

No. \_\_\_\_\_ 09-737 DEC 18 2009

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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*

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

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?

## **PARTIES TO THE PROCEEDING**

The caption names all of the parties to the proceedings in the court of appeals below.

Petitioner Michelle Ortiz was the plaintiff in the district court. Respondents Paula Jordan and Rebecca Bright were defendants. In the court of appeals below, Jordan and Bright were the appellants, and Ortiz was the appellee.

Officer Douglas Schultz, Warden Shirley Rogers, and Ohio Governor George Voinovich were also named as defendants in the district court, but were not parties in the court of appeals below.

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## **PETITION FOR A WRIT OF CERTIORARI**

Michelle Ortiz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## **OPINIONS BELOW**

The decision of the court of appeals is reported at 316 F. App'x 449 and is reproduced in the Appendix at 1a–18a. The decision of the U.S. District Court for the Southern District of Ohio is reported at 211 F. Supp. 2d 917 and is reproduced in the Appendix at 21a–44a.

## **JURISDICTION**

The court of appeals issued its judgment on March 12, 2009. Pet. App. 1a. The court denied petitioner's timely petition for rehearing and rehearing en banc on July 21, 2009. Pet. App. 45a. On October 19, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 18, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **STATUTORY PROVISIONS AND RULES INVOLVED**

The statutes involved are 28 U.S.C. § 1291 and 28 U.S.C. § 1292(b). The rules involved are Federal Rules of Civil Procedure 50(a), 50(b), and 56(c). Pet. App. 47a–50a.

## STATEMENT OF THE CASE

This case presents a basic question of summary judgment that has divided the circuits: whether a party may appeal the denial of summary judgment after a full trial. As one court recently explained, there is one group of federal courts that agrees with a broad prohibition on such appeals, but “[a] separate group of federal courts has narrowed the prohibition by allowing” such appeals “when the orders have been based on legal grounds.” *Larson v. Benediktsson*, 152 P.3d 1159, 1168 (Alaska 2007) (discussing the conflict and the various approaches of eleven circuits). Additionally, the circuits are further divided whether such an appeal is permissible if the party chose not to bring an interlocutory appeal. The Sixth Circuit’s decision below—which reversed a jury verdict in Petitioner Michelle Ortiz’s favor—raises both of these circuit conflicts.

While serving a one-year sentence at the Ohio Reformatory for Women, Ortiz was sexually assaulted by a corrections officer on two consecutive days. On the night of the first assault, he issued the following threat: “I’ll get you tomorrow, watch.” Pet. App. 3a. Ortiz reported the assault, but the next day the officer approached her when she was alone and asleep. Before startling her awake, the officer managed to get his hands inside her underwear and use his fingers to penetrate her vagina. While this incident was investigated, Ortiz was shackled and ordered into solitary confinement, where she was later found ill and vomiting.

Ortiz brought a 42 U.S.C. § 1983 suit (invoking the district court’s federal-question jurisdiction under 28

U.S.C. § 1331), raising two claims relevant here. First, Ortiz alleged that Respondent Jordan, a case manager at the reformatory, failed to take adequate steps to protect Ortiz from the officer, in violation of the Eighth Amendment. (Respondent Bright later testified that if Jordan had immediately reported an assault from the day before, “the proper people would have taken a role in protecting Ms. Ortiz.” Pet. App. 5a.) Second, Ortiz alleged that Bright, an investigator for the reformatory, violated due process by ordering Ortiz into solitary confinement (which inmates called “the hole”) in retaliation for Ortiz reporting the assaults. (Ortiz stated that Bright ordered her into solitary confinement “because [Ortiz] had lied” about the assault.)

Jordan and Bright filed a pre-trial motion for summary judgment on the basis of qualified immunity. On March 29, 2002, the district court denied the motion, concluding that a reasonable jury could find that Jordan and Bright had violated clearly established law. Pet. App. 21a. Jordan and Bright chose not to bring an interlocutory appeal to challenge that ruling. Instead, they proceeded to litigate in district court, engaging in years of pre-trial proceedings. Trial ultimately occurred in September 2005, more than three years after the summary-judgment ruling. After considering the evidence over the course of four days, the jury found Jordan and Bright liable. The jury awarded Ortiz \$250,000 in compensatory damages and \$100,000 in punitive damages against Jordan; it awarded \$25,000 in compensatory damages and \$250,000 in punitive damages against Bright. The district court then entered judgment in Ortiz’s favor based on the verdicts. Pet. App. 19a.

