the *order* before trial? Pet. i (emphases added). The Court did not adopt the different question Respondents raised, which asked whether an appeals court can order judgment as a matter of law on qualified-immunity grounds where the defendants moved under Rule 50(a) on that basis. Opp'n to Cert. i; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280–81 n.10 (1993) ("[T]he provision of our Rules giving respondents the right, in their brief in opposition, to restate the questions presented . . . does not give them the power to *expand* the questions presented . . . ."). Indeed, this case would have been a poor candidate for entertaining Respondent's rewritten question, as Respondents did not raise qualified immunity in their Rule 50(a) motion; they simply argued that the trial evidence was legally insufficient to establish a constitutional violation. And, of course, they filed no Rule 50(b) motion.

As noted below, the answer to the question actually presented is "no." The Sixth Circuit lacked jurisdiction to consider this summary-judgment appeal because it was untimely under Rule 4(a).

B. The district court's order denying summary judgment on qualified-immunity grounds was "final" under § 1291 and had to be appealed within 30 days.

Collateral orders are "final" within the meaning of 28 U.S.C. § 1291. "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal"—thus it "falls within § 1291." *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (emphasis omitted). As Amici explain, a district court's denial of qualified immunity as a question of law "is an appealable 'final decision' *within the meaning of 28 U.S.C. § 1291* . . . ." Amici Br. 3 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1984)) (emphasis added). Such an appeal is therefore permitted under § 1291 as of right.

"An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Fed. R. App. P. 3(a)(1). Rule 4 states the general rule that "the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). This is a jurisdictional requirement. 28 U.S.C. § 2107(a). Put simply, there is "no reason to bend Rule 4" for "parties who have failed to timely appeal from an appealable collateral order." *Lora v. O'Heaney*, 602 F.3d 106, 112 (2d Cir. 2010). Moreover, those parties may simply re-raise the issue, if they so choose, through proper Rule 50 motions.

Respondents suggest that the separate-document requirement under Rule 58 supports their view that such a summary-judgment denial is not a final decision and that "§ 1291 jurisdiction exists because of the final judgment entry under Rule 58" at the end of the district-court proceedings. Rsp't Br. 13–14. But Rule 58 confirms Ortiz's position.

Rule 58 generally requires the district court to enter final orders as a judgment on a separate document. Fed. R. Civ. P. 58. Judgment is then "entered" at the earlier of the time set forth in the document or when 150 days have run. Fed. R. Civ. P. 58(b)(2). This entry starts the clock for appeal of that judgment—making the deadline under Rule 4 clear. As the advisory-committee notes to Rule 58 explain, however, the clock starts for collateral orders once they are entered, without regard to a separate document: "*Appeal time should start to run when the collateral order is entered* without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2)." Fed. R. Civ. P. 58 comm. note (2002) (emphasis added); *accord Berrey v. Asarco Inc.*, 439 F.3d 636, 642 (10th Cir. 2006) (discussing advisory-committee note).

This reflects that collateral orders do not merge into the final judgment at the end of the case. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("[T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment."). Such orders are separate (collateral) and have their own time for appeal. Respondents repeatedly refer to the ability to appeal non-final "interlocutory" orders, but the question here is about an order that is final: "The

collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)).

Indeed, Respondents' effort to recast this case as an appeal from a Rule 58 judgment is a tacit acknowledgment that they missed the time to appeal from the summary-judgment order. Amici, however, are willing to go further and, contrary to the points above, explicitly argue that Rule 4 simply does not apply to collateral orders. Amici Br. 6–7. Amici claim Ortiz's argument "is foreclosed" by *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980). Amici Br. 7. To the contrary, *Clark* supports Ortiz.

In *Clark*, a special appeal statute authorized appeal of not just final judgments, but also *non-final*, interlocutory orders that declared a statute unconstitutional: "Any party may appeal to the Supreme Court from an interlocutory *or* final judgment [holding that a statute is unconstitutional]." 28 U.S.C. § 1252 (emphasis added). Amici note that that the 30-day limit in *Clark* applied only to the final judgment, not the non-final interlocutory order. Amici Br. 7. Here, the collateral order *is final*. *Swint*, 514 U.S. at 42. *Clark* thus states the same rule that Ortiz states (and that circuits have followed): jurisdictional time limits apply to final orders. *See, e.g.*, *Lora*, 602 F.3d at 112 (applying Rule 4 to collateral orders). Indeed, Amici rely on *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007), which makes the same point in the context of qualified immunity: "Once a 'final' decision has been made, the clock for filing a notice of appeal

begins to run." *Id.* at 901. And once "the time for appeal . . . has expired, it does not matter what arguments the litigant adduces. The window for appeal cannot be reopened." *Id.* (emphasis omitted).

