No. 04-597

In the Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC., PETITIONER

v.

SWIFT-ECKRICH, INC. D/B/A CONAGRA REFRIGERATED FOODS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.

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INTEREST OF THE UNITED STATES

This case presents the question whether the party that receives an adverse verdict in a civil jury trial must file a timely post-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) in order to preserve a sufficiency-of-the-evidence challenge for appeal. The United States and its agencies are the Nation's most frequent litigants and are often parties to civil jury trials. Because this Court's resolution of the question presented can be expected to affect the conduct of the government's own litigation, the United States has a significant interest in the disposition of this case. The United States also has an interest in the development and enforcement of appropriate standards governing preservation and waiver of issues for appeal. Such standards help to ensure the just and efficient

operation of the federal courts, goals that would hindered by adoption of the rule applied by the court of appeals in this case. More generally, the United States has an interest in the consistent and predictable application of established rules of procedure, both because of its status as a frequent litigant and because of the *ex officio* participation of Department of Justice attorneys on advisory committees concerning the various Federal Rules. That interest would be compromised by acceptance of respondent's contention that the Court should depart in this case from its prior interpretation of Rule 50(b).

STATEMENT

1. Federal Rule of Civil Procedure 50(a)(1) provides in pertinent part that, "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party." A motion under Rule 50(a) may be made "at any time before submission of the case to the jury." Fed. R. Civ. P. 50(a)(2).

Federal Rule of Civil Procedure 50(b) states:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

Fed. R. Civ. P. 50(b).[1] In construing a predecessor version of Rule 50(b), this Court held that "in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment." *Johnson* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 48, 50 (1952); see *id.* at 50 n.1 (reproducing text of Rule 50(b) in effect at that time).

2. Petitioner Unitherm Food Systems sued respondent Swift-Eckrich, Inc., d/b/a Conagra Refrigerated Foods, in the United States District Court for the Western District of Oklahoma. Pet. 2. Petitioner alleged, *inter alia*, that (1) it was entitled to a declaratory judgment that respondent's patent involving precooked meats was invalid; (2) respondent had tortiously interfered with petitioner's prospective economic relationships in violation of state law; and (3) respondent had violated Section 2 of the Sherman Act, 15 U.S.C. 2, by attempting to monopolize the relevant market through enforcement of a fraudulently obtained patent. Pet.

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[1] Until Federal Rule of Civil Procedure 50 was amended in 1991, a pre-verdict motion under Rule 50(a) was known as a motion for "directed verdict," while a post-verdict motion under Rule 50(b) was known as a motion for "judgment notwithstanding the verdict" or judgment "non obstante veredicto" ("j.n.o.v."). See Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521, at 242-243 & n.12 (2d ed. 1995). Under Rule 50 in its current form, both the pre- and post-verdict motions are known as motions for "judgment as a matter of law."

App. 3a-5a, 26a-27a. The district court granted summary judgment for petitioner on its patent-invalidity claim, see *id.* at 8a, and the other claims proceeded to trial.

The opinion of the Federal Circuit indicates that respondent filed a pre-verdict motion for judgment as a matter of law based on the alleged insufficiency of the evidence to support a verdict in petitioner's favor on the antitrust claim. See Pet. App. 50a-51a n.7; p. 6, *infra*. While asserting that respondent failed to raise that issue in its pre-verdict motion for judgment, petitioner has expressed a willingness to have the case decided on the assumption that an adequate Rule 50(a) motion was made. See Pet. 6-7 n.4. This Court's reformulation of the question presented makes clear that the case will be decided on the understanding that respondent "made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury." *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 125 S. Ct. 1396, 1397 (2005).

The jury found respondent liable for tortious interference with prospective economic relationships, and it awarded $2 million in actual damages and an additional $2 million in punitive damages on that claim. Pet. App. 11a. The jury also found for petitioner on the antitrust claim and awarded damages that, after trebling, amounted to $18 million. *Ibid.* Respondent did not move for judgment as a matter of law pursuant to Rule 50(b) after the jury rendered its verdict. See *id.* at 50a n.7. The question on which this Court has granted certiorari assumes, and it appears to be undisputed, that respondent also did not file a motion for new trial on the issue of antitrust liability under Federal Rule of Civil Procedure 59. *Unitherm*, 125 S. Ct. at 1397.

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-54a. The Federal Circuit affirmed the district court's grant of summary judgment on petitioner's patent-invalidity claim. *Id.* at 26a. The court

also affirmed the judgment on the tortious-interference claim, stating that the evidence was sufficient to support the jury verdict in petitioner's favor. *Id.* at 53a.

The court of appeals vacated the district court's judgment on the antitrust claim. Pet. App. 26a-50a. The court reviewed the pertinent record evidence (*id.* at 44a-49a) and concluded that petitioner had "failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim." *Id.* at 50a. The court of appeals declined to direct the district court to enter judgment in petitioner's favor on the antitrust claim, however, holding that its remedial authority was limited to vacatur of the judgment of liability and the award of antitrust damages. See *id.* at 50a-51a n.7.

