No. 09-737

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May an appeals court, upon review of the entire trial record, order judgment as a matter of law on qualified immunity grounds to defendants who lost a jury trial after unsuccessfully moving under Rule 50 for judgment on that basis?

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INTRODUCTION

Petitioner Michelle Ortiz, a former Ohio prisoner, obtained a jury verdict in her 42 U.S.C. § 1983 suit against two state prison officials. The Sixth Circuit reversed, holding that the state officers were entitled to qualified immunity and thus to judgment as a matter of law. Ortiz claims that her case implicates circuit splits over whether a defendant may appeal, after losing at trial, a denial of summary judgment, where the defendant did not pursue an available interlocutory appeal. Even if Ortiz's case squarely presents the question she raises (and it does not), this is a poor vehicle for resolving that question. And in any event, the question presented does not warrant this Court's review.

First, this case does not clearly raise the issue of appealing the denial of a summary judgment motion under Fed. R. Civ. P. 56 ("Rule 56"), because Defendants-Respondents Paula Jordan and Rebecca Bright also sought judgment as a matter of law under Fed. R. Civ. P. 50 ("Rule 50"). They appealed the final judgment without specifically relying on Rule 56. To be sure, the Sixth Circuit used the term "summary judgment," but its decision was *functionally* a Rule 50 ruling, because it reviewed all of the trial evidence. Thus, Ortiz's question is not truly presented.

Even if the Sixth Circuit's labeling means that Ortiz's question is technically presented, the Rule 50 motion and the Circuit's full-record review make this case a poor vehicle to address the purported Rule 56 issue. Ortiz's argument against post-trial Rule 56 appeals is premised on forcing parties to invoke Rule 50 instead, Petition ("Pet.") at 12, 16, and on the importance of reviewing a full trial record when it is

available, *id.* at 17. The cases Ortiz cites similarly rely on those factors. Here, Respondents *did* invoke Rule 50, and the appeals court's labeling does not implicate a rule aimed at changing the *party's* behavior. And the court's full-record review obviates any concern based on the scope of the record, or any division of authorities based on that concern.

Second, while the vehicle flaw is reason enough to deny the Petition, the issue on its own terms does not warrant review, as the purported circuit splits are minimal to nonexistent.

The Court should therefore deny the Petition.

COUNTERSTATEMENT

A. Respondents invoked Rule 50 at the close of evidence, seeking judgment as a matter of law.

As Ortiz explains, she sued Ohio prison officials under § 1983 for alleged actions or inactions in connection with a corrections officer's assault on Ortiz. Pet. at 2; *Ortiz v. Jordan,* 316 Fed. App'x 449, 450 (6th Cir. 2009); Pet. App. at 2a. Some defendants were dismissed, leaving two defendants subject to a three-day jury trial. Pet. App. at 6a-7a. Ortiz claimed that Respondent Jordan, a case manager, violated the Eighth Amendment by failing to protect her from the assault. *Id.* at 5a. Ortiz claimed that Respondent Bright, an investigator, violated her due process rights by placing her in solitary confinement during the prison's internal investigation. *Id.* at 5a-6a. Ortiz argued that Bright retaliated against her for reporting the assault. *Id.* at 6a. Bright responded that the confinement was for Ortiz's own protection and to protect the integrity of the investigation. *Id.* at 5a-6a.

Before trial, the district court denied Jordan's and Bright's summary judgment motion, which argued, among other things, that they were entitled to qualified immunity. *Id.* at 7a. Respondents did not appeal that denial pretrial, although denials of qualified immunity are eligible for interlocutory appeal under *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Pet. App. at 7a.

