No. 16-903

IN THE
Supreme Court of the United States

ROBERT P. HILLMANN,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should decline to review a case that does not present the issue petitioner claims – namely whether a legal issue raised at summary judgment can be reviewed after trial – where instead the Seventh Circuit properly reviewed a post-trial motion and determined that the City was entitled to judgment because petitioner failed to adduce evidence at trial to support his claim.

2. Whether this Court should decline to review a decision that rests on state law and is supported by alternative grounds in addition to the one on which the court of appeals relied.

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STATEMENT

Petitioner Robert Hillmann worked for the City of Chicago's Department of Streets and Sanitation ("S&S") for nearly three decades, before and after the onset of a disabling medical condition, and was laid off in a reduction in force ("RIF") in July 2002. Pet. App. 1a, 3a. He sued the City alleging, among other claims, that he was included in the RIF because he asserted his rights under the Illinois Workers Compensation Act ("IWCA"), 820 ILCS 305/1 *et seq.,* and that the City violated the Americans With Disabilities Act ("ADA"), 42 U.S.C.

§§ 12100 *et seq*., by discriminating and retaliating against him, and failing to accommodate him. Pet. App. 2a; R. 1.[1] The matter was tried twice.

Trial Proceedings

In the first trial ("*Hillmann I")*, the City filed a motion in limine to bar testimony by three S&S employees – Albert Sanchez, John Sullivan, and Jack Drumgould – who were involved in criminal prosecutions for their involvement in employment decisions at S&S. R. 258-5 at ¶¶ 3-6. The motion cited concern that petitioner had identified Sanchez and Drumgould to testify about political patronage, even though the City had been granted summary judgment on petitioner's patronage-related claims. *Id.* at ¶¶ 10-17. In the alternative, the City moved to bar, as unduly prejudicial, any references to Sullivan's and Drumgould's invocation of the Fifth Amendment at their depositions (Sanchez had not been deposed), and to bar them from invoking the privilege if they testified at trial. *Id.* at ¶¶ 18-26. The district court initially denied the City's motion to bar witnesses, R. 345 at 13, although the court stated it would hold an additional hearing before the witnesses' testimony to ensure they had admissible

[1] We cite the district court record as "R. ___," the Seventh Circuit record as "7th Cir. Dkt. ___" and the audio recording of the oral argument in the Seventh Circuit as "7th Cir. Arg. ___."

testimony, *id.* at 13-14. Petitioner withdrew his writ to have Sanchez brought to court to testify. R. 350 at 668. Sullivan and Drumgould were relieved from testifying following a subsequent hearing during the fourth day of trial, after petitioner urged that they could invoke the Fifth Amendment on all his claims – a position the City opposed. 7th Cir. Dkt. 47 at SA2-SA13. See also R. 258-5 at 12-15 ¶¶ 18-26; R. 274. Petitioner did not submit a proposed adverse inference jury instruction.

The *Hillmann I* jury found in the City's favor on the IWCA retaliatory discharge claim, as well as the ADA discrimination and failure to accommodate claims. R. 312. The ADA retaliation claim was tried to the bench. R. 309. The trial judge passed away before issuing findings of fact and conclusions of law, and a successor judge granted a new trial on all claims based on what he believed to be errors in the Fifth Amendment rulings in *Hillmann I*. Pet. App. 2a. In the second trial ("*Hillmann II"),* petitioner called Sullivan and Drumgould to testify. Sanchez was an agreed witness for trial, R. 466 at 17, but was not called to testify.

The evidence showed the following.[2] Petitioner began working as a truck driver in S&S in 1979. R.

[2] Petitioner does not challenge the Seventh Circuit's reliance on any facts adduced at trial in Hillmann II. For that reason, we cite the Seventh Circuit opinion where it sets forth facts it relies on, and cite the Hillmann II trial testimony where the

576 at 31. In 1984, he developed cervical radiculopathy in his right arm due to a work-related injury. Pet. App. 3a. In 1995, as part of an agreement with the City to avoid repetitive use of his arm, the City assigned petitioner to the position of chief timekeeper in the S&S Bureau of Electricity ("BOE"). *Ibid.* S&S had six operating bureaus in addition to an administrative bureau. R. 580 at 823.

Petitioner never performed all the duties of the timekeeping position but performed the essential functions and did other tasks as directed by his then-supervisor, James Heffernan. R. 577 at 227, 229; R. 579 at 530, 540, 542, 630, 639. Petitioner described his timekeeping responsibilities as overseeing four BOE supervising timekeepers; reporting excessive overtime; examining reports and records for proper execution of timekeeping methods; and attending occasional meetings. R. 576 at 40, 54-55; R. 577 at 230-31, 236-40.

In 2000, the City hired an assistant commissioner in charge of payroll and timekeeping for all of S&S. R. 580 at 839. In 2001, another employee assumed a special projects role at S&S and assumed some timekeeping duties. R. 579 at 672, 677-78. After the RIF in 2002, these two employees

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opinion does not reference a fact, or the parties dispute the substance or import of the testimony.

continued to oversee S&S timekeeping and payroll department-wide. R. 580 at 916-17.