The court of appeals explained that, under the approach followed by the relevant regional circuit, respondent's failure to file a post-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) did not preclude respondent from contesting the sufficiency of the evidence supporting the jury verdict on the antitrust claim, but it did bar the court of appeals from directing the district court to enter judgment in respondent's favor. The court explained:

> [Respondent] failed to renew its motion for judgment as a matter of law (JMOL) after the verdict pursuant to Federal Rules of Civil Procedure 50(b). [Petitioner] contends that [respondent] therefore waived its right to dispute the sufficiency of the evidence supporting the jury's antitrust verdict. We have ruled as a matter of Federal Circuit law that, for issues unique to our jurisdiction, a [post-verdict Rule] 50(b) motion is necessary to preserve a sufficiency of the evidence argument for appeal. On most issues related to Rule 50 motions, however, we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law. Be-

> cause we decide antitrust issues that do not implicate patent law, including market definition, under the law of the regional circuits, we similarly apply Tenth Circuit law to determine whether or not [respondent] has preserved its right to appeal. In the Tenth Circuit, the failure of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, as is the case here, that the party made the appropriate motion prior to the submission of the case to the jury. The absence of a Rule 50(b) post-verdict motion for JMOL, however, precludes our entering judgment in favor of [respondent]. The only remedy available is a new trial. Thus, we may only vacate the jury's verdict in favor of [petitioner].

Pet. App. 50a-51a n.7 (citations and internal quotation marks omitted).

SUMMARY OF ARGUMENT

A. Even when the district court correctly believes that the evidence presented at trial is insufficient to support a verdict in favor of the non-moving party, the court may properly decline to grant a pre-verdict motion for judgment as a matter of law filed under Federal Rule of Civil Procedure 50(a). By deferring consideration of the legal and evidentiary issues raised by such a motion until the jury has rendered its verdict, the court can avoid the need for a retrial that would result if it granted the Rule 50(a) motion and its ruling were reversed on appeal.

The discretionary nature of the district court's task in acting on a Rule 50(a) motion is central to the resolution of the Rule 50(b) questions presented here. Because the court may have sound reasons for granting a post-verdict Rule 50(b) motion even after it has denied relief under Rule 50(a), renewal of a motion for judgment as a matter of law after the jury has rendered its verdict cannot properly be regarded as

a futile endeavor. Rule 50(b) provides a specific mechanism through which the party that receives an adverse jury verdict may contest the sufficiency of its opponent's evidence, and the filing of a motion under that Rule ensures that the district court has an adequate opportunity to resolve the sufficiency issue in the first instance. In light of the discretion vested in the district court by Rule 50(a), moreover, an appellate court's ruling that the evidence was insufficient to support a verdict for the non-moving party would not establish that the district court erred in denying the Rule 50(a) motion. Such a ruling therefore does not preserve the distinct Rule 50(b) issue or provide a basis for reversal or vacatur of the district court's judgment.

B. This Court has repeatedly construed Federal Rule of Civil Procedure 50(b) to preclude a court of appeals from directing entry of a judgment contrary to the jury's verdict unless the appellant filed a timely post-verdict motion under that Rule. There is no sound basis for the remedial approach followed below, under which respondent's failure to seek post-verdict relief under Rule 50(b) precluded the court of appeals from directing entry of judgment in respondent's favor, but did not prevent it from reviewing the sufficiency of petitioner's evidence and ordering a new trial. While that result is not expressly foreclosed by this Court's holdings, it conflicts with the Court's reasoning and with common sense. The perverse and inefficient result of that approach is that respondent, which submitted a pre-verdict request for judgment as a matter of law in the district court, but did not seek a new trial on the issue of antitrust liability after the jury rendered its verdict, is entitled to a new trial but not to entry of a favorable judgment. That remedial scheme cannot be reconciled with the fundamental principle that appellate courts review those claims, and only those claims, that were adequately preserved in the trial court. Given the court of appeals' established lack of authority to direct entry of

judgment in these circumstances, the more logical inference is that the appellate court is also precluded from reviewing the merits of respondent's sufficiency challenge.

Contrary to respondent's contention, there is no warrant for this Court to reconsider its prior decisions construing Rule 50(b). Because Rule 50(b) is subject to amendment either by Congress through the enactment of new legislation, or by this Court pursuant to the Rules Enabling Act, see 28 U.S.C. 2072, 2074, the Court's precedents interpreting and applying the Rule are entitled to strong *stare decisis* effect. Respondent errs in contending that amendments to Rule 50 adopted in 1963 have superseded those precedents. To the contrary, the fact that this Court has repeatedly amended Rule 50 during the past several decades, without providing the courts of appeals with the remedial authority that was found lacking in prior cases, makes it all the more appropriate to adhere to those decisions as a matter of *stare decisis*.