Jordan and Bright then appealed the 2002 pre-trial order denying summary judgment. The Sixth Circuit, in a 2-1 decision, believed it had jurisdiction under 28 U.S.C. § 1291, which provides appellate jurisdiction over final decisions of district courts. The majority reversed the district court's order denying summary judgment on qualified-immunity grounds, overturning the verdict. The majority concluded that Jordan and Bright had not committed any constitutional violations. The majority also acknowledged that Ortiz's retaliation claim would have been permissible under this Court's precedent, but only if it were litigated as a "First Amendment" retaliation claim. Judge Daughtrey dissented, calling the result a "legal travesty." Pet. App. 14a. Ortiz filed a timely petition for rehearing, which was denied over Judge Daughtrey's dissent. Pet. App. 45a.

Ortiz now respectfully petitions a writ of certiorari.

### **REASONS FOR GRANTING THE WRIT**

A court recently canvassed the conflicting holdings of eleven federal circuits regarding the conditions, if any, under which a party may appeal the denial of summary judgment after trial. *Larson*, 152 P.3d at 1166–68. There are two independent splits among the circuits on this point. First, the circuits are divided whether such appeals are permissible if the party raises a question of law. See, e.g., *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 423 (4th Cir. 2005) (noting that the approach of other circuits "simply conflicts with our own"); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719 (7th Cir. 2003) (noting conflict). Second, the circuits are divided whether such appeals—even when raising a question of law—are

permissible if the party chose not to immediately appeal the denial of summary judgment. *See Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) (acknowledging Ninth Circuit's contrary position).

The Sixth Circuit's decision here falls on the wrong side of both splits, and it illustrates the impropriety of permitting such an appeal in both contexts. This Court can resolve both conflicts and clarify an important question that has left the federal courts (and numerous state courts that look to them for guidance) in confusion about a fundamental issue recurring in courts across the Nation: When, if ever, is the denial of summary judgment appealable after trial? Certiorari should be granted.

#### **I. The Circuits Are Divided on the Ability to Appeal the Denial of Summary Judgment After a Full Trial on the Merits.**

Courts agree on the general rule that denials of summary judgment are not appealable after trial. As noted, however, two independent conflicts emerge as courts have created exceptions to this rule. To understand these conflicts (and to assess which courts have the better approach), one must first briefly consider the principles underlying general rule itself.

##### **A. Courts Agree That Denials of Summary Judgment Are Generally Not Appealable After Trial.**

Under Rule 56, summary judgment "should" be rendered if the relevant pleadings and documents "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a

matter of law.” Fed. R. Civ. P. 56(c). If the movant does not meet this standard, the district court must deny the summary-judgment motion and let the case proceed to trial.

Even if the movant meets this standard, the district court may still deny the motion, concluding that the case should proceed to a full trial for judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (noting that district court may deny summary judgment in case “where there is reason to believe that the better course would be to proceed to a full trial”); *see also* Fed. R. Civ. P. 56, Advisory Committee Note of 2007 (noting change of term “shall” to “should” in Rule 56(c) to clarify this point).

If the court denies the summary-judgment motion, the movant generally cannot appeal because such a pre-trial order is interlocutory, not a “final decision.” 28 U.S.C. § 1291; *Mohawk Indus., Inc. v. Carpenter*, No. 08-678, slip op. at 1, 522 U.S. \_\_ (Dec. 8, 2009) (“Section 1291 of the Judicial code confers on federal courts of appeals jurisdiction to review ‘final decisions of the district courts’”). Under 28 U.S.C. § 1292(b), however, a district judge may certify immediate appeals of non-final orders that “involve a controlling question of law as to which there is substantial ground for difference of opinion” and that “may materially advance the ultimate termination of the litigation.”

But “final decisions” also “include a small set of prejudgment orders that are ‘collateral to’ the merits of an action and ‘too important’ to be denied immediate review.” *Mohawk Indus.*, slip op. at 1 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).) That small category includes only decisions

that are conclusive, that resolve important questions separate from the merits, and that are “effectively unreviewable” on appeal from the final judgment in the action. *Id.* at 5–6 (internal quotation marks omitted).