In May 2000, Bart Vittori replaced Heffernan as BOE Deputy Commissioner. Pet. App. 3a. Vittori gave petitioner some duties that required repetitive use of his injured arm; petitioner did not inform Vittori of his physical restrictions until two months later. *Id.* at 4a. On July 1, 2000, for the first time in his career, petitioner did not receive a merit raise. *Ibid.* On August 8, 2000, petitioner notified Vittori that he could not physically perform his additional duties, *ibid.,* but Vittori assigned petitioner duties of a supervising timekeeper; these required repetitive use of his right arm, which petitioner could not do, R. 576 at 66-74; R. 577 at 257-58, 263-64. On August 16, 2000, Brian Murphy became the BOE Deputy Commissioner. Pet. App. 5a.

In mid-August, after petitioner's attorney contacted the City's Corporation Counsel's office requesting that petitioner's 1995 accommodation agreement be honored, S&S's labor-relations liaison, Catherine Hennessy, asked BOE to write a chief timekeeper job description that set forth the timekeeping duties that BOE needed done. Pet. App. 4a. This job description contained tasks petitioner could not physically perform. *Id.* at 5a. On August 23, Hennessy instructed petitioner to report for a fitness-for-duty examination for the chief

timekeeping position. *Ibid.* Petitioner also saw his own physician on August 23, *ibid.*, who wrote petitioner a note for his employer stating that petitioner had a work-related injury and was to refrain from all work until further notice, R. 577 at 281. Petitioner did not show anyone the note, but instead continued to come to work. *Id.* at 289-90. Petitioner testified that on August 24, 2000, the City denied his request to go to the City's medical evaluator to determine whether he had a work-related injury, a determination that is a pre-requisite to the City's payment of disability benefits. R. 577 at 287-88; R. 580 at 788, 790-91, 795-96.

On September 1, 2000, petitioner filed a claim with the Illinois Workers' Compensation Commission ("WC claim"). Pet. App. 5a. Petitioner testified, "I don't recall ever telling anybody" at S&S that he filed a claim, R. 577 at 292, and the five S&S employees who were asked testified they were unaware of it, R. 579 at 592, 607, 620-21, 650; R. 580 at 840, 855; R. 581 at 1003. Others involved in the RIF were not asked if they knew of the claim. Workers' compensation claims are processed by the Workers' Compensation Division of the City Council's Committee on Finance ("Committee"). R. 580 at 721, 785-86.

Also on September 1, petitioner was transferred to a position within BOE where he was

assigned to answer phones, a task he could do with his left hand; and he continued to answer phones until December 21, 2000. R. 576 at 87, 91-93; R. 577 at 290; R. 579 at 529-93. That day, after petitioner provided S&S with the August 23, 2000 letter from his personal physician and another letter dated December 18, 2000, both stating that petitioner should refrain from work until further notice, R. 576 at 97; R. 577 at 296-301, Hennessy sent petitioner a letter directing him to leave work until his physical condition allowed him to perform the duties of his job title and suggesting options regarding a leave of absence and a work evaluation, Pet. App. 5a-6a.

In the next two months, petitioner underwent further medical evaluations in connection with his WC claim. Pet. App. 6a. After initially denying petitioner's claim on January 24, 2001, R. 580 at 729-30, 748, 795, the Committee approved temporary duty disability benefits for petitioner from February 5 to February 26, 2001, based on a letter from petitioner's doctor and a recommendation from the Corporation Counsel's office, R. 580 at 776, 781. One copy of the Corporation Counsel's recommendation memo appears to have the word "phony" handwritten on it. *Id.* at 765-68, 802. No one identified the handwriting. The memo was faxed to BOE on March 2, 2001. Pet. App. 50a ¶82. The Committee continued to dispute petitioner's September 2000 WC claim before the IWCC. R. 580 at 781. Petitioner adduced lengthy testimony about

the work-related nature of his injury and the impact on his health. R. 577 at 116-97; R. 578 at 355, 438-82.

On February 26, 2001, petitioner's doctor issued a discharge sheet clearing him to return to work in a sedentary position with limited use of his right arm. Pet. App. 6a. The discharge sheet was sent to Drumgould, S&S's Assistant Commissioner in charge of personnel. *Ibid.* To accommodate petitioner's restrictions, he was detailed to the Bureau of Traffic Services on March 2, although he continued to hold the title of chief timekeeper and to be paid out of BOE's budget. *Ibid.*; R. 580 at 860, 877; R. 581 at 1039. Murphy repeatedly testified that no one took over petitioner's duties at BOE. R. 580 at 876-77, 879.