ARGUMENT

"Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); cf., *e.g.*, *Yakus* v. *United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). That rule "is not a mere technical formality and is essential to the orderly administration of civil justice." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2472, at 94 (2d ed. 1995). The requirement of a contemporaneous objection or request for judicial action, as a prerequisite to appellate review, ensures that the trial court is given an adequate opportunity to address the relevant legal question in the first instance. That procedure increases the likelihood that the trial proceedings will be con-

ducted in conformance with law, thereby conserving the resources of the litigants and the appellate courts. A contemporaneous objection or request may also induce the trial court to provide an explanation of its ruling that will facilitate any appellate review that proves to be necessary. See *Freytag* v. *Commissioner*, 501 U.S. 868, 900 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Without th[e] incentive to raise legal objections as soon as they are available, the time of lower court judges and of juries would frequently be expended uselessly, and appellate consideration of difficult questions would be less informed and less complete.").[2]

Federal Rule of Civil Procedure 50 provides two complementary mechanisms by which a litigant in a suit tried to a jury may contest the sufficiency of the trial evidence offered to support its opponent's case. Under Rule 50(a), a party may request that the district court enter judgment as a matter of law "at any time before submission of the case to the jury," and the district court "may" grant such a motion if the evidence would not support a verdict in favor of the nonmoving party. Fed. R. Civ. P. 50(a)(1) and (2). If the district court does not grant the Rule 50(a) motion, Rule 50(b) per-

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[2] The requirement of a contemporaneous objection or request for judicial action is a longstanding principle of civil litigation that is currently reflected in Federal Rule of Civil Procedure 46. Rule 46 provides in pertinent part that "[f]ormal exceptions to rulings or orders of the [district] court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor." Fed. R. Civ. P. 46. "Even though [Rule 46] makes exceptions unnecessary, it does not end the need to object to actions by the trial court, or to let it know the action the party wishes it to take." Wright & Miller, *supra*, § 2471, at 93. The functions previously served by formal exceptions "are just as important under the [Federal Rules of Civil Procedure] as they ever were, but less formality is required in performing them." *Ibid.*

mits the movant to "renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment." Fed. R. Civ. P. 50(b).

Respondent appears to acknowledge that a litigant's challenge to the sufficiency of its opponent's evidence may be asserted on appeal only if such a challenge has first been presented to the district court. Respondent contends, however, that a pre-verdict motion under Rule 50(a) is adequate to preserve a sufficiency challenge for appellate review. See, *e.g.*, 04-819 Cond. Cross-Pet. at 14 (respondent argues that a post-verdict motion under Rule 50(b) is unnecessary "to preserve the full range of rights on appeal when a pre-verdict motion has been made under Rule 50(a)").[3] This Court should reject that contention, and should hold that a timely post-verdict motion under Rule 50(b) is a prerequisite to appellate review of any challenge to the sufficiency of the evidence supporting a jury's verdict. Enforcement of that requirement better serves the purposes that underlie contemporaneous-objection rules generally, and is more faithful to the text and structure of Rule 50 and to this Court's prior decisions interpreting the Rule.

A. A Post-Verdict Motion For Judgment Under Rule 50(b) Is A Prerequisite To Appellate Review Of Sufficiency Challenges Because District Courts Have Discretion To Deny Pre-Verdict Motions For Judgment Even When The Evidence Is Insufficient

By its terms, Federal Rule of Civil Procedure 50(a) confers discretion upon the district court, stating that, if "there is no legally sufficient basis for a reasonable jury to find for"

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[3] Respondent did not file a response to the petition for a writ of certiorari in this case, but it did file a conditional cross-petition for a writ of certiorari. See *Swift-Eckrich, Inc.* v. *Unitherm Food Sys., Inc.*, No. 04-819. This Court denied the conditional cross-petition on February 28, 2005. See 125 S. Ct. 1399.

a particular party on a given issue, "the court *may* determine the issue against that party and *may* grant a motion for judgment as a matter of law against that party." Fed. R. Civ. P. 50(a) (emphases added). Thus, the plain text of the Rule authorizes the district court to deny a pre-verdict motion for judgment as a matter of law even if it correctly appears to the court that no reasonable jury could find in favor of the non-moving party.

There is sound reason for that discretion. As one leading treatise explains:

> Even at the close of all the evidence it may be desirable to refrain from granting a motion for judgment as a matter of law despite the fact that it would be possible for the district court to do so. If judgment as a matter of law is granted and the appellate court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial court submits the case to the jury, though it thinks the evidence insufficient, final determination of the case is expedited greatly. If the jury agrees with the court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial. For this reason the appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.

Wright & Miller, *supra*, § 2533, at 319 (footnote omitted).[4] The Advisory Committee Note accompanying the 1991 amendments to Rule 50(b) is to the same effect, stating that, "because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided * * *, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence." *Amendments to Federal Rules of Civil Procedure*, 134 F.R.D. 525, 687 (1991) (*1991 Amendments*). In three related respects, the discretionary nature of the district court's task when confronted with a Rule 50(a) motion is central to the resolution of the question presented here.

1. *The filing of a post-verdict motion for judgment under Rule 50(b) is not futile even when a preverdict Rule 50(a) motion has previously been denied*

Respondent contends that, "[i]n essence, [petitioner's] argument is that for [respondent] to have preserved its right to appeal, it was required to engage in an empty formality: [respondent] had to make its motion to dismiss the antitrust claim twice." 04-819 Cond. Cross-Pet. at 17. The Court has already rejected that argument in *Johnson*, noting that Rule 50(b)'s "requirement of a timely application for judgment