At the close of Ortiz's case in chief, Respondents "move[d] for a judgment as a matter of law pursuant

to Rule 50." Trial Transcript ("Tr.") at 286. They argued that "there is no legally sufficient basis for a reasonable jury to find for plaintiff on both the issues in this case, failure to protect or retaliation." *Id.* More specifically, Respondent Jordan asserted that she did not violate the Eighth Amendment because she took some action to protect Ortiz and did not act with "deliberate indifference" as defined in *Farmer v. Brennan,* 511 U.S. 825, 835 (1994). Tr. at 286-88. For her part, Respondent Bright argued that she did not violate Ortiz's due process rights by placing Ortiz in solitary confinement. *Id.* at 293-97. The district court denied the Rule 50 motion as to each defendant. *Id.* at 291 "[Y]our motion with respect to Ms. Jordan is denied."); *id.* at 299 ("[Y]our motion is denied.").

Respondents renewed their Rule 50 motion at the close of all the evidence. *Id.* at 410-411. Again the court denied the motion. *Id.* at 411. The jury awarded a verdict in Ortiz's favor. Respondents did not renew the motion after the verdict, although Rule 50(b) allows for such renewal.

B. Respondents appealed the final judgment, seeking judgment as a matter of law, without specific reliance upon Rule 56.

Respondents appealed the final judgment to the Sixth Circuit. The appeal was based largely on the legal arguments they had raised in their Rule 50 motion—that the verdict was improper as a matter of law because no constitutional violation was established. Respondents further argued that even if a constitutional violation occurred, they were entitled to qualified immunity.

Respondents' briefs never said that their entitlement to qualified immunity warranted reversal of the denial of summary judgment. Instead, Respondents argued that the verdict should be reversed. For example, Respondents urged in one "issue presented for review" that "the verdict was against the weight of the evidence in that the actions of Defendant Bright did not amount to any constitutional violation," Brief of Defendants-Appellants ("Apt. Br.") at 2, and in another, that "as a matter of law, Defendant Jordan's actions do not meet the high standard for a constitutional violation of failure to protect," *id.* Throughout the briefs, Respondents cited trial evidence.

Respondents referred to summary judgment only in the procedural history and in the context of an issue about whether a concession of Ortiz's in the summary judgment process precluded her proceeding against Bright. *Id.* at 15, 20-21. Specifically, Ortiz had not only failed to oppose Bright's summary judgment motion, but Ortiz also acknowledged that Bright had "acted appropriately," and Respondents therefore argued that Bright could not have been kept in the case after that. *Id.* That argument was tied to the summary judgment motion, but Respondents' argument regarding the lack of a constitutional violation was not phrased in terms of summary judgment. *Id.* at 21-29.

C. The appeals court reviewed the entire trial record and determined that Respondents were entitled to qualified immunity as a matter of law.

The Sixth Circuit reversed the district court's decision on the ground that, as a matter of law, no

constitutional violations occurred, and it consequently found that Jordan and Bright were entitled to qualified immunity. Pet. App. at 13a.

The Sixth Circuit began its opinion by restating the facts, and it first explained that it was considering the "evidence, as reflected by the jury's verdict and, therefore, viewed on appeal in the light most favorable to Ortiz." *Id.* at 2a. The court's recitation of the facts was based on the trial record; for example, it repeatedly referred to witnesses who "testified" at trial. See, e.g., *id.* at 3a ("Hall testified that when he dropped Ortiz off at Jordan's office, he told Jordan what Ortiz had told him."); *id.* at 4a ("Ortiz testified that she was feeling ill."); *id.* at 5a ("Bright testified at trial that if Jordan had reported the first incident immediately."); *id.* ("Bright later testified that she had warned Ortiz several times not to speak about the investigation with other inmates.").

The court did, as Ortiz notes, Pet. at 11, discuss the appealability of a "denial of a summary judgment motion after a trial on the merits," and it did say that such appeals were allowed when the issue is qualified immunity. Pet. App. at 8a. The court did not, however, affirmatively state that Respondents' appeal was tied to summary judgment, nor did the court refer to the Rule 50 motion.

The court's qualified immunity analysis focused on the legal standards applicable to each claim. As to Ortiz's Eighth Amendment claim against Jordan, the court "view[ed] the facts in the light most favorable to Ortiz," *id.* at 9a, and it concluded that "Jordan's conduct [did] not rise to the level of legal indifference," *id.* at 10a. Therefore, the court said,

"Jordan is entitled to qualified immunity." *Id.* at 11a. The court 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." *Id.* at 11a n.3.