Prejudgment orders denying qualified immunity fall into this small category of “collateral orders” that are immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Qualified immunity protects public officials unless they violated “clearly established statutory or constitutional rights of which a reasonable person should have known.” *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). “Because qualified immunity is an immunity from suit rather than a mere defense to liability[,] it is effectively lost if a case is erroneously permitted to go to trial.” *Id.* (alterations and quotation marks deleted). Where the qualified-immunity question is purely one of law, the official is entitled to bring the interlocutory appeal. *Johnson v. Jones*, 515 U.S. 304 (1995); see also *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (“*Johnson* reaffirmed that summary judgment determinations are appealable when they resolve a dispute concerning an ‘abstract issue of law’ relating to qualified immunity—typically, the issue whether the federal right allegedly infringed was ‘clearly established.’”).

Where there is no interlocutory appeal regarding the denial of summary judgment, the case simply proceeds to trial—but a party’s summary-judgment arguments are not necessarily lost. To the extent the party wishes to preserve (thus-far unsuccessful) summary-judgment arguments, the party may raise them in a Rule 50(a) motion for judgment as a matter

of law before the case reaches the jury. Fed. R. Civ. P. 50(a). The party may further preserve those arguments by renewing the motion after trial. Fed. R. Civ. P. 50(b). If those motions are denied, the party can appeal.

When that occurs (i.e., the party appeals the judgment after a full trial), however, the party is not appealing the earlier summary-judgment denial (which was not final); the party is simply appealing the final order denying the Rule 50 motion. *See, e.g., First United Pentecostal Church v. GuideOne Specialty Mut. Ins. Co.*, 189 F. App'x 852, 855 (11th Cir. 2006) (stating that appellant “does not appeal the district court’s order denying summary judgment in its favor; rather, it asserts that the district court relied on the same erroneous reasoning to deny its summary judgment motion as it used to deny its motion for judgment as a matter of law”). This reflects that the trial supersedes the summary-judgment proceedings. *E.g., Johnson Int’l Co. v. Jackson Nat’l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994) (“The district court’s judgment on the verdict after a full trial on the merits thus supersedes the earlier summary judgment proceedings.”) (internal quotations omitted).

Accordingly, courts are loathe to overturn jury verdicts when pretrial summary-judgment issues are not preserved. An oft-cited case for this principle is *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987), where the Ninth Circuit refused to review the denial of summary judgment after a jury verdict in favor of the plaintiff. The court reasoned that any injustice to the party attempting to resurrect summary-judgment arguments was outweighed by the

injustice to the party obtaining a jury verdict after a full trial:

To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial. After considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied. We hold, therefore, that the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits.

*Id.* at 1359; see also *Holley v. Northrop Worldwide Aircraft Servs., Inc.*, 835 F.2d 1375, 1377 (11th Cir. 1988) (“Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal[.]”).

In light of the principles stated above, the circuits agree, as a general rule, that denials of summary judgment are not appealable after a full trial on the merits. *Price v. Kramer*, 200 F.3d 1237, 1243 (9th Cir. 2000) (“For good reason *Locricchio* now reflects the prevailing view among the federal circuits.”); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g*

*Corp.*, 51 F.3d 1229, 1234 (4th Cir. 1995) (citing to various circuits on this point). With this framework in mind, we turn to the first conflict regarding this general rule barring such summary-judgment appeals: whether an exception exists where the appeal raises pure questions of law.

**B. In Conflict with Other Circuits, the Decision Below Endorsed an Exception for Summary-Judgment Appeals Raising a Question of Law.**

*1. Circuits applying the legal-question exception to allow the appeal*

At least three circuits (the Sixth, Seventh, and Ninth), have endorsed this “legal-question” exception, holding that denials of summary judgment are reviewable if the appeal raises a question of law. *See Banuelos v. Constr. Laborers’ Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004) (recognizing *Locricchio*’s general rule but holding that it “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”); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 720 (7th Cir. 2003) (same); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (same).

The Fifth Circuit has also implied approval of the exception, but is not clear. *See Becker v. Tidewater, Inc.*, 581 F.3d 256, 263 (5th Cir. 2009) (“Although the rule does not appear to have been explicitly stated in this circuit, other circuits have held that a denial of summary judgment is appealable after a trial on the

merits when there was a ruling by the district court on an issue of law.” (citing Ninth Circuit’s decision in *Banuelos*)); *but see Black v. J.I. Case*, 22 F.3d 568, 571 n.5 (5th Cir. 1994) (rejecting a distinction for such appeals based on factual versus legal questions).