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[4] Accord, *e.g.*, *Williams* v. *County of Westchester*, 171 F.3d 98, 102 (2d Cir. 1999); *Bergstrom-Ek* v. *Best Oil Co.*, 153 F.3d 851, 859 n.3 (8th Cir. 1998); *Therrell* v. *Georgia Marble Holdings Corp.*, 960 F.2d 1555, 1569 (11th Cir. 1992); *McPhillamy* v. *Brown & Root, Inc.*, 810 F.2d 529, 533 (5th Cir. 1987); *Flannery* v. *President of Georgetown Coll.*, 679 F.2d 960, 962 (D.C. Cir. 1982) (per curiam). See also 9 James Wm. Moore et al., *Moore's Federal Practice* § 50.33, at 50-54 (3d ed. 2005) (in order to ensure that "the jury verdict may be reinstated without a costly retrial if the reviewing court finds that judgment as a matter of law was erroneously granted * * *, many courts of appeal[s] emphasize the wisdom and expediency of reserving a ruling on pre-verdict motions for judgment until the jury has the opportunity to weigh the evidence").

after verdict is not an idle motion." 344 U.S. at 53. If the district court were *required* to grant a Rule 50(a) motion whenever the court deemed the non-moving party's evidence to be insufficient as a matter of law, there might indeed be little reason to suppose that a court, having denied such a motion initially, would reach a different conclusion after the jury had found *against* the moving party. As noted, however, in order to facilitate the fair and expeditious resolution of civil lawsuits, the district court may properly decline to grant relief under Rule 50(a) even if it regards the non-moving party's evidence as insufficient and intends to grant a Rule 50(b) motion if the jury finds against the movant. See pp. 10-12, *supra*. In light of the established legitimacy of that practice, there is no basis for treating the post-verdict renewal of a motion for judgment under Rule 50(b) as a merely formal or futile endeavor.

In a particular case, the district court's stated rationale for denying a pre-verdict motion under Rule 50(a) may be sufficiently explicit and emphatic as to negate any meaningful likelihood that the court will reach a different conclusion after the verdict is in. But this Court should avoid an approach that provokes hair-splitting arguments concerning the definitiveness of a particular judge's explanation of his or her ruling. See *Johnson*, 344 U.S. at 53 ("Rule 50(b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end."). Because a court's refusal to grant pre-verdict relief under Rule 50(a) does not, as a general matter, foreclose any realistic possibility that a post-verdict motion will be granted, there is no basis for a "futility" exception to the

usual rule that relief not requested from the trial court cannot be obtained from the court of appeals.[5]

Nor would it be appropriate to distinguish, for purposes of appellate review of sufficiency-of-evidence challenges, between cases in which the district court explicitly reserves its ruling on the Rule 50(a) motion and those in which it denies the motion outright. In addition to the line-drawing problems that such an approach would create (cf. p. 13, *supra*), the text of Rule 50(b) does not countenance such an endeavor. The first sentence of Rule 50(b) states that "[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion."

Thus, even if the district court states unequivocally that it is denying relief under Rule 50(a) because it regards the nonmoving party's evidence as sufficient to support a verdict, the court's submission of the case to the jury is made subject, as a matter of law, "to the court's later deciding the legal questions raised by the motion." See *Johnson*, 344 U.S. at 53 (explaining that Rule 50(b) "mak[es] it wholly unnecessary for a judge to make an express reservation of his decision on a motion for directed verdict," because "[t]he rule itself made the reservation automatic"); *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967) ("Under Rule 50(b), if a party moves for a directed verdict at the close of the evi-

[5] Respondent suggests that the district court's prior rulings in this case made clear that any post-verdict motion under Rule 50(b) would have had no realistic prospect of success. See, *e.g.*, 04-819 Cond. Cross-Pet. at 16 ("During trial, the trial judge several times expressed her desire not to hear further about [respondent's] position on the deficiencies of the antitrust claim."). Respondent does not identify record materials that would support that conclusion, however, nor does it suggest a workable standard that could be used to determine in an efficient and predictable manner whether a Rule 50(b) motion would have been futile in a particular case.

dence and if the trial judge elects to send the case to the jury, the judge is 'deemed' to have reserved decision on the motion."). Because Rule 50(b) by its terms treats *any* failure or refusal to grant a Rule 50(a) motion as a reservation of the district court's decision, it would be inappropriate for a court of appeals to decide that a particular Rule 50(a) denial "really" reflected the district court's final word on the matter.

2. *Post-verdict renewal of a prior motion for judgment ensures that the district court has an adequate opportunity to pass on the merits of the movant's sufficiency challenge and facilitates any appellate review that proves to be necessary*

As explained above, Federal Rule of Civil Procedure 50(b) provides that, when the district court declines to grant a pre-verdict Rule 50(b) motion for judgment, the court is "considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." In effect, therefore, Rule 50(b) treats the denial of a pre-verdict motion for judgment as merely a tentative ruling subject to "later deci[sion]." The next sentence of Rule 50(b) then specifies the procedural mechanism by which that "later deci[sion]" is to be made: "The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment." If a party declines to renew its motion after verdict, it has waived its right to obtain a final ruling from the district court on the sufficiency of the evidence, and accordingly should not be permitted to raise that issue on appeal.[6]

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[6] This Court has stated that "in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict [Rule 50(b)] forbids *the trial judge* or an appellate court to enter such a judgment." *Johnson* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 48, 50 (1952) (emphasis added). That statement indicates that, even if the district court expressly reserves its decision on