Petitioner worked in the auto pound double checking receipts to ensure cars were released to the proper individual. R. 581 at 977-78, 1021, 1036. Petitioner was denied merit pay increases in October 2000, Pet. App. 5a; October 2001, *id.* at. 44a ¶64; and January 2002, March 2002, and May 2002, *id.* at 7a. Petitioner had a pattern of tardiness and unexcused absenteeism. *Id.* at 7a, 46a ¶69.

In 2002, the City conducted a RIF due to budgetary shortfalls, laying off between 300 and 400 employees. Pet. App. 7a, 16a. Each department was given a target for reductions, and each was free

to select its own RIF criteria. R. 579 at 686, 694. Jack Kenney, deputy commissioner of S&S Bureau of Administration, was responsible for submitting S&S's budget to the City's Office of Budget and Management ("OBM"). R. 580 at 897, 899. Peter Peso, OBM's compensation control manager, testified that approximately 50 positions were eliminated from S&S, including all the budgeted timekeeping positions – 15 supervising timekeepers and one chief timekeeper. R. 578 at 486, 498.

Sullivan, who was managing deputy commissioner at S&S and oversaw all the bureaus, R. 579 at 697, received OBM's budget target and gave each bureau a budget ceiling, *id.* at 704. The deputy commissioner of each bureau gave the Commissioner's office a list of employees proposed for the RIF. *Id.* at 705. Sullivan testified that the lists were reviewed by himself, S&S Commissioner Sanchez, probably Kenney, and the bureau deputies; and the final list was submitted to OBM. *Ibid.* Sullivan, Drumgould, and Murphy each testified that Sanchez had the final say on who was RIF'ed. R. 579 at 704-06 (Sullivan); R. 580 at 829 (Drumgould); *id.* at 881-82 (Murphy).

At the same time the RIF was being considered, in March 2002, the City designated S&S as one of three departments to pilot full implementation of Kronos, a computerized timekeeping and payroll system that eliminated

manual timekeeping and payroll. R. 579 at 671, 678-80; R. 580 at 904-07. Kenney testified that around February or March 2002, consultants from KPMG recommended that supervisors in the field take over timekeeping edits once Kronos was implemented, R. 580 at 904-05, 909-10, so there would no longer be any need "for the entire timekeeping function," *id.* at 909. For that reason, Kenney testified the City comptroller recommended making the timekeeping function part of the RIF. R. 580 at 910. Kenney then recommended to Sullivan the elimination of the S&S timekeeper positions, including the chief timekeeper position, as part of the RIF. *Id.* at 910-11. Sullivan also testified to implementation of Kronos. R. 579 at 697. Kenney did not know who held the chief timekeeper title in S&S or what duties petitioner actually performed, and it made no difference to his recommendation what someone holding a timekeeping title actually did. R. 580 at 898-90, 912-13. All timekeeping titles were then eliminated. *Ibid.* Petitioner elicited testimony that in 2005, three other departments – Transportation, Police, and Aviation – had employees in a position called chief timekeeper. R. 579 at 663-65.

Murphy, as BOE Deputy Commissioner, also recommended the elimination of BOE's chief timekeeper position because the position could be eliminated without affecting BOE's delivery of services. Pet. App. 7a. As Murphy testified, no one

was performing the chief timekeeping duties and the transition to Kronos rendered the position obsolete. *Ibid*; R. 580 at 878-79.

Hennessy testified that she had no role in selecting employees for the RIF. R. 579 at 611, 624-25. Her only role was that "Drumgould . . . handed my staff layoff letters and asked us to mail them." *Id.* at 627. She signed Sanchez's name to the letters. *Ibid.*

Drumgould testified that he was not involved in eliminating the timekeeping positions. R. 580 at 840-41. When asked whether "any supervising timekeepers were transferred just prior to the RIF," he said yes, *id.* at 829, but was not asked how many, why, or where they were transferred. Drumgould was also aware that some documents were falsified between 1998 and 2004 to justify S&S employment decisions. *Id.* at 836.

On July 1, 2002, petitioner received a letter from Sanchez notifying him that he was being placed on administrative leave and his chief timekeeper's position would be eliminated effective July 31, 2002, as part of the citywide RIF. Pet. App. 7a.

Before the close of evidence, the City moved for directed verdict pursuant to Fed. R. Civ. P. 50(a), R. 490, which the district court denied, R. 582 at 1155-56. In closing argument, petitioner repeatedly

referred to the "payroll scandal" as a reason he was included in the RIF, asserting he was let go because S&S did not "need some honest employee calling up overtime." R. 581 at 1096-97. See also R. 582 at 1158-59 (asserting that petitioner "could spot fraud on that payroll, but they took that job away from him"). The jury returned a verdict in petitioner's favor of $2 million on his IWCA retaliatory discharge claim, but for the City on all other counts. R. 500; R. 501.