The Sixth Circuit’s decision below expressly applied the exception as to the legal question of qualified immunity, allowing Jordan and Bright to appeal after the jury found in Ortiz’s favor. Pet. App. 8a (“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 interlocutory appeals of qualified immunity, the standard of review is *de novo*.”).

Courts applying this exception generally reason that it would be unfair to allow a judgment to stand where the appellant can show that the district court erroneously denied summary judgment as a matter of law. *See, e.g., Varghese v. Honeywell Int’l, Inc.*, 424 F.3d 411, 425–26 (4th Cir. 2005) (Mozt, J., dissenting) (relying on Seventh Circuit’s conclusion that “there is no unfairness in allowing a party to reassert on appeal a legal defense rejected as a basis for summary judgment (e.g., res judicata, statute of limitations, immunity, preemption) because by definition a legal defense provides a basis to avoid liability for an otherwise meritorious claim”).

## *2. Circuits rejecting the legal-question exception and barring appeal*

By contrast, the Fourth and Eighth Circuits have held that there is no such exception for questions of

law. *EEOC v. Southwestern Bell Tel., L.P.*, 550 F.3d 704, 708 (8th Cir. 2008) (refusing to consider appeal of summary judgment denial where appellant argued district court erred “as a matter of law”); *Varghese v. Honeywell Int’l, Inc.*, 424 F.3d 411 (4th Cir. 2005) (rejecting the exception in a 2-1 decision and acknowledging the circuit conflict); *see also Eaddy v. Yancey*, 317 F.3d 914, 916 (8th Cir. 2003) (“Even a cursory review of precedent in this Circuit reveals that we do not review a denial of a summary judgment motion after a full trial on the merits.”).

The Eleventh Circuit also appears to reject the exception. *Lind v. United Parcel Servs., Inc.*, 254 F.3d 1281, 1286 (11th Cir. 2001) (noting its earlier decision suggesting that the exception might exist but holding that “this Court will not review the pretrial denial of a motion for summary judgment after a full trial and judgment on the merits”); *see also Larson*, 152 P.3d at 1167 (noting that the Eleventh Circuit is among those courts that “have apparently converted to the broader view after initially adhering to the narrower form of the rule” barring such summary-judgment appeals).

Among other reasons for adhering to the general no-appeal rule, these courts explain 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. § 1292(b) (permitting a party to appeal an interlocutory order of the district court if the district court certifies the order for appeal).” *Eaddy*, 317 F.3d at 916. These courts have stated that they “do not reward litigants who fail, either inadvertently or intentionally, to exercise their rights under Federal Rules of Civil Procedure.” *Id.* Courts also explain that

overturning verdicts in this context is unfair to the party who obtained the verdict after a full trial. *Larson*, 152 P.3d at 1167.

\* \* \*

This question alone would be worthy of this Court's review. But that review is particularly justified in this case: As discussed below, there is an additional conflict regarding how broadly the legal-question exception applies.

**C. In Conflict with Other Circuits, the Court Below Reviewed the Legal Question Even Though the Appellants Chose Not to Bring the Appeal Before Trial.**

*1. Circuits rejecting post-trial appeals that could have been raised before trial*

Though the Ninth Circuit generally recognizes the legal-question exception, it will not review the legal question where the appellant could have raised the issue before trial in an interlocutory appeal but failed to do so. *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 2000). Similarly, it appears that the Fourth Circuit would adhere to its clear holdings that appeals of summary judgment denials are simply not appealable after a full trial under any circumstances—suggesting that it would not rule otherwise, even where the legal question involved qualified immunity. *See Varghese*, 424 F.3d 411 (rejecting the exception altogether and acknowledging the circuit conflict).

