No. 22-210

IN THE

Supreme Court of the United States

NEIL DUPREE, *Petitioner*,
v.
KEVIN YOUNGER, *Respondent*.

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

BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The DRI Center for Law and Public Policy is the public policy "think tank" and advocacy voice of DRI, Inc.—an international organization of approximately 14,000 attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an *amicus curiae* in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

This case fits those criteria. As defense counsel, DRI's members routinely file summary-judgment motions, including on purely legal issues that can be decided by reference to undisputed (or no) facts, and then seek to appeal district courts' adverse rulings on those purely legal issues post trial. The Center thus has an interest in eliminating the procedural trap for the unwary for which respondent advocates.

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents a straightforward question: must a party reassert in motions for judgment as a matter of law under Federal Rule of Civil Procedure 50 purely legal issues rejected at summary judgment. As petitioner correctly explains and a majority of circuits have recognized, the answer to that question is no considering Rule 50's text, policy, and history.

Adopting the rule that summary-judgment issues capable of resolution by reference to undisputed or no facts need not be renewed in Rule 50 motions also makes sense in light of the tight length limitations the vast majority of district courts place on such motions. Most district courts have adopted local rules limiting briefs supporting such motions to 25 pages or less. In those circuits that have adopted the minority rule, parties who lost at summary judgment are left with an unenviable choice: do they focus their Rule 50 briefing on sufficiency-of-the-evidence issues that could actually affect the outcome of the trial? Or do they waste pages and dilute their sufficiency arguments by asking the district court to reconsider its holding on a purely legal issue, even though the trial evidence could not have affected that holding's validity?

As respondent's petition-stage "just renew summary-judgment arguments in a sentence or two" suggestion shows, the minority rule promotes the worst kind of meaningless formalism, not the efficient, just resolution of disputes. No stakeholder benefits from raising issues in a perfunctory manner; courts typically deem those issues forfeited. If all it takes to renew a summary-judgment issue is a sentence or two in later briefing, then there is no

rational reason to impose the renewal requirement in the first place.

The Federal Rules of Civil Procedure were designed to eliminate such technical traps for the unwary. Making appellate preservation "a game of skill in which one misstep by counsel may be decisive to the outcome" is contrary to the rules' purpose. *Foman* v. *Davis*, 371 U.S. 178, 181–82 (1962) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957)). Requirements that enable gotcha games only benefit those who can afford sophisticated counsel. They do not promote just outcomes.

For all these reasons, this Court should vacate the Fourth Circuit's judgment and hold that a party need not renew in motions for judgment as a matter of law purely legal arguments capable of resolution with reference only to undisputed or no facts.

ARGUMENT

I. Requiring parties to renew purely legal arguments in motions for judgment as a matter of law puts them between a rock and a hard place and disserves judicial economy.

The minority rule pays no heed to the limits that district courts place on dispositive motions such as motions for judgment as a matter of law. Those limits mean that, in minority-rule jurisdictions, Rule 50 movants must dilute their sufficiency of the evidence arguments—the undisputed core of Rule 50 practice—by asking the district court to reconsider its earlier holding on a purely legal issue.

Rule 50 exists to "focus on the evidence that was actually admitted at trial" because the trial evidence, not the summary judgment record, is what matters for

evidentiary purposes after trial. *Rothstein* v. *Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); see also *Ericsson Inc.* v. *TCL Commc'n Tech. Holdings Ltd.*, 955 F.3d 1317, 1324 (Fed. Cir. 2020) ("Rule 50(a) is intended to allow a trial court 'to re-examine the question of evidentiary insufficiency' and alert opposing counsel to any insufficiency."); *Ruyle* v. *Cont'l Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994) ("Motions under Fed.R.Civ.P. 50(a) for judgment as a matter of law test whether there is a 'legally sufficient evidentiary basis for a reasonable jury to find' for the moving party."). For that reason, "once evidence is presented at a trial, any challenge to evidentiary sufficiency at summary judgment becomes moot." *Feld* v. *Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012); accord *Chemetall GMBH* v. *ZR Energy, Inc.*, 320 F.3d 714, 718–19 (7th Cir. 2003) ("Once the trial has taken place, our focus is on the evidence actually admitted and not on the earlier summary judgment record." (collecting cases)). Indeed, as this Court has "repeatedly held, an appellate court is 'powerless' to review the sufficiency of the evidence after trial" in the absence of Rule 50 motions. *Ortiz* v. *Jordan*, 562 U.S. 180, 189 (2011) (quoting *Unitherm Food Sys., Inc.* v. *Swift–Eckrich, Inc.*, 546 U.S. 394, 405 (2006)). But the same logic does not extend to purely legal summary-judgment issues, the resolution of which is necessarily unaffected by the trial evidence. *Chemetall*, 320 F.3d at 719 ("[T]he principle that an order denying summary judgment is rendered moot by trial . . . is intended for cases in which the basis for the denial was that the party opposing the motion had presented enough evidence to go to trial." (quoting *Rekhi* v. *Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995))).