District Court Post-Trial Rulings

The City filed several post-trial motions. The City renewed its motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) based upon the lack of evidence that Sanchez, whom the City identified as the final decisionmaker on the RIF, knew that petitioner had pursued rights under the IWCA; that petitioner's discharge was based upon protected activity; or that petitioner could perform the functions of his job title. R. 508, R. 510. The City alternatively moved to reinstate the *Hillmann I* verdict or for a new trial on the IWCA retaliatory discharge claim, R. 511; R. 524; and alternatively, for remittitur or an evidentiary hearing on damages, R. 515; R. 516. Petitioner moved to partially vacate the judgment regarding the ADA retaliation claim, R. 503, and the City moved for findings of fact and conclusions of law on that claim, R. 521.

The district court denied the City's motion for judgment as a matter of law, ruling that petitioner did not have to "expressly demonstrate" that Sanchez knew of petitioner's WC claim, and that the evidence taken as a whole showed petitioner "began to experience adverse consequences as soon as he filed his workers' compensation claim, in retaliation of that claim, culminating in his termination." Pet. App. 77a. The court also rejected the City's submission that petitioner had to prove his protected activities were the but-for cause of his termination. *Id.* at 77a-78a. Next, the court concluded that the evidence showed the City needed the "very timekeeping tasks [petitioner] had been performing" and the City "could have transferred [petitioner] to a different title that would not have been eliminated." *Id.* at 82a. And, without specifically addressing the City's submission that the *Hillmann I* verdict should be reinstated because the district court's Fifth Amendment rulings in the first trial did not warrant a new trial, the district court denied the motion to reinstate. *Id.* at 83a, 99a-100a. The court also denied the City's motion for a new trial, but granted the City's motion for remittitur, and entered judgment of $400,000. *Id.* at 100a-107a.

Additionally, the court issued findings of facts and conclusions of law on the ADA retaliation claim, ruling in the City's favor. Pet. App. 17a-72a. On petitioner's motion, the court subsequently modified

the remitted judgment to $1.6 million. *Id.* at 108a-133a. The parties both appealed. *Id.* at 2a.

The Court Of Appeals' Ruling

The City, relying solely upon evidence adduced at the *Hillmann II* trial, argued on appeal that it was entitled to judgment as a matter of law because the verdict was contrary to the Illinois law governing petitioner's WC retaliation claim, which required him to establish actual causation between his pursuit of IWCA rights and his discharge, and because retaliatory motive could not be inferred from other employment actions undertaken by different decisionmakers. 7th Cir. Dkt. 46 at 2-3, 13-24, 34-40 ["City Br."]; see also 7th Cir. Dkt. 57 at 25-31 ["City Response-Reply Br."]. There was no evidence that Sanchez, the RIF final decisionmaker, knew petitioner had asserted his IWCA rights; and every witness involved in the RIF testified that S&S no longer needed timekeepers. *Ibid.* Even assuming Murphy's animus, Illinois does not recognize a cat's paw theory for workers' compensation retaliation, and, in any event, petitioner had not relied upon that theory. *Id.* at 37-38.

Alternatively, the City argued it was entitled to reinstatement of the *Hillmann I* verdict because the *Hillmann I* evidentiary rulings were not an abuse of discretion, City Br. 30-34; or further remittitur or a

new trial on emotional damages only, *id.* at 40-51; or a new trial, *id.* at 51-52.

At oral argument, the panel engaged in an approximately 14-minute exchange with petitioner's counsel regarding the state of the evidence on the identity of the final decisionmaker and petitioner's burden of proof regarding that individual's animus. 7th Cir. Arg. 32:53-47:07. During that exchange, petitioner's counsel conceded that the district court had misapplied Illinois law in ruling on the City's post-trial motion:

> Q: Well the judge applied the wrong legal standard in the post-trial motion holding in his conclusions of law that plaintiff was not required to expressly demonstrate that the RIF decisionmaker knew about the plaintiff's workers' compensation claim in order for the jury to conclude that the plaintiff was discharged in retaliation for that protected activity. That's just wrong as a matter of Illinois law.
>
> A: Right. Well we did not argue that that was the standard.

7th Cir. Arg. 33:40-34:04. Petitioner's counsel also repeatedly claimed that Murphy was the final decisionmaker. 7th Cir. Arg. 34:42, 36:08. Counsel

was asked what evidence supported that conclusion, and the following exchanges occurred:

> Q: So there's nothing in the record in the second trial about Sanchez as the final decisionmaker?
>
> A: There is from John Sullivan and Jack [Kenney] . . . .

Id. at 37:19-37:30.

> Q: Okay let me ask this differently. How did you establish, by what evidence, did you establish that Murphy was the final decisionmaker?
>
> A: We didn't and I don't think under Illinois law we have to establish . . . .
>
> Q: You have to establish that the person who made the decision knew about the workers' compensation claim. If Murphy's not the person who made the decision, if he made a preliminary decision that was then reviewed several layers up the food chain and the final decisionmaker didn't know, then you don't have a case under Illinois law.