The rationale for this conclusion is well articulated in *Price*. There, the Ninth Circuit reaffirmed the

general rule, as expressed in *Locricchio*, that summary judgment denials are not reviewable after a full trial. *Id.* at 1243. The court saw “no reason to deviate from *Locricchio* in the present context[,]” where the appealing party chose not to bring an interlocutory appeal regarding qualified immunity. *Id.* at 1244. “In fact,” the court explained, “there is even less reason to permit a post-trial appeal of a pretrial denial of qualified immunity” because “a denial of a motion for qualified immunity as a matter of law is appealable as of right on an interlocutory basis.” *Id.* The court encapsulated its view as follows: “The defendants’ complaint to us now—that in retrospect the officers should have been immune from suit at the time of the pretrial order—is long past due and unreviewable on this appeal.” *Id.*

This conclusion is true to this Court’s holdings regarding the collateral-order doctrine. To fit within the “small class” of orders that are immediately appealable (such as qualified-immunity denials), the decision must be “effectively unreviewable on appeal from a final judgment.” *Id.* (citing *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).) The *Price* court’s decision not to review, after trial, the pre-trial denial of qualified immunity reflects that such an order is indeed “effectively unreviewable” after trial. *See also Johnson v. Walton*, 558 F.3d 1106, 1108 n.1 (9th Cir. 2009) (reaffirming *Price* and noting that “[p]arties intending to appeal the determination of qualified immunity must ordinarily appeal before final judgment”).

2. *Circuits allowing post-trial appeals that could have been raised before trial*

By contrast, the Sixth, Seventh, Eighth, and Tenth Circuits have allowed such appeals. *Medina v. Bruning*, 56 F. App'x 454, 455 (10th Cir. 2003); *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) (acknowledging Ninth Circuit's contrary position); *Goff v. Bise*, 173 F.3d 1068, 1072 (8th Cir. 1999); *but see Littlewind v. Rayl*, 33 F.3d 985, 987 (8th Cir. 1994) (holding that defendants waived qualified-immunity defense where they failed to bring interlocutory appeal and failed to include the issue in their notice of appeal).

Here, the Sixth Circuit followed this approach, acknowledging Jordan and Bright's failure to bring an interlocutory appeal, yet reversing the trial verdict based on qualified-immunity arguments not appealed before trial. Pet. App. 7a ("[T]he defendants did not file an interlocutory appeal of the denial of qualified immunity.").

Among other reasons, these courts generally explain that the qualified-immunity question is reviewable because parties can wait to appeal "nonmoot interlocutory rulings." *Pearson*, 237 F.3d at 884.

## **II. For Both Conflicts, the Decision Below Falls on the Side That Undercuts Federal Rules and Statutes.**

### **A. The Federal Rules and Statutes Contemplate That the Denial of Summary Judgment is Not Appealable After a Full Trial on the Merits—Even for A Question of Law.**

The Sixth Circuit’s decision endorses the legal-question exception, allowing post-trial summary-judgment appeals. This exception undercuts fundamental tenets of federal procedure in three ways.

First, it makes Rule 50 meaningless, rewarding parties who failed to follow the Rules to preserve issues after summary judgment. *See Black*, 22 F.3d at 571 n.4 (noting that an exception for legal questions “would benefit only those summary judgment movants who failed to properly move for judgment as a matter of law at the trial on the merits” under Rule 50).

Second, reviewing pre-trial denials of summary judgment, even on purely legal grounds, diminishes the discretion of district courts, contrary to Rule 56. As this Court has held, even in the absence of a factual dispute, a district court has the power “to deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where courts of appeals review such denials after trial, the district court’s discretion is no longer meaningful. *Black*, 22 F.3d at 572.

Third, the exception undermines 28 U.S.C. § 1292(b), which establishes a distinct process by which the district court can certify important issues of law for pre-trial appeal. *See Lum v. City and Cty. of Honolulu*, 963 F.2d 1167, 1169–70 (9th Cir. 1992) (holding that “the appropriate forum to review the denial of a summary judgment motion is through interlocutory appeal under 28 U.S.C. § 1292(b)”); *Metro. Life Ins. Co. v. Hoyt*, 121 F.3d 351, 356 (8th Cir. 1997) (noting that allowing such appeals “condones a litigation strategy that disregards the Federal Rules of Civil Procedure 50(a) and 50(b), and 29 U.S.C. § 1292(b)”).

The Sixth Circuit has itself acknowledged these problems, but is now bound by its own precedent. *E.g.*, *Barber v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 295 F. App’x 786, 789 (6th Cir. 2008) (“The exception is interpreted narrowly because, as one treatise notes, the exception can undo the carefully calibrated structure of the rules of civil and appellate procedure[.]”).