In finding that Bright was also entitled to qualified immunity, the Sixth Circuit explained that Bright's placement of Ortiz in solitary confinement did not even trigger a liberty interest protected by due process, because "a temporary placement in solitary confinement is not an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* at 12a (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). Without a protected liberty interest, no due process violation could have occurred, regardless of any allegedly retaliatory motive. The court rejected Ortiz's attempt to recast her retaliation claim as premised on the First Amendment rather than, as she had pleaded in her Complaint, on due process. It explained that "it is evident from the language in her complaint, as well as from the record as a whole, that her claim was conceived of and analyzed squarely as a due process violation and not as a First Amendment retaliation claim." *Id.* at 12a. The court also explained that its qualified immunity holding as to Bright made it unnecessary to reach Bright's separate argument that she was entitled to summary judgment based on Ortiz's failure to oppose that motion. *Id.* at 13a n.5.

REASONS FOR DENYING THE WRIT

The Petition should be denied for several reasons. To begin with, this case does not raise the question presented regarding summary judgment, and even if it does, it is not a proper vehicle to address the issue. Ortiz's own description of the circuit split, and of the merits of her argument, relies upon the purported need to channel defendants into using Rule 50 and the need to review a full trial record. But neither problem occurred here. Moreover, even on its own terms, the question presented does not warrant review, because the alleged conflicts below are minimal or nonexistent.

A. This case does not implicate any objections to appealing denials of Rule 56 summary judgment motions, because Respondents invoked Rule 50 and the court reviewed the full trial record.

1. Ortiz's arguments are premised on an absence of a Rule 50 motion and a concern over failure to review the entire trial record.

Ortiz leaves no doubt that the circuit splits she alleges, and her underlying concerns, exist only in regard to pure summary judgment appeals post-trial, where no Rule 50 motion occurred at trial or where a party seeks to limit the scope of the record to the pretrial evidence.

Ortiz claims two divisions of authority. First, she says that the circuits disagree over whether summary judgment denials may be appealed post-trial when the issue is legal, rather than factual. Pet. at 10-13. She notes that the Sixth Circuit allows

such appeals, along with the Seventh and Ninth. *Id.* at 11 (citing Pet. App. at 8a); *id.* at 10 (citing *McPherson v. Kelsey,* 125 F.3d 989, 995 (6th Cir, 1997); *Chemetall GMBH v. ZR Energy, Inc.,* 320 F.3d 714, 720 (7th Cir. 2003); *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.,* 382 F.3d 897, 902 (9th Cir. 2004)). She says that the Fourth and Eighth Circuits reject such appeals, maintaining a bright-line rule against post-trial appeals of summary judgment denials. Pet. at 11-12 (citing *Varghese v. Honeywell Int'l., Inc.,* 424 F.3d 411 (4th Cir. 2005) and *EEOC v. Southwestern Bell Telephone*, 550 F.3d 704, 708 (8th Cir. 2008)).

Second, Ortiz claims a circuit split over whether any such right to appeal is forfeited if the party could have pursued an interlocutory appeal—as is the case with qualified immunity—but did not. Ortiz says that the decision below aligns the Sixth Circuit with the Seventh, Eighth, and Tenth Circuits in allowing such appeals. Pet. at 15 (citing *Pearson v. Ramos,* 237 F.3d 881, 884 (7th Cir. 2001); *Goff v. Bise,* 173 F.3d 1068, 1072 (8th Cir. 1999); *Medina v. Bruning,* 56 F. App'x 454, 455 (10th Cir. 2003)). Ortiz contends that the Ninth Circuit rejects such appeals based on the failure to file an interlocutory appeal. Pet. at 13-14 (citing *Price v. Kramer,* 200 F.3d 1237 (9th Cir. 2000). She also suggests that the Fourth Circuit would reject such appeals, not based on the failure to appeal earlier, but based solely on a broader bar to all appeals of summary judgment denials. Pet. at 13 (citing *Varghese*, 424 F.3d at 420-23).