There are substantial practical reasons for barring appellate review of sufficiency issues unless the appellant has first presented its sufficiency challenge in the manner prescribed by Rule 50(b), thereby ensuring that the district court is given a full and fair opportunity to rule on those issues after the conclusion of the trial. In the midst of a jury trial, the district court may lack the time and resources necessary to conduct a detailed review of the record and make a final determination regarding the sufficiency of the evidence to support particular claims or defenses, yet it is the trial court that is best positioned to make those determinations as an initial matter. As this Court recognized in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Id.* at 216. "Exercise of this discretion presents to the trial judge an opportunity * * * to view the

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a Rule 50(a) motion until after the jury has rendered its verdict, Rule 50(b) precludes the district court from setting aside the jury verdict and granting judgment as a matter of law unless the losing party renews its prior request by filing a timely post-verdict motion. If that characterization of Rule 50(b) is treated as controlling, a litigant's failure to file a post-verdict motion for judgment would clearly deprive the district court of an adequate opportunity to pass on sufficiency issues in the first instance. Notwithstanding the *Johnson* Court's statement that trial courts lack authority to grant a post-verdict judgment for the losing party in the absence of a timely Rule 50(b) motion, however, "several lower courts have ignored this language as nothing more than dictum, because it appeared in a case concerning the power of appellate courts to enter judgment as a matter of law in the absence of a proper post-verdict motion." 9 *Moore's Federal Practice*, *supra*, § 50.05[5][b][ii], at 50-28 to 50-29 (footnotes omitted). But even assuming, *arguendo*, that the district court would have *power* to enter judgment for the verdict loser in the absence of a post-verdict motion, the litigant's express request for judgment under Rule 50(b) should be treated as a prerequisite to appellate review of any sufficiency challenge, for all the reasons set forth in text.

proceedings in a perspective peculiarly available to him alone." *Ibid.* As the *Cone* Court suggested, Rule 50 should be construed so as to afford the district judge "a last chance to correct his own errors without delay, expense, or other hardships of an appeal." *Ibid.* (citation omitted); see *Johnson*, 344 U.S. at 53 ("The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness.").

A renewed motion for judgment as a matter of law under Rule 50(b) may serve a useful function, moreover, even if it is ultimately denied. In light of the district court's greater familiarity with the trial record, that court's identification of the evidence that it believes supports the jury's verdict (and its explanation for rejecting the losing party's sufficiency challenge) can be expected substantially to facilitate any subsequent appellate review.[7] Although the district court is not required to give reasons for denying a motion under either Rule 50(a) or Rule 50(b), the court clearly has a greater incentive to provide a detailed explanation of its denial of a motion filed under Rule 50(b) (when the jury has found against the moving party, and the prospect of an appeal on the sufficiency question is real and immediate) than of its denial of a pre-verdict motion filed under Rule 50(a) (when the possibility still exists that a jury verdict in the movant's favor will moot the sufficiency question altogether). That is particularly true when the propriety of entering judgment contrary to the jury's verdict potentially depends on the resolution of antecedent legal issues such as the admissibility

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[7] "The appellate process materially benefits by a comprehensive summary of the course of proceedings below and an impartial review of the evidence supporting a verdict. The appellant is directed to the probative evidence contrary to his or her position and the appellate court need not sift through the entire record searching for such contrary evidence." *Biodex Corp.* v. *Loredan Biomedical, Inc.*, 946 F.2d 850, 859 (Fed. Cir. 1991), cert. denied, 504 U.S. 980 (1992).

of evidence. See *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 573-574 (1948).

By giving the district court a chance to explain its decision at a time when the practical significance of that ruling is apparent, a renewed motion for judgment as a matter of law under Rule 50(b) may thus assist the appellate court even if that motion is denied. Appellate courts should not be deprived of the benefit of the district court's most considered judgment by an interpretation of Rule 50 that permits appellants to obtain appellate review of sufficiency determinations without first filing a Rule 50(b) motion.[8]

3. A district court's denial of a pre-verdict motion under Rule 50(a) cannot be deemed reversible error on the ground that the non-moving party's evidence was insufficient, because district courts have discretion to deny Rule 50(a) motions in such circumstances

Respondent observes that, although motions of many sorts may be and sometimes are renewed after the district court's initial denial of relief, "the fact that a motion is *not* renewed when the opportunity arises does not mean that the original motion can no longer serve as the basis for an appeal." 04-819 Cond. Cross-Pet. at 14. While that is true as a general matter, it is not true of motions filed under Federal

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[8] If the party that receives an adverse jury verdict in a civil suit believes that the district court would be unlikely to grant a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), but the court has not previously offered a detailed, on-the-record description of the evidence supporting the verdict winner's claim, the losing party might have an incentive to forgo a Rule 50(b) motion so that the court of appeals will review any sufficiency challenge without the benefit of the district court's analysis. Treating a Rule 50(b) motion as a prerequisite to appellate review of a challenge to the sufficiency of the evidence supporting a jury verdict eliminates that incentive. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977) (refusal to enforce procedural default rules may encourage "sandbagging" by trial counsel).