> A: If they participate in the decision . . . .
>
> Q: There's no cat's paw theory. There's no imputation of animus for a retaliatory discharge
>
> A: Ok then I would say that the other evidence in this case that would impute animus is the phony memo.
>
> Q: You can't impute. That's my point as a matter of law. That's not allowed on a retaliatory discharge claim. There is no cat's paw theory. You can't impute Murphy's animus.

Id. at 38:22-39:33.

The Seventh Circuit ordered judgment for the City as a matter of law. Pet. App. 16a. The opinion recognizes that "the City argue[d] that the IWCA claim fails as a matter of law because petitioner produced no evidence of causation." *Id.* at 2a. The court declined to address the City's entitlement to reinstatement of the *Hillmann I* verdict because "[t]he undisputed evidence shows that this claim should not have gone to a jury at all." *Id.* at 11a-12a. The court similarly stated "we agree with the City on the merits. *Neither* [the IWCA or ADA retaliation claim] should have been tried. . . . [N]o

evidence suggests that the RIF decision-maker knew about Hillmann's claim." *Id.* at 2a-3a (emphasis in original). See also *id.* at 14a ("Because . . . no evidence suggests that [Sanchez] knew about Hillmann's workers' compensation claim, the IWCA retaliatory-discharge claim fails as a matter of law. It should not have been submitted to one jury, let alone two."); *id.* at 16a ("Hillmann lacked evidence to prove the element of causation on *either* claim, so the City was entitled to judgment as a matter of law on both."). The Seventh Circuit also denied petitioner's petition for rehearing and rehearing en banc. *Id.* at 148a-149a.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied. Petitioner misreads the Seventh Circuit's opinion to have reversed the district court's denial of summary judgment, when it is clear from the opinion and the record that the court properly reviewed and reversed the denial of the City's motion for judgment as a matter of law brought post-trial pursuant to Fed. R. Civ. P. 50(b). For this reason, the decision below does not present the purported circuit split regarding the authority of the courts of appeals to review the denial of summary judgment based on a legal issue once there has been a trial on the merits.

Additionally, prudential reasons support denying the petition. Resolution of the WC retaliation claim

involves application of the Illinois common-law doctrine of retaliatory discharge to the facts of this particular case. Resolution of those issues has little if any implication beyond the outcome of this case, and certainly none outside of Illinois. Moreover, the court of appeals did not address the City's argument that it is entitled to reinstatement of the *Hillmann I* verdict, which is an alternative basis to affirm the judgment for the City no matter how the questions petitioner presents are decided. And the City's motions in the alternative for a new trial on damages only, further remittitur, or a new trial also would need to be resolved before petitioner could finally prevail.

For all these reasons, the decision below does not warrant review.

I. PETITIONER MISCHARACTERIZES THE BASIS OF THE SEVENTH CIRCUIT RULING.

This case presents a run-of-the-mill ruling on a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, which the City urged it was entitled to because petitioner had not adduced sufficient evidence to meet the requirement under Illinois law of actual causation between his pursuit of his WC claim and his inclusion in the RIF. City Br. 29, 34-40; City Response-Reply 25-31. Before the close of the evidence, the City brought a Rule 50(a)

motion, R. 490, and renewed that motion under Rule 50(b) after judgment, R. 508; R. 510. Pursuant to *Unitherm Food System, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006), the City then challenged the denial of the Rule 50(b) motion on appeal. Accordingly, in its appellate briefs, the City presented extensive facts from the *Hillmann II* trial, City Br. 13-24, and argued based upon those facts that petitioner was not entitled to a verdict in his favor based upon a proper application of Illinois law, *id.* at 34-40.

The Seventh Circuit opinion repeatedly acknowledges that this was the issue before it. Pet. App. 2a ("[T]he City argues that the IWCA claim fails as a matter of law because [petitioner] produced no evidence of causation."); *id.* at 11a-14a (analyzing Illinois retaliatory discharge law and discussing the lack of evidence required to satisfy the doctrine's requirements). And the court ruled for the City because it agreed that there was "no evidence" supporting petitioner's claim that the RIF decisionmaker knew of his assertion of WC rights. *Id.* at 3a, 11a.[3]

The ability of the federal courts to order judgment as a matter of law based upon the

[3] At oral argument, the Seventh Circuit similarly referred to the City's "post-trial motion" on the WC retaliatory discharge claim, 7th Cir. Arg. 3:40, and specifically asked petitioner's counsel about evidence at "the second trial," id. at 37:19.

insufficiency of the evidence adduced at trial has long been established, and raises no cert. worthy issue. "If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century." *Galloway v. United States*, 319 U.S. 372, 389 (1943).

As this Court has explained, by directing the verdict or entering judgment notwithstanding the verdict, the result is saved from speculation over legally unfounded claims. "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway,* 319 U.S. at 395. An appellate court likewise has the power to order entry of judgment as a matter of law. *Weisgram v. Marley Co.*, 528 U.S. 440, 447-457 (2000).

