No. 09-737 APR 5 - 2010

In The
Supreme Court of the United States

MICHELLE ORTIZ,
Petitioner,
v.
PAULA JORDAN AND REBECCA BRIGHT,
Respondents.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

A. This is a Summary-Judgment Case. 2

1. Under Unitherm, *this cannot be a Rule 50 case.* 2

2. The court below explicitly decided the summary-judgment appeal. 2

3. Respondents conceded that this was a summary-judgment appeal. 3

4. Respondents' new claim that this is actually a Rule 50 case is unsupportable. 4

B. Because This Was a Summary-Judgment Appeal, The Problems Other Circuits Recognize For Such Appeals Did Materialize Here. 5

C. The Case Would Have Come Out Differently in Circuits on the Other Side of the Splits. 6

D. The Circuit Split is Real and Pervasive. 9

E. Respondents Do Not Dispute That the Petition Presents an Important Federal Question. . . . 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Allison v. City of East Lansing,
484 F.3d 874 (6th Cir. 2007) 3

Bryant v. Dollar Gen. Corp.,
538 F.3d 394 (6th Cir. 2008) 5

EEOC v. Southwestern Bell Tel., L.P.,
550 F.3d 704 (8th Cir. 2008) 7, 8, 9

First United Pentecostal Church v. GuideOne Specialty Mut. Ins. Co.,
189 F. App'x 852 (11th Cir. 2006) 7

Goff v. Bise,
173 F.3d 1068 (8th Cir. 1999) 9

Hertz v. Woodbury Cty.,
566 F.3d 775 (3d Cir. 2009) 4, 7

Kelley v. City of Albuquerque,
542 F.3d 802 (10th Cir. 2008) 3

Nitco Holding Corp. v. Boujikian,
491 F.3d 1086 (9th Cir. 2007) 8

Padgett v. A. Curtis Wright,
587 F.3d 983 (9th Cir. 2009) 9, 10

Pearson v. Welborn,
471 F.3d 732 (7th Cir. 2006) 3

Price v. Kramer,
200 F.3d 1237 (9th Cir. 2000) 8, 10

Shepherd v. Dallas Cty.,
591 F.3d 445 (5th Cir. 2009) 4, 5, 7

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) . . . . *passim*

Williams v. Gonterman,
313 F. App'x 144 (10th Cir. 2009) 5

RULES

Fed. R. Civ. P. 50(a) 4

Fed. R. Civ. P. 50(b) 4

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REPLY

Respondents have changed their position in an attempt to shift this Court's focus from the well-recognized splits regarding Rule 56 summary-judgment appeals. Respondents had correctly stated that the decision below "reversed the District Court's denial of [their] *motion for summary judgment* and determined that Jordan and Bright were entitled to qualified immunity." Response to En Banc Pet. at 10 (May 14, 2009) (emphasis added). But faced with the deep circuit-conflict on such Rule 56 appeals, Respondents now cite their unrenewed, pre-verdict Rule 50(a) motion and claim that the case is actually some sort of disguised Rule 50 appeal. They further claim that nobody (including the court below and Respondents themselves) realized it.

As dubious as this proposition is on its face, it is also impossible: The appeal could not have been based on the Rule 50(a) motion because Respondents concede that they never renewed the motion under Rule 50(b). This Court's decisions "unequivocally establish that the precise subject matter of a party's Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006).

This is a summary-judgment case that squarely raises the question presented. It enables the Court to resolve the circuit splits and provide uniformity to federal practice. The petition should be granted.

A. This is a Summary-Judgment Case.

1. Under Unitherm, *this cannot be a Rule 50 case.*

The decision below could not have been based on a Rule 50 appeal. In its 2006 *Unitherm* decision, this Court held that a Rule 50(a) motion "cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." 546 U.S. at 404. Put another way, "a litigant that has failed to file a Rule 50(b) motion is foreclosed from seeking the relief it sought in its Rule 50(a) motion . . . ." *Id.* Respondents here made an oral Rule 50(a) motion during trial but concede that they did not renew the motion under Rule 50(b). Opp. at 4. Thus, under the *Unitherm* Rule, the decision below could not be a Rule 50 ruling, let alone "functionally" be one. Opp. at 1. Indeed, it never purported to be; the Sixth Circuit did not even mention Rule 50.