Putting aside whether those splits exist, or to what extent (see Part B below), the cases cited

demonstrate that the issue exists only where two related concerns arise. First, the courts that reject post-trial appeals of summary judgment denials apply that bar only when a party failed to invoke Rule 50; the rationale is to force parties to use Rule 50. Second, the corollary concern is that post-trial appeals should be based on a review of the full trial record, rather than the limited record that had been available at the summary judgment stage.

For example, the Fourth Circuit explained, in rejecting a summary judgment appeal, that the defendant "had the option to move for judgment as a matter of law (the denial of which we will review) .... Although [defendant] moved for judgment as a matter of law, they did not so move on this issue and therefore failed to preserve it for appeal." *Varghese,* 424 F.3d at 423. Similarly, the Ninth Circuit in *Price* refused to review an appeal a Rule 56 denial, but it did review a separate denial of a Rule 50 motion in the same case. *Price,* 200 F.3d at 1243-44.

The Rule 50 distinction is critical because the rationale for rejecting Rule 56 appeals, according to both Ortiz and the cases she cites, is to force parties to use Rule 50 to appeal final judgments. Ortiz says that allowing post-trial summary judgment appeals "makes Rule 50 meaningless, rewarding parties who failed to follow the Rules to preserve issues after summary judgment." Pet. at 16. Ortiz relies on the Eighth Circuit's reasoning that "allowing parties to appeal denials of summary judgment, even for pure questions of law, 'would undermine Federal Rule of Civil Procedure 50(a) and (b) and 28 U.S.C. section 1292(b) (permitting a party to appeal an interlocutory order of the district court if the district

court certifies the order for appeal).'" Pet. at 12 (quoting *Eaddy v. Yancey,* 317 F.3d 914, 916 (8th Cir. 2003)).

The other rationale for rejecting summary judgment appeals post-trial, according to Ortiz and some courts, is rooted in the different scope of evidence available at the summary judgment stage versus post-trial. Ortiz says such appeals "create[] a contradictory inquiry for the reviewing court," Pet. at 17, quoting the Fifth Circuit's observation that "the 'evidence' presented at pretrial may well be different from the evidence presented at trial." *Black v. J. I. Case*, 22 F.3d 568, 572 (5th Cir. 1994). In *Black,* the defendants-appellants had also moved for a directed verdict, and the court explained that the sole motive for appealing the denial of the Rule 56 motion was to seek "revers[al] based on the embryonic facts that existed before trial, as opposed to the fleshed-out facts developed at trial." *Id.* at 572 n.6.

All this demonstrates that Ortiz's question presented matters, if at all, only in cases involving an absence of a Rule 50 motion, a concern over reviewing less than the full trial record, or both. As shown below, this case does not raise those issues.[1]

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[1] Ortiz cites two other rationales for barring post-trial Rule 56 appeals, but both are corollaries of Ortiz's argument about directing parties to use Rule 50 instead, and both evaporate when Rule 50 is involved. Ortiz says that the discretion involved in Rule 56 is at stake, Pet. at 16, and she also cites the need to use interlocutory appeals for Rule 56 denials, *id.* at 17. But if Rule 50, not Rule 56, is at issue, neither arises, because both issues are tied only to Rule 56.

2. Respondents' Rule 50 motion and the Sixth Circuit's consideration of trial evidence leave doubt as to whether the question presented is raised at all.

As shown above, not only did Respondents invoke Rule 50 in the district court, but the appeal on qualified immunity grounds was framed as a post-trial challenge to the verdict "as a matter of law," in light of all the evidence presented at trial. Ortiz cannot show that Respondents sought to achieve a belated appeal of a denial of summary judgment as to the qualified immunity issues.