Rule of Civil Procedure 50. Because the district court has broad discretion in ruling on Rule 50(a) motions, and may properly deny a motion even if the court believes that the evidence is insufficient to support a verdict against the non-moving party, an appellate court's determination that the evidence was insufficient would not establish that the district court *erred* in denying the Rule 50(a) motion. See *McPhillamy* v. *Brown & Root, Inc.*, 810 F.2d 529, 532-533 (5th Cir. 1987) (even if trial evidence was such that the district court could legitimately have granted pre-verdict motion under Rule 50(a), court's failure to do so could not properly be characterized as error, since submission of doubtful cases to the jury will often expedite resolution of civil lawsuits). And, absent identified *error* by the trial court, there would be no basis for the court of appeals to disturb the judgment.[9]

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[9] Although a pre-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) is not by itself adequate to preserve a sufficiency challenge for appellate review, such a motion is an essential prerequisite to a post-verdict request for judgment under Rule 50(b). As the Advisory Committee Note accompanying the 1991 amendments to Rule 50(b) explains, the Rule in its current form

> retains the concept of the former rule that the post-verdict motion is a renewal of the earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.

1991 Amendments, 134 F.R.D. at 687; see Wright & Miller, *supra*, § 2537, at 335-336 ("A post-verdict motion under Rule 50(b) for judgment as a matter of law cannot be made unless a previous motion for judgment as a matter of law was made by the moving party at the close of all the evidence."). The requirement of a pre-verdict motion ensures "that the responding party may seek to correct any overlooked deficiencies in the proof" before the case is submitted to the jury. *1991 Amendments*, 134 F.R.D. at 686. Thus, the practical effect of Rule 50 is that a litigant must

B. Requiring A Post-Verdict Motion For Judgment As A Matter Of Law As A Prerequisite To Appellate Review Of Sufficiency Challenges Is Consistent With This Court's Prior Decisions Construing Rule 50(b), Which Are Entitled To Strong *Stare Decisis* Effect

This Court has repeatedly held that, if the party that receives an adverse verdict in a civil jury trial fails to submit a timely post-verdict motion under Federal Rule of Civil Procedure 50(b), the court of appeals lacks power to direct the district court to enter a judgment contrary to the verdict of the jury. See *Johnson*, 344 U.S. at 50; *Globe Liquor Co.*, 332 U.S. at 572-574; *Cone* v. *West Va. Pulp & Paper Co.*, 330 U.S. 212, 215-218 (1947).[10] The Federal Circuit in this case recognized that, under those decisions, respondent's failure to file a timely Rule 50(b) motion precluded the court of appeals from directing the entry of judgment in respondent's favor. The court of appeals nevertheless reviewed and accepted respondent's contention that the trial evidence was insufficient to support the jury verdict on petitioner's antitrust cause of action. Having reached that conclusion, and being barred by *Johnson*, *Globe Liquor*, and *Cone* from ordering the relief that would most naturally follow—*i.e.*, entry of judgment for respondent—the court nonetheless granted a new trial. See Pet. App. 50a-51a n.7.

Rather than defend the Federal Circuit's ruling, which can be squared with the holdings but not the logic of *John-*

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seek judgment as a matter of law in the district court both before and after the jury verdict in order to preserve a claim of evidentiary insufficiency for appeal.

[10] The Court subsequently determined in *Neely* that, if a timely post-verdict motion is filed in the district court under Rule 50(b), and the court of appeals later concludes that the evidence at trial was insufficient to support the jury verdict, the court of appeals may, in an appropriate case, direct the district court to enter judgment in the movant's favor. 386 U.S. at 319-330; see *Weisgram* v. *Marley Co.*, 528 U.S. 440, 449-452 (2000).

son, *Globe Liquor*, and *Cone*, respondent has urged the Court to "revisit the question" previously decided in those cases. 04-819 Cond. Cross-Pet. at 18. Respondent contends that its submission of a pre-verdict motion under Rule 50(a) should be sufficient to preserve its right to any otherwise-appropriate appellate remedy, including an order directing the district court to enter judgment in respondent's favor. See *id.* at 14-18.

Neither of those approaches is sound. In light of the established rule that the court of appeals in this situation lacked power to direct entry of judgment, it is illogical to permit the court to review the sufficiency of petitioner's evidence and to order a form of relief—a new trial on the question of antitrust liability—that respondent *never* requested in the district court. Moreover, this Court's decisions interpreting the Federal Rules of Civil Procedure are entitled to strong *stare decisis* effect, and respondent has offered no sound basis for departing from those precedents.

1. *This Court should reject the remedial approach employed by the Federal Circuit in this case*

In determining the scope of its review and of its remedial authority in this case, the Federal Circuit applied Tenth Circuit precedent. See Pet. App. 50a-51a n.7. The Tenth Circuit has recognized that, under this Court's decisions, a litigant's failure to file a timely post-verdict motion under Rule 50(b) precludes a court of appeals from directing the district court to enter a judgment contrary to the verdict of the jury. See, *e.g.*, *Cummings* v. *General Motors Corp.*, 365 F.3d 944, 951 (2004). The Tenth Circuit has nevertheless concluded that the absence of a Rule 50(b) motion does not bar the party receiving an adverse verdict from raising a claim of evidentiary insufficiency on appeal. In such cases, the Tenth Circuit has held, the sufficiency challenge may go forward, but "the only remedy available is a new trial," even if the

court of appeals concludes that the jury verdict lacks any evidentiary basis. *Ibid.* Relying on *Cummings*, the Federal Circuit in the instant case vacated the judgment in petitioner's favor on the antitrust claim but did not order the district court to enter judgment for respondent. See Pet. App. 50a-51a & n.7.