The heartland of Rule 50 practice is therefore challenges to the sufficiency of the evidence at trial,

not legal issues. Parties do not have infinite space in which to mount those challenges. As set forth in *Table 1*, a review of the local rules for each of the 94 judicial districts reveals that 80 districts have adopted word or page limits for briefs supporting such motions. Well over half (56) of those have adopted limits of 25 pages or less—in some cases, far less—for initial briefs.

Table 1—Summary of Local Rules re Dispositive Motion Page Limits for Initial Briefs[2]

District	Page Limit
N.D. Ala.	15
D. Alaska	20 pages / 5,700 wds.
D. Ariz.	17
C.D. Cal.	7,000 wds.
N.D. Cal.	25
S.D. Cal.	25
D. Conn.	40
D. Del.	20
D.D.C.	45

District	Page Limit
N.D. Fla.	8,000 wds.
M.D. Fla.	25
S.D. Fla.	20
N.D. Ga.	20
M.D. Ga.	20
S.D. Ga.	26
D. Guam	25
D. Haw.	25
D. Idaho	20
N.D. Ill.	15
C.D. Ill.	15

[2] In the interest of avoiding voluminous, repetitive citation, *amicus* notes that the information in *Table 1* was compiled from information published on each district's uscourts.gov website. Nearly every district publishes its length limitations for motions and supporting briefs in a local rule corresponding to Federal Rule of Civil Procedure 7. See, e.g., D. Alaska Local Civ. R. 7.4(a); D. Ariz. LRCiv 7.2(e). *Amicus* acknowledges that district judges may modify any limits found in local rules.

District	Page Limit
S.D. Ill.	20
N.D. Ind.	25
S.D. Ind.	35
N.D. Iowa	20
S.D. Iowa	20
D. Kan.	15
E.D. Ky.	25
W.D. Ky.	25
E.D. La.	25
M.D. La.	25
W.D. La.	25
D. Me.	10
D. Md.	35
D. Mass.	25
E.D. Mich.	25
W.D. Mich.	10,800 wds.
D. Minn.	12,000 wds.
N.D. Miss.	35 pages total for initial & replies
S.D. Miss.	35 pages total for initial & replies
E.D. Mo.	15
W.D. Mo.	15
D. Mont.	6,500 wds.

District	Page Limit
D. Neb.	13,000 wds.
D. Nev.	24
D.N.H.	25
D.N.J.	40
D.N.M.	27
N.D.N.Y.	25
W.D.N.Y.	25
E.D.N.C.	30
M.D.N.C.	6,250 wds.
W.D.N.C.	25
D.N.D.	20
D.N. Mar. I.	25
N.D. Ohio	20 (std. track)
S.D. Ohio	20
E.D. Okla.	25
N.D. Okla.	25
W.D. Okla.	25
D. Or.	11,000 wds.
M.D. Pa.	15 pages / 5,000 wds.
D.P.R.	25
D.S.C.	35
D.S.D.	30
E.D. Tenn.	25
M.D. Tenn.	25
W.D. Tenn.	20

District	Page Limit
E.D. Tex.	60
N.D. Tex.	25
W.D. Tex.	20
D. Utah	10
D. Vt.	25
D.V.I.	20
E.D. Va.	30