The appeals court ruled solely on the qualified immunity issues, which were briefed as challenges to the final judgment. Respondents argued that the final judgment—not the decision to go to trial, but the final judgment—was wrong as a matter of law, in light of the lack of evidence at trial to justify the judgment. Respondents' appellate brief aligned the errors precisely with the arguments in their Rule 50 motion. In particular, Respondents argued that the evidence at trial established that "the jury could not reasonably have found Jordan liable under §1983" because Ortiz did not prove that she was "deliberately indifferent" to the danger posed by the corrections officer. Apt. Br. at 27-28. As to Bright, Respondents argued that as a matter of law, she did not violate Ortiz's due process rights by placing her in solitary confinement. *Id.* at 21-26. In arguing that both were entitled to qualified immunity, Respondents phrased everything in terms of judgment as a matter of law, not specifically summary judgment. *Id.* at 37-39. Respondents even cited, in support of their argument that no

constitutional violation existed as a matter of law, a case that reviewed, on qualified immunity grounds, a district court's grant of judgment notwithstanding the verdict. *Id.* at 29 (citing *Marsh v. Arn,* 937 F.2d 1056 (6th Cir. 1991)).

Thus, Respondents' appeal does not squarely present Ortiz's question, which asks, "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. at i. Respondent Bright did appeal the summary judgment denial on other grounds, but that is no longer at issue, and both Respondents' appeals on qualified immunity grounds were challenges to the final judgment.[2] To the extent that Ortiz's question asks what a *party* may do, this case literally does not raise that issue.

Recasting Ortiz's question in terms of the Sixth Circuit's decision, rather than Respondents' request, does not help Ortiz. First, if the whole idea is to encourage *parties* to invoke Rule 50, and if Respondents followed the proper channel in doing so, it makes little sense to punish Respondents for the appeals court's labeling choice.

Second, and more important, the court's review was, for all practical purposes, a Rule 50 review. On appeal, decisions regarding Rule 50 or Rule 56 motions are both subject to de novo review, and both

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[2] Respondent Bright raised an independent argument that was tied to the summary judgment motion, as she argued that Ortiz's failure to oppose the motion entitled Bright to summary judgment. That argument explains why the Notice of Appeal cited the summary judgment motion. Ortiz's issue might have been presented had the appeals court ruled on that basis, but the court did not reach that issue. Pet. App. at 13a n.5.

ask the same ultimate question as to whether judgment as a matter of law is required, in light of the evidence. *Black,* 22 F.3d at 568. The sole difference in reviewing a Rule 56 motion or Rule 50 motion is the scope of the evidence at issue. *Id.*

Here, the appeals court expressly reviewed all of the trial evidence, not just the evidence available at the earlier Rule 56 stage. The court explained at the outset that it assessed all the "evidence, as reflected by the jury's verdict and, therefore, viewed on appeal in the light most favorable to Ortiz." Pet. App. at 2a. It relied repeatedly on how various witnesses "testified" at trial. *Id.* In particular, the court looked to the trial testimony of a corrections officer, Steve Hall, *id.*, and Hall provided no pretrial testimony by deposition or affidavit. The dissent, too, understood the majority's review to be a full-record review of the verdict, not of the denial of the pretrial Rule 56 motion, as it disputed "the majority's decision to overturn the jury's verdict." *Id.* at 18a. Therefore, the appeals court's review was, in effect, a Rule 50 review.[3]

Ortiz fails even to acknowledge Respondents' Rule 50 motion, and to the extent that she appears to imply that no such motion was raised, she is wrong. Ortiz says that allowing appeals of summary judgment "reward[s] parties who failed to follow the

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[3] After Respondents briefed the appeal in terms of "judgment as a matter of law," and after the panel ruled in their favor and used "summary judgment" language, Respondents did refer to the appeal in summary judgment terms in their brief opposing en banc review. No further review ensued, and Respondents' post hoc use of the court's labeling does not change the Rule 50 basis for the appeal.

rules" by ignoring Rule 50, Pet. at 16, and that it creates problems regarding the scope of evidentiary record, *id.* at 17—concerns that she says "materialized" in her case, *id.* But those concerns did *not* materialize, because Respondents made a Rule 50 motion, and both Respondents and the court addressed the full trial record.