Amici further note that under this Court's decision in *Behrens*, 516 U.S. 299, "a qualified immunity case can produce multiple 'final decisions' under Section 1291, each of which is independently appealable." Amici Br. 8. That is correct, but Amici miss the point that there are rules governing those final decisions—including the time to appeal under Rule 4. *See Fairley*, 482 F.3d at 901 ("When there are two 'final' decisions in a case, the time runs independently from each.").

Simply put, Respondents' appeal of the district court's final order denying summary judgment was untimely, and the court below lacked jurisdiction to consider it. Fed. R. App. P. 4; 28 U.S.C. § 2107. This Court should therefore reverse.

None of this, however, means that state officials are "forced" to appeal the order denying summary judgment to preserve the immunity *issue*. Indeed, the doctrine at work here is the collateral-*order* doctrine, not the collateral-*issue* doctrine; the order is final, but the issue may live on as a defense to liability. To the extent Respondents wished to preserve the qualified-immunity issue, they were free to do so; as noted below, they could have easily opened a new appellate window through Rule 50.

C. Ortiz agrees with Amici and Respondents that state officials are not required to take an immediate appeal to preserve the *issue* of qualified immunity.

The Amici Brief is based entirely on a false premise. Amici say Ortiz argues that state officials' failure to pursue immediate appeal "prevents" them from arguing qualified immunity on appeal from the final judgment. Amici Br. 2. Amici then purport to counter Ortiz's attempt to "force officials into taking unwanted interlocutory appeals in qualified immunity cases." *Id.* at 2. Ortiz says no such thing.

Ortiz repeatedly states that officials have the *option* to appeal the immunity issue at summary judgment, as they can always present the issue later for appeal. *See, e.g.*, Pet'r Br. 29 (stating that even if a party does not appeal "a collateral order, one can preserve the legal arguments for appeal through a Rule 50 motion renewed after the verdict . . . ."); *id.* at 6 ("[N]one of this means that the legal arguments are forever lost when the trial occurs; the moving party may simply raise them through a Rule 50 motion."); *id*. at 16, 27 (same).

Ortiz even explained that, for this reason, it might be sensible *not* to immediately appeal the collateral order: "Parties who lose qualified-immunity arguments at the summary-judgment stage may purposefully forgo the immediate appeal, especially where they believe they can simply end the matter through a short trial." Pet'r Br. 29 n.3. Oddly, Amici and Respondents have devoted pages to this same point, as if it were disputed. *See, e.g.*, Rsp't Br. 24–25 ("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."); Amici Br. 15 ("At times, however, there may be good reasons why a defendant may elect not to appeal before trial.") (citation omitted).

Having misstated Ortiz's argument to say officials are forced to immediately appeal to preserve the issue, Respondents and Amici argue at length that Ortiz advocates a legal world that no party seeks and that makes little sense. *See, e.g.*, Rsp't Br. 25 (forcing collateral-order appeals "could ossify civil rights litigation") (internal quotation marks omitted); Amici Br. 12–13 ("Petitioner's proposal is absurd as a matter of institutional design, insofar as it would force parties to argue an appeal that neither of them wants to take, in front of a court that does not want to hear the case."); *id.* at 13 ("Petitioner invites this Court to announce a . . . rule that punishes the official who chooses not to appeal . . . .").

The truth is that the parties agree that officials are not forced to bring collateral-order appeals to preserve the issue of qualified immunity.

* * *

There indeed is a difference between the final order being appealed and the issue being reviewed. But the Sixth Circuit reviewed the *order* denying summary judgment. The question presented is whether Respondents could appeal the denial of that order after a full trial on the merits where they chose not to appeal that order before trial. As shown above, the answer is "no," because the Sixth Circuit lacked jurisdiction over the collateral summary-judgment

order once the time to appeal expired. Accordingly, this Court should reverse the Sixth Circuit for lack of jurisdiction.[1]

II. Even if this were not a summary-judgment appeal, reversal would still be required because Respondents failed to preserve the issue of qualified immunity after trial, leaving the Sixth Circuit powerless to consider the issue.