District	Page Limit
E.D. Wash.	20
W.D. Wash.	4,200 wds.
N.D. W. Va.	25
S.D. W. Va.	25
E.D. Wis.	30
D. Wyo.	25

The minority-rule jurisdictions thus leave a party who lost on purely legal arguments at the summary-judgment stage and who also has sufficiency-of-the-evidence challenges to a verdict between Scylla and Charybdis. Does the party dedicate the limited pages in the Rule 50 motions to sufficiency-of-the-evidence arguments that might actually change the outcome of the trial? Or does the party dilute the strength of the sufficiency arguments by asking the district court to reconsider its earlier holding on a pure question of law, even though "[n]o changed facts or credibility determinations at trial could alter" that holding? *Feld*, 688 F.3d at 782. No experienced advocate would willingly choose the second course. Cf. *Jones* v. *Barnes*, 463 U.S. 745, 752 (1983) ("Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention." (quoting Robert Stern, *Appellate Practice in the United States* 266 (1981)).

Nor would district courts. "There isn't a judge alive" who "puts down a brief and says, 'I wish that had been longer.'" *Interview by Bryan A. Garner of*

Chief Justice John G. Roberts Jr., 13 Scribes J. Legal Writing 5, 35 (2010) (quoting Roberts, C.J.) (cleaned up). And courts roundly disfavor motions for reconsideration, e.g., *Nadendla* v. *WakeMed*, 24 F.4th 299, 304 (4th Cir. 2022) ("[A]llowing litigants a 'second bite at the apple' via a motion to reconsider is disfavored."), particularly when they simply restate earlier arguments, see, e.g., *United States* v. *$23,000 in U.S. Currency*, 356 F.3d 157, 165 (1st Cir. 2004) ("[T]he motion to reconsider filed by Rodríguez merely restated the facts set out in the motion to vacate. The repetition of previous arguments is not sufficient to prevail on a Rule 59(e) motion."). In function, if not form, renewing purely legal arguments rejected at summary judgment in Rule 50 motions merely seeks reconsideration. See, e.g., *Feld*, 688 F.3d at 782 ("Had Karen raised her legal argument again in a Rule 50 motion, the district court would have been faced with precisely the same question she raised before trial."). So, like the party who raised the issue, district courts have no interest in the routine repetition of arguments already raised and rejected. The minority-rule jurisdictions, however, force reconsideration on district courts and parties.

At the petition stage, respondent breezily minimized these concerns by asserting that a party may renew his purely legal arguments by "includ[ing] a sentence or two incorporating arguments lost at summary judgment." Opp. 7. Respondent's position goes too far. To start, incorporation by reference is a disfavored practice. Federal Rule of Civil Procedure 10, which addresses incorporation by reference, permits incorporation by reference only of statements in a *pleading*. Fed. R. Civ. P. 10(c). A motion is not a pleading. Fed. R. Civ. P. 7(a). While a small number of district courts have broadened the scope of

permissible cross-references by local rule, e.g., D. Ariz. LRCiv 7.1(d)(2); D. Guam CVLR 7(b), the vast majority have not. At least one district court specifically prohibits incorporating by reference other briefs. M.D. Pa. LR 7.8(a) ("No brief may incorporate by reference all or any portion of any other brief."). Respondent's incorporation-by-reference suggestion thus has no foundation in the Federal Rules of Civil Procedure.

What's more, courts are loath to consider arguments raised in just a sentence or two and not fully developed in a brief. See, e.g., *Grayson O Co.* v. *Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to 'develop [its] argument—even if [its] brief takes a passing shot at the issue.'" (quoting *Brown* v. *Nucor Corp.*, 785 F.3d 895, 923 (4th Cir. 2015)) (alterations in original)); *United States* v. *Charles*, 469 F.3d 402, 408 (5th Cir. 2006) ("A single conclusory sentence in a footnote is insufficient to raise an issue for review."); *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way . . . ."). Rather, courts routinely consider such arguments forfeited.[3] This axiomatic principle