Finally, the fact that Respondents did not follow their Rule 50(a) motions (raised at the end of Ortiz's case in chief and at the close of all the evidence) with a post-verdict Rule 50(b) motion does not change the analysis. This Court has held that a defendant appealing a denial of a Rule 50(a) motion made on sufficiency-of-the-evidence grounds must renew its motion under Rule 50(b) to enable appellate review. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 456 U.S. 394 (2006). But *Unitherm* does not apply here, because Respondents' Rule 50(a) motion was based on legal issues, such as the absence of a protected liberty interest under *Sandin,* not sufficiency of the evidence. See *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 397 n.2 (6th Cir. 2008) (noting that *Unitherm*'s Rule 50(b) requirement arises only for sufficiency challenges); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006) (same). Even if *Unitherm* did extend to all Rule 50(a) cases, that would not help Ortiz, because Ortiz purports to challenge the availability of Rule 56 review, not the availability of Rule 50(a) review based on an absence of a Rule 50(b) motion.

For all these reasons, this case does not even raise the question presented.

3. Even if the Rule 56 question is technically raised here, this case is a poor vehicle for reviewing the issue.

Even if the Sixth Circuit's reference to summary judgment means that the Rule 56 question presented is technically raised here, this case is a poor vehicle for reviewing any Rule 56 issues, because the result here would be the same in the courts on the other side of Ortiz's claimed circuit split.

For example, the Fourth Circuit in *Varghese* rejected a Rule 56 appeal, 424 F.3d at 423, but it did review a different issue that had been raised in a Rule 50 motion, *id.* at 415-16, and it explained that it would have reached the rejected issue, too, had appellant preserved that issue in a Rule 50 motion, *id.* at 423. The Fifth Circuit in *Black* not only stressed its willingness to review a denial of a Rule 50 motion, but it did review such a Rule 50 denial—one concerning the same issues as the rejected Rule 56 appeal—and the court insisted only that the record for review include the full trial record. *Black*, 22 F.3d at 572-73.

Other circuits are in accord. *Lind v. UPS, Inc.*, 254 F.3d 1281, 1295 (11th Cir. 2001); *EEOC*, 550 F.3d at 708. In *EEOC*, the appellants challenged the denials of both their Rule 56 and Rule 50 motions. Although the Eighth Circuit rejected both appeals, its rejection of the Rule 50 appeal was based on *Unitherm,* 456 U.S. 394, because the Rule 50(a) motion at issue in *EEOC* was based on a sufficiency-of-the-evidence objection, and the appellant had not preserved it under Rule 50(b). That reasoning would not preclude this appeal.

And the Ninth Circuit, too, would hear this appeal. Ortiz identifies the Ninth as the sole circuit on the anti-appeal side of her alleged second split, which is tied to the theory that defendants waive any right to appeal Rule 56 denials if they fail to take advantage of an interlocutory appeal. Pet. at 13 (citing *Price,* 200 F.3d at 1244). But that requirement of seeking an interlocutory appeal applies only if the party truly wishes to appeal a Rule 56 denial, not a Rule 50 denial.

Consequently, even if the Sixth Circuit's decision implicates an abstract circuit split, this case does not involve any split as to its outcome. All circuits would hear this appeal because of the Rule 50 motion.

B. The purported divisions of authority are minimal to nonexistent.

In light of the vehicle flaws discussed above, it matters little whether a circuit split exists on the abstract issue that Ortiz identifies. Even viewing the case on Ortiz's terms, however, any division of authority is minimal to nonexistent.

1. Only the Fourth Circuit is plainly against post-trial appeals of summary judgment denials, and that alone does not warrant review of the first alleged split.

Ortiz first claims that the Sixth Circuit decision below conflicts with the Eighth Circuit's decision in *EEOC*, 550 F.3d 704, and with the Fourth Circuit's decision in *Varghese,* 424 F.3d 411.