Despite Respondents' concession that the Sixth Circuit considered their appeal of the summary-judgment *order*, Respondents now suggest that this Court should decide a different question: whether they properly preserved the qualified-immunity *issue* and could raise it on appeal from the final judgment issued after the trial. *See* Rsp't Br. i.

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[1] The question presented—dealing with the appealability of summary-judgment orders—does not directly implicate Rule 50. As Respondents note, Ortiz's "petition for certiorari referenced Rule 50(b) only as a supporting argument," and it "was *Respondents* who first cited *Unitherm*" in relation to Rule 50 issues. Rsp't Br. 30 (discussing *Unitherm Food Sys. Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006)). Thus, to the extent Respondents have raised their own question regarding Rule 50, Ortiz has not "forfeited" any argument about Respondents' failure to bring a Rule 50(b) motion. *See id.* at 27. This is true regardless whether *Unitherm* presents a "claims-processing" rule; the lack of a Rule 50(b) motion rendered the Sixth Circuit powerless to consider the immunity question here. *See, e.g.*, *Williams v. Gonterman*, 313 Fed. App'x 144, 147 (10th Cir. 2009) (holding that, even if *Unitherm* presents a claim-processing rule and the verdict-winner did not initially raise the verdict-loser's failure to file a Rule 50(b) motion, the court "would nevertheless be barred" from considering verdict-loser's challenge).

Were the Court to entertain that question (and it need not), Ortiz would still prevail. Respondents take great pains to argue that a Rule 50(b) motion is required to preserve a pretrial legal question only when that question later turns on the evidence at trial—that is, when the evidence at trial supersedes (or as Respondents say, "moots") the evidence presented at the summary-judgment stage. *Id.* at 12. As explained in Ortiz's opening brief, some circuits have adopted a clear rule avoiding such an exception. But even if an exception were to apply, Respondents acknowledge that their qualified-immunity challenge *did* turn on the trial evidence. Accordingly, even rewriting the question before the Court and taking Respondents' view of it, there was no basis for the Sixth Circuit to reverse Ortiz's judgment on the verdict.

A. The clearest rule is to require a Rule 50(b) motion to preserve all legal questions.

The simplest, clearest rule is to require that all legal questions ("pure" or otherwise) raised at summary judgment must be raised in a Rule 50(b) motion to preserve them for appeal. In that way, whether the issue could be superseded by trial evidence is immaterial. That is the approach of the Fourth and Fifth Circuits. *See Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 423 (4th Cir. 2005); *Black v. J.I. Case*, 22 F.3d 568, 571 & n.5 (5th Cir. 1994); *see also* Pet'r Br. 22–27.

B. At the very least, Rule 50 motions are required to preserve pretrial legal issues that are superseded by the trial evidence.

Even Respondents agree that at least some legal questions must be preserved through Rule 50(a) and Rule 50(b). Rsp't Br. 11. To assess whether other legal questions are exempt from this requirement, we must first be clear that there are *two* relevant categories of "legal questions."

1. *Legal questions are either "pure" or "mixed."*

There are two types of legal questions: (1) "purely legal" questions that do not turn in any way on the facts; and (2) "mixed questions" of law and fact that turn on the facts—even if those facts are undisputed. Respondents mistakenly call both of these questions "purely legal." Rsp't Br. 11 ("Critical to each of these decisions is the purely legal nature of the claim under review."); *id.* at 12 (noting that "legal claims" are preserved for review); *see also Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) ("By implying a fixed dichotomy between fact and law, our brief initial opinion inadvertently failed to consider an important category of cases—those that raise mixed questions of law and fact.").

"Purely legal" contentions are limited to "those as to which the facts are not merely undisputed *but immaterial*, such as a facial challenge to the constitutionality of a statute." *York v. Bailey*, 976 P.2d 1181, 1184 (Or. Ct. App. 1999) (emphasis added). "In other words, the legal theory underlying the motion must be that the moving party has a right to prevail on any set of facts and that the facts, in effect, do not

matter." *Id.* Because the facts are immaterial (even where undisputed), such a "purely legal" question cannot change with the trial evidence. The question is not superseded by trial.

A mixed question, by contrast, turns "on the significance of adjudicative facts (albeit, facts that [the moving party may] assert to be undisputed)." *Id.*; *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (defining mixed questions as those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated"); *see also Ramadan*, 479 F.3d at 648 (stating that "questions of law" include not only "pure" issues such as statutory interpretation, but also "application of law to undisputed facts, sometimes referred to as mixed questions of law and fact"). A mixed question, which relates to the facts of the particular case, by definition *can be superseded* by the evidence at trial.