Petitioner even acknowledges, repeatedly, that the City sought review of the denial of its motion for judgment as a matter of law, and not review of the denial of any issue raised on summary judgment. Pet. 16, 21-22. That, too, should establish that the Seventh Circuit decided the case on the basis on which the City argued it, and resolved it in the City's favor by granting the City judgment as a matter of

law because of the insufficiency of the evidence. Pet. App. 2a-3a, 11a-14a, 16a. In fact, the City's sole argument at summary judgment was based upon tort immunity, R. 158 at 12, Pet. App. 146a-147a, not causation. See also Pet. 16, 21-22 (recognizing that City did not raise tort immunity in its Rule 50 motions or before the Seventh Circuit). That also shows that in ruling on causation, the court of appeals did not rule on the summary judgment motion.

As should be clear, then, this case does not present the issue that petitioner contends it does. Petitioner asserts that "[t]his case involves the important question raised by Justice Thomas in the concurring opinion in *Ortiz v. Jordan*, 562 U.S. 180, 193 (2011) on whether a Court of Appeals lacks jurisdiction to decide whether a case should have been tried after a full trial on the merits." Pet. 2; see also *id.* at 13-14 (making identical assertion). Petitioner elaborates that, "[a]t stake is whether under federal law, defenses must be evaluated in light of the full record at trial after a jury verdict, with all reasonable inferences being drawn in favor of the non-movant, or whether the trial record can be ignored because the legal arguments have no bearing on the sufficiency of the evidence." *Id.* at 14. This case involves no such issue. As we explain, judgment as a matter of law in the City's favor was based on the City's Rule 50(b) motion, and not, as petitioner imagines, resolution of a legal issue raised

on summary judgment. In fact, petitioner concedes that causation, on which the case turns, is not a purely legal issue. Pet. 19-21.

Thus, the Seventh Circuit's decision does not raise any issue left unresolved by the majority or the concurrence in *Ortiz*, or any other case petitioner cites. The *Ortiz* petitioners appealed the denial of summary judgment on their qualified immunity defense after they were found liable by a jury. 562 U.S. at 183. The Court granted certiorari to resolve a circuit split regarding whether a party may "appeal an order denying summary judgment after a full trial on the merits? Our answer is no." *Id.* at 183-84.

The *Ortiz* Court rejected the argument that the qualified immunity defense raised a purely legal issue, determined that the petitioners should have brought a Rule 50(b) motion, and consequently determined that it need not decide whether a Rule 50(b) motion is necessary where summary judgment does present only a pure legal issue. 562 U.S. at 189-92. Thus, if *Ortiz* leaves an open issue, it is whether a Rule 50(b) motion is needed to preserve appellate review of a purely legal issue. Petitioner discusses a circuit split on this issue at length. Pet. 14-19. But the issue on which the courts are split is simply not presented where a party files a Rule 50(b) motion challenging the sufficiency of the evidence, as *Ortiz* makes clear. 562 U.S. at 189-92. And that is precisely what the City did here.

Petitioner's repeated reliance on Justice Thomas's *Ortiz* concurrence as raising the unresolved question whether a court of appeals lacks jurisdiction to decide if a case should have been tried after a full trial on the merits, Pet. 2; see also *id.* at 13-14, is mystifying. Petitioner's citations do not support the proposition that the concurrence highlights this issue. In fact, petitioner elsewhere appears to be claiming the decision below implicates the issue the majority *Ortiz* opinion identifies but does not resolve. *Id.* at 14 (citing *Ortiz*, 562 U.S. at 187-88, 189, 191). Moreover, Justice Thomas wrote separately because he believed that the majority "reaches beyond th[e] question [the Court had granted certiorari on] to address the effect of [the petitioners'] failure to renew their motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b)." *Ortiz*, 562 U.S. at 192; see also *id.* at 193 ("not . . . necessary to reach beyond the question presented").

Petitioner's entire argument that the Seventh Circuit did not base its decision upon review of the *Hillmann II* trial record appears to center on a statement in the opinion that the retaliatory discharge claim "never 'should have been tried.'" Pet. 2 (quoting Pet. App. 2a). Petitioner complains that:

> In reversing the jury verdict in favor of [petitioner], the Seventh Circuit never

> set out what Federal Rule of Civil Procedure or standard of review applied. It did state that the case never should have been tried, seemingly relying upon cases in the circuits that hold a Court of Appeals may ignore the jurisdictional bar and trial record and determine whether a case should have been tried, when the defense is based purely on a legal conclusion.

Pet. 16.

At the outset, petitioner's reliance on a single sentence fragment, ignoring the rest of the opinion and the procedural history, should be rejected. Read as a whole, the Seventh Circuit's opinion makes clear that the court ordered judgment in the City's favor because the evidence in *Hillmann II* was insufficient to satisfy the causation requirements of Illinois law. Pet. App. 3a-8a, 11a-14a.