Moreover, the exception creates a contradictory inquiry for the reviewing court. To review the pretrial denial of summary judgment, courts have to review two different sets of evidence: the “evidence” before the district court at pretrial when it denied the motion, and the evidence presented at trial. *Black*, 22 F.3d at 572. “Of course, the ‘evidence’ presented at pretrial may well be different from the evidence presented at trial.” *Id.*

In Michelle Ortiz’s case, all of these concerns materialized to create a result that the dissenting judge deemed a “legal travesty.” Pet. App. 14a.

First, the Sixth Circuit expressly stated that its review was of the summary-judgment denial, enabling Jordan and Bright to circumvent Rule 50 altogether. *Cf. Metro. Life*, 121 F.3d at 353 n.3 (party waives right to appeal final judgment, even if cited in the notice of appeal, where party “failed to file a motion for judgment as a matter of law at the close of the evidence, and it failed either to renew its motion for judgment as a matter of law, or to file a motion for a new trial within ten days after the trial court entered judgment.” (citing Fed. R. Civ. P. 50(a), 50(b), 59(b))).

Second, this improper procedural posture created strange conclusions on the merits, illustrated, for example, by the Sixth Circuit’s ruling on Ortiz’s retaliation claim against Bright. The majority overturned the jury’s verdict on this claim because the claim “was conceived of and analyzed squarely as a due process violation and not as a First Amendment retaliation claim.” Pet. App. 12a; *cf. id.* (noting that this Court’s decision in *Sandin v. Conner*, 515 U.S. 472 (1995), recognizes claims that prison officials used solitary confinement “for retaliatory purposes”).

As an initial matter, the majority’s reasoning would not suffice even at the pleading stage. Federal Rule 8(a)(2) does not require a plaintiff to set forth a legal theory justifying the relief sought on the facts alleged; it simply requires sufficient facts to show that the plaintiff may be entitled to relief. *See, e.g., Ryan v. Illinois Dep’t of Children & Family Servs.*, 185 F.3d 751, 764 (7th Cir. 1999) (stating that plaintiff could not “plead herself out of court” by citing to wrong legal theory or by failing to cite legal theory).

Here, the majority expressly stated that Ortiz made such factual allegations. The opening paragraph to its decision noted that Ortiz claimed that “prison officials retaliated against her for reporting the incident.” Pet. App. 2a. The majority further explained that “Ortiz alleged in her complaint that Bright placed her in isolation ‘with a distinctly punitive purpose’ . . .” Pet. App. 12a. That states a First Amendment retaliation claim. *See Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (concluding that prisoner stated First Amendment retaliation claim under *Sandin* where prisoner’s complaint “alleged facts that he was punished for filing a grievance” even though the “complaint did not expressly refer to the First Amendment”); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (reversing district court’s dismissal of retaliation claim where prisoner alleged that he was “placed in lockdown segregation, for 11 days, to ‘punish’ him for filing the suit”).

But the particularly odd effect of this ruling—which decided the appeal of a pre-trial summary-judgment order—is that it contradicted the very question the jury ultimately answered more than three years later on the verdict form:

We, the jury, having been duly empaneled and sworn, find the following by a preponderance of the evidence:

1. Did defendant Bright commit acts that violated plaintiff Ortiz’s constitutional right not to be placed in solitary confinement *for an unlawful purpose such as retaliation or intimidation*?

Yes ☒ No ☐

R. 102: Verdict Form (emphasis added).

The majority cited no authority for its conclusion that this was a “new theory” it could not consider. Pet. App. 12a. That conclusion is contrary to this Court’s precedent and the Federal Rules. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). This outcome would not have occurred had the court simply recognized that the appeal was not permitted. *Cf. Black*, 22 F.3d at 572 n.6 (noting that appellants “obviously hope that we will reverse based on the embryonic facts that existed before trial, as opposed to the fleshed-out facts developed at trial”).

**B. Allowing Such an Appeal is Even Less Appropriate Where, As Here, the Appellant Chose Not to Bring an Appeal Before Trial.**

As stated in *Price*, “there is even less reason to permit” an appeal of the denial of summary judgment where the legal issue is one of qualified immunity. 200 F.3d at 1237. There is at least some logic to applying the legal-question exception (allowing the appeal) where the party could not appeal the legal question before trial. *See Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569, 571 (7th Cir. 1995) (reviewing denial of pretrial motion regarding choice of law after a full trial, explaining that “one may not bring an interlocutory appeal of a district court’s choice of law determination”); *cf. E. Miss. State Hosp. v. Callens*, 892 So. 2d 800, 812 n.7 (Miss. 2004) (reviewing denial of summary judgment on qualified-immunity grounds after full trial and noting that there is no federal right to an interlocutory appeal in state court).