2. *Mixed questions turning on trial evidence require Rule 50(b) motions for appeal.*

Despite the simplicity of the Fourth and Fifth Circuits' approach (requiring a Rule 50(b) motion for all legal questions), Ortiz acknowledges that there is less reason to require a Rule 50(b) motion when the legal question at summary judgment is one that is "purely legal" (as opposed to a mixed question). Such a pure question of law (e.g., a facial challenge to a statute) cannot be superseded by evidence at trial because the facts are immaterial. Respondents call the distinction for "purely legal" issues "critical" to

determining whether Rule 50(b) is required to preserve the issue. Rsp't Br. 15. But even if that distinction is warranted, it is a sound distinction only for issues that a court may examine without reference to the facts—where the facts are *immaterial* (not simply undisputed). Even this distinction can raise complexities, but the Court could nonetheless draw this line. *See, e.g.*, *York*, 976 P.2d at 1184 (holding that denial of summary judgment is not reviewable because the motion did not rest on a "purely legal" contention under which the facts were immaterial; rather, the motion raised a legal question that turned on the significance of adjudicative facts—even though the facts were undisputed).

But where the legal question at summary judgment is a mixed question that later turns on the facts adduced at trial, a Rule 50(b) motion is required to appeal that question. Indeed, the parties agree that Rule 50, by its terms, enables a party to raise a legal question challenging the sufficiency of the evidence at trial. That is a classic mixed legal question. *See, e.g.*, *Maynard v. Boone*, 468 F.3d 665, 673 (10th Cir. 2006) (sufficiency of the evidence is a mixed question). Even Respondents agree with this view (as they must) when they explain that a Rule 50(b) motion is required when the trial evidence supersedes the pretrial legal question. Respondents fail to recognize, however, that this is exactly what occurred in this case: As they concede, the immunity inquiry turned on the trial evidence.

C. Respondents concede that their qualified-immunity defense here turned on the evidence at trial.

Respondents' opposition to Ortiz's petition for certiorari highlighted that the qualified-immunity inquiry here turned on—and changed because of—the trial evidence. Although the Sixth Circuit reviewed "the District Court's denial of [their] motion for summary judgment," JA 25 (Rsp't En Banc Br.), Respondents have since conceded that they "cited to trial evidence" in their briefs to the Sixth Circuit and relied "on how various witnesses 'testified' at trial." Opp'n to Cert. 12, 14.

Indeed, the qualified-immunity inquiry here is a quintessential mixed question that turns on trial evidence. As noted, this Court has described mixed questions as "whether the rule of law as applied to the established facts is or is not violated," *Pullman-Standard*, 456 U.S. at 289 n.19—that is, whether the facts cross the legal line. Or as Respondents put it: "The merits question with respect to both Respondents is . . . whether the conduct that did occur crossed a constitutional line." Rsp't Br. 35. And this is precisely why courts hold that officials such as Jordan and Bright cannot bring this issue first to the court of appeals without affording the district court an opportunity to consider it:

> [A]lthough a post-trial grant of immunity would still confer a benefit on defendants by shielding them from any liability for monetary damages awarded by the jury, a defendant determined to persist in challenging the court's denial of qualified immunity *cannot rest on the*

> *objection lodged at the summary judgment stage*, but must move for judgment as a matter of law at the conclusion of the trial. If the court adheres to its original position, the defendant may then appeal from the denial of judgment as a matter of law. A contrary rule would contradict the principle enshrined in our jurisprudence that *facts elicited at trial are often probative of the defendant's entitlement to qualified immunity*.

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 93 (1st Cir. 2003) (emphasis added).

The requirement of Rule 50(b) is more compelling in this particular case, as the Sixth Circuit reached only the first prong of the immunity inquiry. Respondents explain that the Sixth Circuit "specified that its conclusion was premised on the baseline finding that 'there was no constitutional violation,' so it did 'not reach whether the right was clearly established.'" Opp'n to Cert. 7 (citing Pet. App. 11a n.3). That baseline finding is a classic question of sufficiency of the evidence at trial. *See, e.g.*, *Williams*, 313 F. App'x at 147 (holding that the question whether state officials violated plaintiff's constitutional rights in a § 1983 action was a question of "sufficiency of the evidence" that could not be considered on appeal when not preserved in a Rule 50(b) motion); *Shepherd v. Dall. Cnty.*, 591 F.3d 445, 456 (5th Cir. 2009) (same); *Allison v. City of E. Lansing*, 484 F.3d 874, 876 (6th Cir. 2007). In this regard, Respondents answer their own question: "All courts . . . agree that questions going to the sufficiency of the evidence are not preserved for appellate review by a summary judgment motion alone." Rsp't Br. 11.