Additionally, none of petitioner's assumptions about the decision below withstands analysis. To begin, the omission by a court of appeals to set out a relevant rule of civil procedure or standard of review does not show that the court engaged in review of an issue not before it, on a procedural or jurisdictional basis never presented. As we explain above, the Seventh Circuit was quite clear that "the City argues the IWCA claim fails as a matter of law because

[petitioner] produced no evidence of causation." Pet. App. 2a. As we also explain, the City presented those arguments pursuant to Rule 50(b), relying solely upon the *Hillmann II* record. This Court should accept that the Seventh Circuit adjudicated the issues presented based upon the appropriate standard of review put forth by the parties.

Beyond that, in context, the Seventh Circuit's statement that "*[n]either* of these claims should have been tried," Pet. 2a (emphasis in original), is, at worst, an imprecise description of judgment as a matter of law, which pursuant to Rule 50, requires the court to determine whether a case should be, or should have been, "submitted to a jury." Fed. R. Civ. P. 50(a)(2), 50(b). It likely also expressed frustration at the waste of resources that resulted from proceeding to trial twice on a matter that lacks merit. As the court unsparingly found after reviewing the record, the briefs, and the exhaustive exchange at oral argument with petitioner's counsel regarding what evidence supported his claim, "no evidence suggests that the RIF decision-maker knew about petitioner's claim." Pet. App. 3a. See also *id.* at 13a ("No evidence suggests that Sanchez knew that [petitioner] had filed a workers' compensation claim.").

In no event should the court's isolated statement be interpreted as a ruling on issues raised before trial, as petitioner contends, when no pre-trial

issues were placed before that court. In fact, petitioner acknowledges that the court ruled in the City's favor based upon its evaluation of the sufficiency of the evidence, albeit he disagrees with the results of that analysis. Pet. 23-33. Unsurprisingly, petitioner provides no citation in support of his proposition that the Seventh Circuit "ignored" the trial record, *id.* at 14, nor is this true. And he likewise fails to provide support for his notion that the court reviewed a legal issue that had "no bearing on the sufficiency of the evidence." *Ibid.* Petitioner never identifies what "defense . . . based purely on a legal conclusion," *id.* at 16, the Seventh Circuit purportedly addressed, nor was there any such issue.

Petitioner's contention that the court's statement that the matter should never have been tried meant it was reviewing a legal issue that arose pre-trial makes no sense. And to the extent petitioner may be suggesting that a party must challenge the sufficiency of the evidence before trial to preserve that issue for review, Pet. 21-23, any such contention is absurd – as well as contrary to Rule 50. Clearly, a party cannot challenge the sufficiency of the evidence at trial until the evidence has been adduced.

In all events, nothing in *Ortiz* or any of the other cases petitioner cites that address appeals from summary judgment provides a basis for a grant of

certiorari in this case. The City did not press, and the Seventh Circuit did not rule upon, any purely legal issue that arose during summary judgment. For that reason, this is not a proper case in which to decide the issue possibly left open by *Ortiz* regarding the propriety of appellate review of the denial of a motion for summary judgment when the only issue is purely legal.

II. PRUDENTIAL CONCERNS COUNSEL AGAINST GRANTING THE PETITION.

Additionally, prudential considerations support denying the petition. First, the retaliatory discharge claim arises under Illinois law, and the decision thus has little chance to affect cases beyond this one, and certainly none outside of Illinois. Second, the City presented an alternative basis for judgment in its favor, which the court of appeals did not reach, regarding reinstatement of the *Hillmann I* verdict. This could require judgment in the City's favor, no matter how the questions petitioner presents are decided. Further, the City raised other arguments including remittitur and new trial that would also need to be addressed before petitioner would be entitled to reinstatement of the earlier judgment in his favor.

Petitioner complains at length about the Seventh Circuit's application of the standards for judgment as a matter of law, Pet. 23-33, but none of

his arguments provides a reason to grant certiorari. First, this Court has long held that it does not "sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). Yet that is precisely what petitioner requests when he complains about the Seventh Circuit's supposed misapplication of Rule 50(b) standards and delves into whether the Seventh Circuit drew proper inferences in his favor. Pet. 23-33.

Further counseling against wading into this issue, petitioner's argument is contrary to Illinois law. To recover for retaliatory discharge under Illinois law, an employee must prove: (1) the employer discharged the employee; (2) the discharge was in retaliation for the employee's activities; and (3) the discharge violates a clear mandate of public policy. *E.g., Michael v. Precision Alliance Group, LLC,* 21 N.E.3d 1183, 1188 (Ill. 2014). Illinois requires proof of actual causation. *Clemons v. Mechanical Devices Co.*, 704 N.E.2d 403, 408 (Ill. 1998). *Michael* makes clear that a "causal nexus" between a WC claim and discharge "is not the equivalent of a finding of actual causation" required under *Clemons*. *Id.* at 1189. Further, a plaintiff cannot succeed merely by showing that retaliation was a proximate cause of his discharge. Instead, Illinois law "clearly provides that if the trier of fact finds the employer's proffered reasons for the employee's discharge to be valid and nonpretextual,

the employee has failed to show causation." *Michael,* 21 N.E.3d at 1190.