2. The court below explicitly decided the summary-judgment appeal.

The Sixth Circuit left no doubt that it was deciding the summary-judgment question, beginning its legal analysis with the following introductory sentence: "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; *see also id.* at 13a n.5 (noting that additional challenge to the denial of summary judgment need not be addressed).

The court's repeated references to summary judgment were not a sloppy "labeling choice." Opp. at 13. To the contrary, this fits with *Unitherm*'s Rule that the decision could not be based on Rule 50(a). *See Allison v. City of East Lansing,* 484 F.3d 874, 876 (6th Cir. 2007) (holding that appellate court lacked jurisdiction to consider city's appeal of § 1983 verdict for violation of constitutional rights after city failed to renew Rule 50(a) motion with a Rule 50(b) motion); *see also Kelley v. City of Albuquerque*, 542 F.3d 802, 816 (10th Cir. 2008) (same); *Pearson v. Welborn*, 471 F.3d 732, 739 (7th Cir. 2006) (same).

3. *Respondents conceded that this was a summary-judgment appeal.*

Until the Opposition Brief, Respondents conceded that the decision below "reversed the District Court's denial of [their] motion for summary judgment." Response to En Banc Pet. at 10. That statement was unremarkable, as Respondents included the order denying their summary-judgment motion in their Notice of Appeal. R. 112: Notice of Appeal ("Notice is hereby given that Defendants . . . appeal . . . the Order (doc. no. 60) denying Defendants' Motion for Summary Judgment . . . ."). To everyone involved, this was a summary-judgment appeal after trial, regularly allowed in the Sixth Circuit. (Of course, as the Petition notes, and Respondents now realize, the appeal would not have been allowed in other circuits.)

4. Respondents' new claim that this is actually a Rule 50 case is unsupportable.

In response to the Petition, Respondents now suggest that the decision below could be a disguised Rule 50 decision because, they say, it is not clear that the *Unitherm* Rule applies when the Rule 50(a) motion involves "legal issues" (as opposed to "sufficiency of the evidence"). Opp. at 15.

Respondents fail to recognize that every Rule 50 motion involves, by definition, a "legal issue" challenging sufficiency of the evidence: "In an action tried by jury, a motion for judgment as a matter of law *is* a challenge to the sufficiency of the evidence supporting the jury's verdict." *Shepherd v. Dallas Cty.*, 591 F.3d 445, 456 (5th Cir. 2009) (emphasis added). The question under Rule 50(a) is whether "there is no *legally sufficient evidentiary* basis" for the jury's verdict, such that the moving party is entitled to "judgment as a matter of *law*." Fed. R. Civ. P. 50(a) (emphasis added). And Rule 50(b) allows the party to renew *"the legal questions* raised" in the Rule 50(a) motion. Fed. R. Civ. P. 50(b) (emphasis added); *see also Hertz v. Woodbury Cty.*, 566 F.3d 775, 781 (3d Cir. 2009) ("Because a Rule 50(a) motion can *only* prevail if there is no *'legally* sufficient evidentiary basis to find for the party,' each of the arguments that Plaintiffs raise in their motion on appeal is, in effect, a sufficiency-of-the-evidence challenge." (emphasis added)). Indeed, this Court stated the *Unitherm* Rule with no exceptions (let alone one for "legal issues"): a Rule 50(a) motion simply "cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." *Unitherm*, 546 U.S. at 404.

Thus, the Sixth Circuit—and, until now, Respondents themselves—were correct to say that the decision below was simply a summary-judgment appeal involving Rule 56. Respondents' attempt to recast it as a Rule 50 case is strategically understandable but legally unsupportable. With the "Rule 50" centerpiece of the Opposition Brief dismantled, Respondents' remaining points fall quickly.[1]

B. Because This Was a Summary-Judgment Appeal, The Problems Other Circuits Recognize For Such Appeals Did Materialize Here.