The only way Respondents could avoid the effect of their own rule—that legal issues superseded by trial evidence require Rule 50(b) to preserve them for appeal—would be to incorrectly define mixed questions as "purely legal," and then assert that Rule 50(b) is required only for a category of "fact-based" arguments that they say are not present here. That effort is discussed below.

D. Respondents attempt to avoid the problem here by erroneously asserting that mixed questions of law *are* purely legal.

Contrary to the dichotomy between "pure" and "mixed" legal questions described above, Respondents contend that determining whether a Rule 50(b) motion is required to preserve a legal argument for appeal turns on the "law-fact divide." Rsp't Br. 15. They say that if the argument is based on "legal" grounds (what they inaccurately call "pure law"), a Rule 50(b) motion is not required; when the argument is based on "factual" grounds (though somehow still seeking judgment as a matter of law), a Rule 50(b) motion is required. *Id.* They then claim that their qualified-immunity argument is not based on "factual" grounds and that, therefore, they did not have to make a Rule 50(b) motion here. Respondents' "law-fact" dichotomy—though appropriate in other contexts—is entirely mistaken in this context, which involves separating categories of *law*.

Indeed, Respondents unwittingly reveal that their "law-fact" distinction is nonsensical in the Rule 50 context, as they suggest that the legal question turns on disputed facts: "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." Rsp't Br. 16. Hornbook law establishes that the "evidence sufficiency" claim is also a legal question that turns on undisputed facts—the facts must be viewed in the light most favorable to the nonmovant. *See, e.g.*, *Kennedy v. Town of Billerica*, __ F.3d __, 2010 U.S. App. LEXIS 14274, at *41 (1st Cir. 2010) (denial of Rule 50 motion reviewed de novo, "viewing the evidence in the light most favorable to the verdict"); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (standard for summary judgment "mirrors" the standard under Rule 50).

None of this is to suggest that the law-fact distinction of *Johnson v. Jones*, 515 U.S. 304 (1995), should be revisited. That *Johnson* allows immediate *appeals* of both types of legal claims (pure and mixed), but not of fact-based determinations, is perfectly appropriate. A mixed question of immunity, as here, is well recognized for immediate appeal: So long as the officers do not challenge the district court's determination of the facts, *Johnson* permits the officers to appeal the district court's conclusion that those facts (assumed true for the appeal) do not entitle the officers to immunity. *Behrens*, 516 U.S. at 313. *Johnson* simply says one cannot immediately appeal questions regarding "the existence, or nonexistence, of a triable issue of fact." *Johnson*, 515 U.S. at 316.

But that analysis—whether the denial of qualified immunity is immediately appealable—is entirely different from whether a district court must have the opportunity to consider the question after trial (via Rule 50) to preserve it for appeal. Though *both* types of legal claims (pure and mixed) are immediately

appealable, only one type (mixed) can turn on the trial evidence. Accordingly, it is entirely appropriate (and required by *Unitherm*) that—at the very least—*mixed* legal questions turning on the evidence at trial must be renewed in a Rule 50 motion so that the district court can consider them. The law-fact distinction of *Johnson* simply reveals that one cost of the collateral-order doctrine is that it could enable an official to avoid suit through pre-trial appeal even where the evidence at trial might actually establish liability. If *Johnson* has any lesson to offer here, it is that the *district court* must rule on the issue to be considered on appeal in light of the relevant facts—whether before or after trial.

Respondents' emphasis on a law-fact distinction explains why they repeatedly insist on something Ortiz does not dispute: that the qualified-immunity question here is "law-based." *See, e.g.*, Rsp't Br. 18 ("Ortiz has never argued that Respondents' qualified-immunity was fact-based rather than law-based.") *id.* at 19 ("Ortiz is right to assume that each Respondent's immunity defense is law-based."). Again, Respondents' misstep is failing to recognize that the question in the Rule 50 context is not whether the issue is law-based—the question is *what type* of law-based issue is it? If "pure," perhaps an exception to Rule 50 can be debated; if "mixed" and turning on the facts at trial, there is no debate—a Rule 50(b) motion is required. Otherwise, the district court could not consider the mixed question of immunity in terms of what actually matters: the trial evidence.