Thus, the Illinois Supreme Court has "decline[d] to expand the tort [of retaliatory discharge] to encompass a retaliatory discharge 'process,'" *Hartlein v. Illinois Power Co.,* 601 N.E. 2d 720, 729 (Ill. 1992), or to include retaliatory workplace conduct other than discharge, *Zimmerman v. Buchreit of Sparta*, 645 N.E. 2d 877, 882-84 (Ill. 1994). Further, it is "essential" in Illinois to prove that those responsible for the plaintiff's termination knew he had filed a WC claim, *Marin v. American Meat Packing Co.*, 562 N.E.2d 282, 286 (Ill. App. Ct. 1990), and one decisionmaker's motive for an employment action cannot be attributed to a different decisionmaker responsible for a different decision, *e.g. Hiatt v. Rockwell International Corp.*, 26 F.3d 761, 768-70 (7th Cir. 1994).

Based upon these principles, the City argued that the district court misapplied Illinois law when it denied the City's motion for judgment as a matter of law on the basis that petitioner's discharge could be viewed as part of a retaliatory process, and that retaliatory motive for discharge could be inferred from other employment actions taken by a decisionmaker other than the RIF decisionmaker. City Br. 34-40; City Response-Reply 25-31.

At oral argument, petitioner conceded that the district court had not properly applied Illinois law to the City's post-trial motion:

> Q: Well the judge applied the wrong legal standard in the post-trial motion holding in his conclusions of law that plaintiff was not required to expressly demonstrate that the RIF decisionmaker knew about the plaintiff's workers' compensation claim in order for the jury to conclude that the plaintiff was discharged in retaliation for that protected activity. That's just wrong as a matter of Illinois law.
>
> A: Right. Well we did not argue that that was the standard.

7th Cir. Arg. 33:40-34:04.

Petitioner ignores this concession, and Illinois law, when he argues that the Seventh Circuit disregarded circumstantial evidence from which the jury could conclude his discharge was retaliatory because he was subjected to other acts he believes were retaliatory. Pet. 28-31. That is simply not the law in Illinois. Petitioner had to adduce sufficient evidence to identify the final decisionmaker of the RIF in order to establish actual causation. Identifying others who merely played a role in the

process does not, without more, meet the actual causation requirement. Petitioner is entitled to all reasonable inferences in his favor, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), but not speculation, *Galloway,* 319 U.S. at 395.

These standards establish that the Seventh Circuit properly concluded that petitioner's arguments failed to show that the verdict was supported by a "legally sufficient evidentiary basis," as Rule 50(b) requires. Petitioner's main contention is that the jury did not have to believe Sanchez was the final decisionmaker, and could conclude that Murphy, or perhaps Hennessy, was. Pet. 24-32. But the burden of establishing the identity of the decisionmaker rested at all times on petitioner, because there is no burden shifting under Illinois law. *Michael*, 21 N.E. 3d at 1189. The panel exhaustively delved into what evidence petitioner adduced to support his claim that Murphy was the final decisionmaker, 7th Cir. Arg. 32:53-47:07, and there was none. Further, petitioner's argument collapses because disbelieving the multiple witnesses who testified that Sanchez was the final decisionmaker still does not amount to evidence that Murphy or Hennessy was. Nor does the conclusion that someone other than Sanchez was the decisionmaker supply the needed animus to establish pretext when others testified to full implementation of Kronos, and Kenney testified that KPMG and the

Comptroller had recommended eliminating petitioner's position given the implementation of Kronos. To conclude, as petitioner urges, that he was included in the RIF for retaliatory reasons would require the jury to irrationally believe that the City laid off hundreds of people, including eliminating 15 other timekeeping positons in S&S, to cover its tracks with petitioner.

Additionally, this Court should deny the petition because a basis independent of Rule 50 exists to enter judgment in the City's favor. The City contended that it was entitled to reinstatement of the *Hillmann I* verdict because the judge who granted the new trial improperly concluded that the *Hillmann I* judge erred by allowing witnesses to assert a blanket Fifth Amendment right to not testify, and then erred by failing to give an adverse inference jury instruction. As the City argued, petitioner invited any error in this regard because he urged that Sullivan and Drumgould were entitled to invoke the Fifth Amendment, and he failed to submit an adverse inference jury instruction. City Br. 30-34. Petitioner therefore has waived any error.

The Seventh Circuit rejected the City's argument that no error occurred, Pet. App. 2a, 10a-11a, but declined to address the City's invited error argument, instead ruling in the City's favor under Rule 50(b), *id.* at 11a. The City also pressed arguments for a remittitur and a new trial, which the

Seventh Circuit did not address. Because there are alternative bases for granting judgment in the City's favor – namely, reinstating the *Hillmann I* verdict and other post-trial motions that would need to be resolved if the verdict were not reinstated – the issues petitioner presents are not likely to change the result regardless of the Court's decision on those issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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