[3] As the previous citation sentence shows, courts often use the words "waiver" and "forfeiture" interchangeably. *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004) (recognizing the same). Because "forfeiture is the failure to make the timely assertion of a right" as opposed to the "intentional relinquishment or abandonment of a known right," forfeiture is the more appropriate label for the effect of a party's failure to adequately

applies with equal force to perfunctory renewals of summary-judgment arguments. See, e.g., *Equal Emp't Opportunity Comm'n* v. *Wal-Mart Stores, Inc.*, 503 F. Supp. 3d 801, 807 (W.D. Wis. 2020) (party forfeited summary-judgment argument renewed in Rule 50(b) motion because it "relegated its argument to a footnote and failed to develop it properly in the main body of its brief"), *aff'd*, 38 F.4th 651 (7th Cir. 2022). A party who follows respondent's "just drop a footnote" suggestion may put herself in no better a position than if she made no mention of her summary-judgment arguments at all.

Even if a district court did not apply the forfeiture principle to conclude that a one-or-two sentence renewal of summary-judgment arguments is insufficient to raise them, a one-or-two sentence renewal invites the district court to summarily renew its own prior holding. See, e.g., *Fed. Deposit Ins. Corp.* v. *Ching*, No. 13-CV-01710, 2018 WL 621297, at *6 (E.D. Cal. Jan. 29, 2018) (summarily rejecting summary-judgment argument renewed by cross-reference for reasons stated in prior orders); *Vehicle Mkt. Rsch., Inc.* v. *Mitchell Int'l, Inc.*, No. 09-CV-2518, 2015 WL 13642257, at *2 (D. Kan. Sept. 11, 2015) ("To the extent VMR incorporated by reference its summary judgment briefs . . . , the Court stands by its previous rulings on those issues."). Such perfunctory denials do nothing to aid appellate review and only muddy the district court record.

Accordingly, respondent's suggestion of a sentence-or-two recitation is no panacea for the obvious practical problems associated with requiring

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brief an issue. *Ibid.* (quoting *United States* v. *Olano*, 507 U.S. 725, 733 (1993)).

parties who lost at summary judgment to reassert purely legal issues in Rule 50 motions. Parties should not be required to seek reconsideration as a matter of course solely to ensure that the already-decided issue can be raised on appeal.

II. The minority rule serves no purpose and is merely a trap for the unwary.

The foregoing discussion shows that requiring even a fulsome request for reconsideration of purely legal summary-judgment arguments in Rule 50 motions serves no purpose. Cf. Transcript of Oral Argument at 46, *Ortiz* v. *Jordan*, 562 U.S. 180 (2011) (No. 09-737) ("It's a pure issue of law, and the district court has already said: I ruled on this on summary judgment; don't bother me with this again. And we're going to say, well, you still have to raise it in a 50(b) motion? . . . [T]here's no point." (Alito, J.)). Respondent's suggestion that parties simply renew their summary-judgment arguments with a sentence or two further underscores the game of gotcha the minority rule enables. If all it takes to preserve a legal issue decided at summary judgment is a sentence or two, then there is no conceivable reason to impose the renewal requirement in the first place.

Who benefits from a rule that accepts a perfunctory renewal? Not the movant, who must remember to include a meaningless cross-reference or else forfeit his purely legal arguments on appeal. Not the district court, which already rejected those arguments at the summary-judgment stage. And not the court of appeals, whose review undoubtedly will focus on the substance of the district court's summary judgment opinion where the court addressed the arguments. The only beneficiary is the nonmovant,

who can leverage the minority rule to avoid appellate consideration of potentially meritorious legal issues in cases where the movant mistakenly failed to include a sentence or two in his Rule 50 motions.

The Federal Rules of Civil Procedure were adopted to eliminate, not enable, such traps for the unwary. Rule 1 itself recognizes that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. As this Court recognized over sixty years ago, "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities." *Foman* v. *Davis*, 371 U.S. 178, 181–82 (1962). Particularly if it can be satisfied by just a sentence or two, the minority rule is nothing but a technicality. This Court should reject it.

CONCLUSION

For all the foregoing reasons, this Court should vacate the Fourth Circuit's judgment and hold that a party need not renew in motions for judgment as a matter of law purely legal issues capable of resolution with reference only to undisputed (or no) facts.

Respectfully submitted,

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