Respondents' insistence that this is a Rule 50 case enables them to avoid responding to many of Ortiz's arguments altogether, including that this case

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[1] Courts have noted that other parties who similarly failed to renew their Rule 50(a) motions have also raised the possibility of an exception to the *Unitherm* Rule for "questions of law." *See, e.g.*, *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 397 n.2 (6th Cir. 2008) ("[W]e need not resolve the parties' dispute regarding the effect of *Unitherm* on [appellant's] failure to renew, post-verdict, its Rule 50 motion, in which [appellant] raised a question of law and not a question going to the sufficiency of the evidence."). Those arguments do nothing to convert the summary-judgment decision into a Rule 50 appeal. And, in any event, the decision below decided a classic sufficiency-of-evidence question, i.e., whether Respondents' conduct violated a constitutional right. *See Williams v. Gonterman*, 313 F. App'x 144, 147 (10th Cir. 2009) (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*, 591 F.3d at 456 (same).

undercuts the discretion involved in Rule 56 decisions and the need to use interlocutory appeals for Rule 56 denials. *See, e.g.*, Opp. at 11 n.1 ("[I]f Rule 50, not Rule 56, is at issue, neither [of these issues] arises, because both issues are tied only to Rule 56.").

Because this is a summary-judgment case, the concerns raised by courts on the side of the split that do not allow such appeals are in full force here. For example, Respondents were able to circumvent Rule 50: they did not file a Rule 50(b) motion, yet they achieved the same result based on a summary-judgment appeal. Pet. at 16. Moreover, the appeal conflicts with the collateral-order doctrine, which provides that such appeals are "effectively unreviewable" after trial. *Id.* at 21. Finally, reviewing a summary-judgment motion after trial can lead a court to consider two sets of evidence. *Id.* Respondents say that the court did properly consider all the evidence. As the petition noted, however, that cannot be. *See* Pet. at 19–20 (court concluded that Ortiz had not stated a First Amendment retaliation claim but the jury checked "Yes" on verdict form under question asking if she was placed into solitary confinement "for an unlawful purpose such as retaliation").

C. The Case Would Have Come Out Differently in Circuits on the Other Side of the Splits.

Respondents further argue that, if they must acknowledge their earlier view that this is a Rule 56 case (as it is), the result would nonetheless be the same in circuits on the other side of the splits (i.e., the appeal would still be allowed). But again, Respondents put the entire weight of their argument

on their unrenewed Rule 50(a) motion. Opp. at 16. It cannot possibly bear that load.

Respondents rely on a number of pre-*Unitherm* cases to say that Respondents' summary-judgment arguments could be preserved in the Rule 50(a) motion for review on appeal. Opp. at 16–17 (citing Fifth, Ninth, and Eleventh Circuit cases). But the circuits have held that *Unitherm* precludes such review. *See Shepherd v. Dallas Cty.*, 591 F.3d 445, 450, 456 (5th Cir. 2009) (applying *Unitherm* Rule where Rule 50(a) motion raised same arguments as Rule 56 motion) (Section 1983 context)); *First United Pentecostal Church v. GuideOne Specialty Mut. Ins. Co.*, 189 F. App'x 852, 855 & n.6, 856 (11th Cir. 2006) (same); *Hertz v. Woodbury Cty.*, 566 F.3d 775, 781 (3d Cir. 2009) (same).

Indeed, the only post-*Unitherm* decision Respondents rely on—the Eighth Circuit's decision in *EEOC v. Southwestern Bell*—proves Ortiz's point. There, the Eighth Circuit held that it could not review an appeal where the losing party's Rule 50(a) motion relied "on the same argument" as its summary-judgment motion but was not renewed through a Rule 50(b) motion. 550 F.3d 704, 709 (8th Cir. 2008). The appellant made the same argument about *Unitherm* that Respondents make here: "[T]hat *Unitherm* only precludes our review of sufficiency of the evidence challenges." *Id.* at 709. The Eighth Circuit rejected this argument, noting that Rule 50 motions are, by definition, sufficiency challenges as a matter of *law*. *Id.*

Finally, as noted in the Petition, there is even less reason to allow such post-trial summary-judgment

appeals where, as here, the appealing defendant failed to bring an interlocutory appeal. Pet. 20–21 (citing Ninth Circuit's decision in *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 2000)). Allowing such a post-trial appeal eviscerates the collateral-order doctrine's premise that the pretrial Rule 56 order was "final." *Id.* at 21. Respondents do not dispute this point; instead they rely on their defunct refrain that Rule 56 is simply not at issue because they appealed "a Rule 50 denial." Opp. at 17. Ortiz's case certainly would have come out differently in the Ninth Circuit. *See Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1088, 1089 (9th Cir. 2007) (holding that failure to file a Rule 50(b) motion absolutely precludes consideration of issues raised in Rule 50(a) motion because they are forfeited).