Ortiz is mistaken in asserting a conflict with the Eighth Circuit. In *EEOC*, the court held that it would not review a district court's denial of a motion for summary judgment after a trial on the merits. That case, however, did not raise the qualified immunity issue. By contrast, in *Goff v. Bise,* 173 F.3d 1068 (8th Cir. 1999), the Eighth Circuit reviewed the qualified immunity issue post-trial, finding that the issue of qualified immunity was an exception to the general rule of "no review." The *Goff* court explained that it "[n]ormally . . . [would] not review the denial of a motion for summary judgment after a trial on the merits. However, a district court's denial of summary judgment based on qualified immunity is an exception, and is reviewable after a trial on the merits." *Id.* at 1072 (citations omitted).

Goff shows that Ortiz overstates the Eighth Circuit's position, because *Goff* demonstrates that the Eighth Circuit, when confronted with a qualified immunity issue post-trial, will review the issue even when it stems from the denial of a summary judgment motion. That Circuit's broader statements about summary judgment appeals are apparently inapplicable in the specific context of qualified immunity, so no conflict exists between the decision below and the Eighth Circuit.

This leaves the Fourth Circuit as the only possible circuit that would conflict with the decision below. But the *Varghese* decision did not include a qualified immunity claim, and therefore, it is unclear whether the Fourth Circuit would rule ultimately in favor of reviewing the appeal in a qualified immunity context (as the Eighth Circuit did in *Goff*). 173 F.3d

at 1072. This case is therefore not worthy of this Court's review.

2. No clear split exists at all as to the second alleged split, regarding appeals of qualified immunity issues post-trial.

Ortiz describes her second alleged split as concerning whether any possible right to appeal is forfeited if the party forgoes an interlocutory appeal. Pet. at 13. This argument would apply in the qualified immunity context, in which such interlocutory appeals are allowed.

Ortiz alleges that just one circuit, the Ninth, creates this second division of authorities, and she bases that claim on one case. Pet. at 13 (citing *Price,* 200 F.3d 1237). In *Price,* the court held that it would not review the pretrial denial of qualified immunity because that issue could have been reviewed in an interlocutory appeal. In reaching this conclusion, the Ninth Circuit relied on its earlier decision of *Loricchio v. Legal Servs. Corp*, 833 F.2d 1352 (9th Cir. 1987), in which the court refused to consider any post-trial appeals of the denials of summary judgment.

But *Price* is questionable support for pinning the Ninth Circuit to a bright-line no-appeal rule, in light of more recent decisions. In *Banuelos,* 382 F.3d 897, the Ninth Circuit held that the "general rule" against appeals "does not apply to those denials of summary judgment motions where the district court made an error of law that, if not made, would have required the district court to grant the motion." *Id.* at 902.

More recently, the Ninth Circuit appeared to harmonize *Baneulos*'s distinction between legal and factual issues with *Price*'s rejection of an appeal grounded in qualified immunity. In *Padgett v. A. Curtis Wright,* 587 F.3d 983 (9th Cir. 2009), a defendant sought review of the denial of his summary judgment motion based on qualified immunity. The *Padgett* court applied the distinction between legal and factual issues and rejected the appeal. The court explained that the summary judgment issue turned on the existence or absence of a disputed fact issue. In other words, the *Padgett* court viewed qualified immunity appeals the same as any other summary judgment appeals, with law-based appeals allowed and fact-based appeals rejected. The *Padgett* court specifically distinguished *Price,* saying that *Price's* general rule of no review does not apply "where the denial of summary judgment turned on a pure legal question, rather than a disputed factual issue that went to the jury." *Id.* at 986.

Under *Padgett*'s reading of *Price* and its application of the distinction between legal and factual issues to the qualified immunity context, the Ninth Circuit's position does not conflict with the decision below. Here, the issues were plainly legal, turning on the absence of a protected liberty interest and the standard for deliberate indifference.

In sum, the purported circuit splits amount to little, even on Ortiz's own terms.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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