The remedial scheme devised by the Tenth Circuit has little to recommend it. Under that approach, an unrenewed pre-verdict motion under Rule 50(a) will be deemed insufficient to preserve the movant's entitlement to the remedy actually sought in the unrenewed Rule 50(a) motion—the entry of judgment in the movant's favor—but sufficient to preserve a claim for a form of relief that the Rule 50(a) movant never actually sought below—a new trial. Given the established rule that an appellate court cannot order judgment in the appellant's favor unless a timely Rule 50(b) motion was filed, the much more logical conclusion is that an unrenewed Rule 50(a) motion is simply inadequate to preserve a claim of evidentiary insufficiency.[11]

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[11] This is not to say that an order directing judgment in the appellant's favor is the *only* permissible remedy when a sufficiency challenge has been properly preserved through a timely Rule 50(b) motion and the court of appeals subsequently determines that the jury verdict is unsupported by the evidence. Federal Rule of Civil Procedure 50(d) makes clear that, "[i]f the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." This Court in *Neely* recognized that, even when the court of appeals holds that the evidence is insufficient to support the jury's verdict, there may be valid reasons for the appellate court to order a new trial, or to leave the choice of remedies to the district court's informed discretion, rather than to direct the entry of judgment in the appellant's favor. See 386 U.S. at 325-327. But the fact that a new trial will *sometimes* be the appropriate relief in cases of this nature does not provide a persuasive rationale for the remedial scheme adopted by the Tenth Circuit and applied by the Federal Circuit here, under which an unrenewed Rule 50(a) motion is considered adequate to preserve claims of evidentiary insufficiency, but not to preserve the movant's right to what would otherwise be

The Tenth Circuit's approach also imposes substantial inefficiencies on the federal courts, because it compels district courts to convene new jury trials in cases where the correct result—but for the appellant's failure to file a Rule 50(b) motion—would have been the entry of judgment as a matter of law. The consequences of the failure to seek Rule 50(b) relief thus fall most heavily on jurors, court personnel, and already clogged court calendars. Neither respondent nor the courts that follow the Tenth Circuit's approach have identified any plausible justification for imposing those substantial costs on the federal judicial system.

To be sure, if a litigant files a pre-verdict motion for judgment as a matter of law under Rule 50(a), fails to renew that motion after an adverse verdict within the time allowed by Rule 50(b), but *does* file a timely post-verdict motion for a new trial under Federal Rule of Civil Procedure 59, the court of appeals may order a new trial but cannot direct the entry of judgment in the litigant's favor. But in that scenario, the court of appeals is awarding relief that the litigant *actually sought* in the district court, and the result is therefore consistent with the general rule that an appellate court can review those claims, and only those claims, that were adequately preserved in the trial court.[12] In the instant case, however, the question on which this Court has granted certiorari assumes (and it appears to be undisputed) that respondent did *not* file a post-verdict motion for new trial on

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an appropriate (and indeed the most natural) appellate remedy in the event that such a claim is upheld.

[12] The appellants in *Cone* (see 330 U.S. at 213), *Globe Liquor* (see 332 U.S. at 572), and *Johnson* (see 344 U.S. at 54) all filed timely motions for new trial in the district court after the juries in those cases rendered their verdicts. Contrary to respondent's suggestion (see 04-819 Cond. Cross-Pet. at 18 & n.11), it was those post-verdict motions, not the Rule 50(a) motions for directed verdicts previously filed by the same litigants, that preserved those parties' rights to argue in the courts of appeals that new trials should be granted.

the issue of antitrust liability under Rule 59. See 125 S. Ct. at 1397. There is no reason to give litigants a right to relief in the appellate courts that they never sought in the district court. Such a scheme can be reconciled with the holdings of *Johnson*, *Globe Liquor*, and *Cone*, but not with either their logic or common sense.

2. *This Court's prior decisions construing Rule 50(b) are entitled to strong* stare decisis *effect and should not be abandoned*

In its conditional cross-petition for a writ of certiorari, respondent has contended—contrary to the square holdings of this Court (see p. 20, *supra*)—that a litigant who has filed a pre-verdict motion under Federal Rule of Civil Procedure 50(a) need not file a Rule 50(b) motion in order "to preserve [its] full range of rights on appeal," including the right to an appellate order directing judgment in the litigant's favor if the court of appeals finds the trial evidence insufficient to support the jury's verdict. 04-819 Cond. Cross-Pet. at 14; see *id.* at 14-18. Because the Court has denied the conditional cross-petition, see 125 S. Ct. 1399 (2005), it is doubtful that respondent's request for a remedy more favorable than the one it received from the Federal Circuit is properly before this Court. Cf. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985) (although "[a] prevailing party may advance any ground in support of a judgment in his favor," an "argument that would modify the judgment * * * cannot be presented unless a cross-petition has been filed"). In any event, respondent's argument lacks merit.

a. "Respect for precedent is strongest 'in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.'" *Hubbard* v. *United States*, 514 U.S. 695, 711-712 (1995) (quoting *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977)); accord, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 792 (1998);

Hilton v. *South Carolina Public Rys. Comm'n*, 502 U.S. 197, 203 (1991); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). That principle is applicable here *a fortiori*. Although Federal Rule of Civil Procedure 50(b) is not a statute, it is subject to revision not only by Congress, see, *e.g.*, *Henderson* v. *United States*, 517 U.S. 654, 668 (1996); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941), but also by this Court pursuant to the Rules Enabling Act, see 28 U.S.C. 2072, 2074.