In short, other circuits would not have heard the Rule 56 appeal that occurred here, regardless of the Rule 50(a) motion raising the same argument: the *Unitherm* Rule would simply prevent the appeal. Thus, this case squarely presents an opportunity to resolve the question presented and provide uniformity of federal practice in the lower courts.[2]

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[2] Ironically, Respondents' reliance on their unrenewed Rule 50(a) motion highlights that this case is particularly appropriate for review. First, to the extent there are suggestions that *Unitherm* might leave an opening for Rule 50(a) appeals regarding "legal questions," the Court can clarify *Unitherm*'s bar on such appeals. *See supra*, at 5 n.1. Second, the Court can clarify whether the bar is jurisdictional. *See Southwestern Bell*, 550 F.3d at 708 ("There are legitimate questions as to whether the *Unitherm* holding is jurisdictional . . . .")

D. The Circuit Split is Real and Pervasive.

Respondents' attempt to refute the related circuit splits here is counterproductive: Respondents' statements about the first split are false, and their attempt to minimize the second split only confirms its entrenchment.

First, Respondents say that "Ortiz is mistaken in asserting a conflict with the Eighth Circuit." Opp. at 18. Respondents explain that the *Southwestern Bell* decision stated the general rule that the Eighth Circuit will not review summary-judgment appeals even for legal questions, but that its *Goff v. Bise* decision holds that the court will review qualified-immunity questions. 173 F.3d 1068 (8th Cir. 1999). This is exactly what Ortiz said in her petition. *Compare* Pet. at 12 (including *Southwestern Bell* among decisions "rejecting the legal-question exception and barring appeal") *with* Pet. at 15 (including *Goff* among decisions "allowing post-trial appeals that could have been raised before trial"). The point, as the Petition makes clear, is that *Southwestern Bell* falls on one side of the first split, and that *Goff* falls on one side of the second split. Nothing more. Ortiz never said that the decision below conflicts with *Goff*; she explained that, "[h]ere, the Sixth Circuit *followed* this approach . . . ." Pet. at 15 (emphasis added). Ortiz is not "mistaken," and she has not "overstate[d]" the Eighth Circuit's position. Opp. at 18.

Second, Respondents say that the second split, exemplified by the Ninth Circuit's decision in *Price* (no post-trial appeal where the loser failed to bring an interlocutory appeal), is not so apparent in light of the Ninth Circuit's *Padgett* decision. In *Padgett v. A.*

Curtis Wright, the state official appealed the denial of qualified immunity at summary judgment *before* going to trial (as Respondents here failed to do). 587 F.3d 983, 985 (9th Cir. 2009). Because the district court certified the appeal as frivolous, however, the case proceeded to trial while the appeal was pending. *Id.* Then, after trial, the Ninth Circuit dismissed the appeal, following the "general rule preventing [it] from reviewing denials of summary judgment." *Id.* Approving of *Price*, the Ninth Circuit further noted that reviewing the summary-judgment appeal would have been particularly inappropriate after the full trial, "as the jury verdict concerned precisely the issue that was the subject of [the official's] qualified immunity appeal—whether [the official] violated Padgett's First Amendment rights." *Id.* at 986. Thus, *Padgett* confirms Ortiz's position: If Respondents had brought a (nonfrivolous) interlocutory appeal of the summary-judgment ruling, the appeal would have been considered. By failing to do so and instead proceeding to trial, Respondents made the post-trial appeal, like the appeal in *Padgett*, unreviewable.

More fundamentally, Respondents do not address Ortiz's argument that the minority rule in *Price* is simply the most logical approach, as it honors the structure of the federal rules and statutes, and is true to the collateral-order doctrine. Pet. at 21.

E. Respondents Do Not Dispute That the Petition Presents an Important Federal Question.

Respondents do not address Ortiz's argument that the question presented is an important federal

question and that it also has left in disarray many state courts looking for guidance. Pet. at 22–23.

* * *

Respondents' Opposition boils down to the suggestion that this is a Rule 50 case. They ask this Court to accept that suggestion even though there was no Rule 50(b) motion, even though *Unitherm* would bar such a Rule 50 appeal, even though the decision below never cited Rule 50, and even though Respondents explicitly stated that the court below reversed the denial of their motion for summary judgment under Rule 56. This strained effort reveals an attempt to divert this Court from one point: this case squarely presents two related conflicts on a fundamental question of summary judgment.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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