Once the proper dichotomy is in place and one looks to whether the legal question is actually superseded through the evidence at trial, Respondents' examples

of legal questions such as statute of limitations and preclusion fall nicely into place: Unlike the immunity question here, those issues often do *not* turn on the evidence at trial. Accordingly, in those circumstances, some courts say that a Rule 50 motion is not needed.

Ruyle v. Continental Oil Co., 44 F.3d 837 (10th Cir. 1994), on which Respondents rely, is a good example. There, the court concluded that a defense of collateral estoppel was properly preserved at summary judgment because "the parties and the trial court agreed that the issue of collateral estoppel was a legal question *separate* from the sufficiency of the evidence." *Id.* at 841 (emphasis added). This is true of other cases Respondents cite—the legal issue (even if mixed) at summary judgment does not change with the evidence at trial. *See Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995) (res judicata operates to bar suit "no matter how much evidence" plaintiff had); *Gramercy Mills Inc. v. Wolens*, 63 F.3d 569, 572 (7th Cir. 1995) (noting that choice of law is "sufficiently independent of the ultimate summary judgment inquiry—whether there are disputed facts that would lead to different legal results depending on how they are interpreted").

What respondents fail to note is that, even for these examples of legal issues, courts hold that a Rule 50(b) motion is required when the issue *does* turn on the trial evidence—that is, when the issue is superseded at trial—just as the qualified-immunity issue was superseded here.

This is true, for example, with statutes of limitations. *See AXA Versicherung AG v. N.H. Ins. Co.*, No. 08-2521, 2010 U.S. App. LEXIS 17645, *15–16

(2d Cir. Aug. 23, 2010) (reversing question of statute of limitations that turned on trial evidence and was raised in Rule 50(b) motion); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 418 (2d Cir. 1999) (affirming denial of Rule 50(b) motion where statute-of-limitations defense turned on jury question of whether the time was tolled due to fraudulent concealment); *FDIC v. UMIC, Inc.*, 136 F.3d 1375, 1380–81 (10th Cir. 1998) (same); *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 759–63 (1st Cir. 1996) (affirming denial of Rule 50 motions because evidence at trial was sufficient to find claims timely).

The same goes for defenses such as res judicata. *Tapalian v. Tusino*, 377 F.3d 1, 7 n.1 (1st Cir. 2004) (holding that res-judicata argument at summary judgment was not properly preserved through Rule 50 motions); *Allahar v. Zahora*, 59 F.3d 693, 695–96 (7th Cir. 1995) (holding that res-judicata defense raised at summary judgment was waived because "an order denying summary judgment is ordinarily not appealable after a trial on the merits" and defendant did not re-raise res judicata in Rule 50 motions).

In sum, then, Respondents are correct to say that Rule 50(b) is required to preserve legal issues turning on the evidence at trial. As noted below, the lack of a Rule 50(b) motion here barred the Sixth Circuit from reviewing the issue.

E. Because the qualified-immunity issue turned on evidence at trial, the trial court's summary-judgment decision could not be reviewed on appeal.

The relevance of the trial evidence in this qualified-immunity inquiry is exactly why Ortiz provided what Respondents' dismiss as an irrelevant "paen" to the importance of the jury's conclusion (Rsp't Br. 17) and to the careful rules restricting the power of judges—especially appellate judges—to take cases away from the jury. *See* Pet'r Br. 9.

The facts at trial play a crucial role in the district court's assessment of mixed legal questions; thus, the determination under Rule 50(b) "calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Unitherm*, 546 U.S. at 401. And here, as Respondents note, "[t]he merits question with respect to both Respondents is . . . whether *the conduct* that did occur crossed a constitutional line." Rsp't Br. 35 (emphasis added). Yet Respondents never asked the district judge that "merits question" after the verdict, as *Unitherm* requires. Thus, even if questions of "pure law" can be preserved through a summary-judgment motion alone, qualified immunity in this case was not an issue of "pure law," so reversal is required.

* * *

In sum, Respondents' appeal of the summary-judgment order was jurisdictionally time-barred under Rule 4. That answers the question presented. Yet even if appeal of the post-trial judgment were at issue,

Respondents' qualified-immunity argument turned on the trial evidence and was therefore unreviewable. Either way, reversal is required.

CONCLUSION

The Sixth Circuit's decision should be reversed.

Respectfully submitted,

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