Indeed, repudiation at this late date of the Court's precedents construing Rule 50(b) would be especially unwarranted in light of this Court's statutory authority to amend the Federal Rules of Civil Procedure, and the limitations placed by Congress upon the exercise of that power. The Rules Enabling Act vests this Court with "the power to prescribe general rules of practice and procedure * * * for cases in the United States district courts." 28 U.S.C. 2072(a). The Act thus provides a mechanism by which this Court can amend Rule 50(b), without the need for congressional action, if the Court agrees with respondent's contention that no useful purpose is served by requiring a post-verdict motion for judgment as a matter of law as a prerequisite to appellate review of sufficiency challenges.

In exercising its authority under the Rules Enabling Act, however, the Court is required to "transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule." 28 U.S.C. 2074(a). The new or amended Rule "shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." *Ibid.* That statutory procedure affords litigants and other interested persons notice of proposed changes to the Federal Rules, and it provides Congress a meaningful opportunity to reject a proposed Rule before its effective date. See, *e.g.*, *Sibbach*, 312 U.S. at 15. By contrast, a deci-

sion in this case that overruled established precedents and announced a new understanding of Rule 50(b) would have retroactive consequences, thereby frustrating the legitimate expectations of litigants in this and other cases, and it would undermine Congress's ability to perform the oversight role that the Rules Enabling Act contemplates.[13]

b. Respondent briefly acknowledges this Court's prior holdings in *Cone*, *Globe Liquor*, and *Johnson*, but it contends that "[t]he views expressed in those cases were not * * * included in the current Rule 50, when it was completely rewritten and adopted by this Court in 1963." 04-819 Cond. Cross-Pet. at 18 n.11. That argument reflects a fundamental misunderstanding of the 1963 amendments to Federal Rule of Civil Procedure 50. Insofar as the 1963 amendments added new subsections (c) and (d), those amendments did effect substantial changes to the Rule. Nothing in subsections (c) and (d) addresses the question presented here, however, and the minor, technical alterations made to Rule 50(b) in 1963 cannot plausibly be read to supersede the Court's prior holdings that a post-verdict motion under that Rule is a prerequisite to an appellate order directing entry of judgment in the verdict loser's favor. See *Amendments to Rules of Civil Procedure for the United States District Courts*, 31 F.R.D. 587, 643-644 (1963) (*1963 Amendments*) (redlined document showing changes to Rule 50(b)).

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[13] Indeed, with respect to the precise question at issue here, the Court in *Johnson* explained that

> Rule 50(b) as written and as construed by us is not difficult to understand or to observe. * * * In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who * * * had made no timely motion for judgment notwithstanding the verdict. We did not adopt the amendment then. No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation.

344 U.S. at 53-54 (citation omitted).

The Advisory Committee Note accompanying the 1963 amendments to Federal Rule of Civil Procedure 50 cited this Court's decisions in (*inter alia*) *Cone*, *Globe Liquor*, and *Johnson*, and stated that "[t]he amendments do not alter the effects of a jury verdict or the scope of appellate review." *1963 Amendments*, 31 F.R.D. at 645. In 1967, the Court in *Neely* cited the same precedents and noted the 1963 Advisory Committee's stated intent not to alter the scope of appellate review "as articulated in the prior decisions of this Court." 386 U.S. at 324. The Court in *Neely* explained that "[t]he opinions in the [earlier] cases make it clear that an appellate court may not order judgment *n.o.v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)." *Id.* at 325. In light of that discussion, it is wholly implausible to suppose that the 1963 amendments to Rule 50, which had been adopted by the Court itself only four years before the decision in *Neely*, were intended to supersede the Court's earlier rulings by vesting the courts of appeals with the authority to direct entry of judgment in the absence of a timely Rule 50(b) motion.

c. Federal Rule of Civil Procedure 50 has been amended on four additional occasions since 1963. See Fed. R. Civ. P. 50 note, 28 U.S.C. App. at 778-779 (reproducing Advisory Committee Notes accompanying amendments adopted in 1987, 1991, 1993, and 1995). Neither the textual changes effected by those amendments, nor the relevant Advisory Committee Notes, suggest dissatisfaction with the rule that a court of appeals may not direct entry of a judgment contrary to the jury's verdict unless a timely Rule 50(b) motion was filed.

This Court is "especially reluctant to reject th[e] presumption [of adherence to *stare decisis* on questions of statutory interpretation] in an area that has seen careful, intense, and sustained congressional attention." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

That reluctance is based in part on the fact that Congress, when it amends some features of the United States Code while leaving adjacent provisions intact, "must be presumed to have been fully cognizant of" this Court's construction of the pre-existing statutory scheme. *Id.* at 420; see *id.* at 420 n.26 (citing cases). Under those circumstances, Congress's failure to amend a statutory provision that has been definitively construed by this Court suggests approval of the Court's interpretation. See *Faragher*, 524 U.S. at 804 n.4. It is all the more reasonable to assume that this Court is familiar with its *own* prior decisions when it promulgates amendments to the Federal Rules of Civil Procedure, and that its failure to amend a Rule that has been given an authoritative construction implies satisfaction with existing law and practice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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