This only further suggests that no appeal should lie where a party affirmatively chooses to forgo pre-trial rights to immediately appeal the denial of qualified immunity. In *Cohen*, this Court held that denials of summary judgment for qualified immunity are immediately appealable because the issue may be “too important to be denied review.” 337 U.S. at 546. If the party to be shielded by the immunity deems the issue not important by simply proceeding to trial, that concern is eliminated. Indeed, if the pre-trial denial of qualified immunity were “effectively reviewable” on appeal after a full trial (as the Sixth Circuit concluded here), then it would violate the collateral-order doctrine. *Mohawk Indus.*, slip op. at 4–5. In this context, the summary-judgment denial is no longer an appealable “final decision” under 28 U.S.C. § 1291; it is simply a pre-trial order.

In short, Jordan’s and Bright’s pleas to the Sixth Circuit—“that in retrospect [they] should have been immune from suit at the time of trial—[was] long past due and unreviewable” on appeal. *Price*, 200 F.3d at 1244.

### **III. This is an Important Federal Question Recurring in Courts Across the Nation.**

The conflict in the courts regarding the basic process of appealing the denial of summary judgment has created confusion. *See generally*, 19-205 Moore’s Federal Practice and Procedure 205.08 (3d ed. 2009): (“[W]here denial of the motion turns on an issue of law, its reviewability is unsettled and the circuit courts disagree on if, or when, the denial is reviewable.”). The confusion permeates the circuits to this day.

Some circuits remain unclear whether the legal-question exception exists. *See, e.g., Becker v. Tidewater, Inc.*, 581 F.3d 256, 263 (5th Cir. 2009) (noting that it “does not appear to have been explicitly stated in this circuit” but indicating approval); *see also Maher v. Int’l Paper Co.*, 600 F. Supp. 2d 940, 955 n.12 (W.D. Mich. 2009) (noting that “there may be an exception” for purely legal questions).

Other circuits acknowledge internal inconsistency. *See Hertz v. Woodbury Cty.*, 566 F.3d 775, 780 (8th Cir. 2009) (“As Plaintiffs note, we have, in at least one instance, allowed a party to appeal a district court’s denial of summary judgment after final judgment when there were no disputed material facts and the denial of summary judgment was based on the interpretation of a purely legal question.”) (quotation marks and alterations deleted); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 278 (7th Cir. 1994) (“We by and large have followed the majority rule disfavoring review of summary judgment denials after trial, although we have sent conflicting signals.”); *see also Larson*, 152 P.3d at 1168 (noting that the Second, Seventh, and Tenth Circuits seemed to adopt a broad version of no-appeal rule “but then narrowed it in a later case”).

This concern is not simply federal. It affects state courts looking to the federal courts for guidance. *See, e.g., id.* at 1167 (“Considering our own prior rulings and the compelling weight of the federal cases, we conclude that policy reasons, and precedent militate in favor of a rule that precludes post-trial review of orders denying motions for summary judgment—at least when the motions are decided on the basis that there are genuine issues of material fact.”) (internal

quotation marks omitted); *Staten v. Steel*, 222 Ore. App. 17, 35 (Ore. Ct. App. 2008) (“comparing federal summary judgment principles with Oregon’s summary judgment procedure” and noting that, “as in Oregon, in the federal system, the denial of a summary judgment motion generally is not reviewable from final judgment entered after a full trial on the merits”) (relying on Ninth Circuit’s decision in *Price v. Kramer*).

Many of these other courts also have the question unsettled. *See, e.g., Fischer v. Estate of Flax*, 816 A.2d 1, 10 (D.C. 2003) (relying on federal cases and noting that recent decisions “leave unclear whether this court has adopted the exception, which “has been criticized” by courts elsewhere); *Gump v. Wal-Mart Stores, Inc.*, 93 Haw. 428, 437 (Ct. App. 1999) (noting that Hawaii Supreme Court “has acknowledged, but not expressly adopted” the no-appeal rule and noting that the exception “has been questioned,” but applying the exception).

\* \* \*

This case presents the proper opportunity to resolve both conflicts in the courts of appeals on this fundamental question of summary judgment.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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