No. 09-1071

In the Supreme Court of the United States

GO DADDY SOFTWARE, INC., PETITIONER

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

P. DAVID LOPEZ
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

JAMES M. TUCKER
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported the jury's conclusion that Youssef Bouamama had a reasonable belief he had been subjected to conduct made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when he complained to his employer about the possible discriminatory elimination of his position.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

In the Supreme Court of the United States

No. 09-1071

GO DADDY SOFTWARE, INC., PETITIONER

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 581 F.3d 951. The order of the district court (Pet. App. 43-64) is unpublished but is available at 2007 WL 1076701.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2009. A petition for rehearing was denied on December 4, 2009 (Pet. App. 65). The petition for a writ of certiorari was filed on March 4, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission sued petitioner in the United States District Court for

the District of Arizona asserting that it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by discriminating against charging party Youssef Bouamama on the basis of his national origin and religion, and by discriminating against him due to his engagement in activity protected from retaliation under the statute. Gov't C.A. Supp. E.R. 1-2. The jury found for the Commission on the retaliatory discharge claim, and for petitioner on the remaining claims. *Id.* at 8-12. As relevant here, petitioner moved under Federal Rule of Civil Procedure 50(b) for judgment as a matter of law on the retaliation claim. The district court denied the motion because petitioner failed to preserve its argument in a pre-verdict Rule 50(a) motion. Pet. App. 44. The court of appeals affirmed, applying "the deferential plain error standard applicable to arguments not made in a Rule 50(a) motion." *Id.* at 23; see *id.* at 1-40.

1. a. The following evidence was presented to the jury at trial. Petitioner Go Daddy Software, Inc. is a company that registers Internet domain names for websites. Gov't C.A. Supp. E.R. 103. Bouamama first began working for petitioner in September 2001 as a temporary Customer Service/Tech Support/Web Board employee in its call center. *Id.* at 49. Three months later, petitioner converted Bouamama to a permanent full time employee, in the position of Sales Representative. *Id.* at 18-19, 50, 89. In this position, Bouamama provided customer service by telephone and email to petitioner's clients, and also trained new hires in the Sales Representative position. *Id.* at 51.

Brett Villeneuve, petitioner's Operations Manager and the person responsible for the call center, assessed Bouamama's performance as a Sales Representative and observed that while handling customer calls "wasn't his

strongest point," Bouamama "was a good rep," and generally as an employee "[a]ll in all, he's okay. He's got good technical knowledge." Gov't C.A. Supp. E.R. 86-87, 89, 96-97. On February 25, 2002, Villeneuve promoted Bouamama to the Team Lead position. *Id.* at 53, 115-116. In this position, Bouamama supervised and provided training and support to a team of five or six Sales Representatives. *Id.* at 54, 91, 114. Villeneuve noted that, as compared to the other Team Leads at Go Daddy, Bouamama's customer service skills were "[r]ight in there in the middle of them." *Id.* at 92. Bouamama was again promoted by Villeneuve in early July 2002 to the position of Inbound Sales Manager. *Id.* at 78, 94-95. In this position, Bouamama provided support to the Sales Representatives, prepared sales reports and goals, and organized sales contests. *Id.* at 55.

Shortly after making Bouamama a permanent employee, Villeneuve heard Bouamama speaking to a customer in a foreign language and asked Bouamama where he was from, what language he was speaking, what other languages he spoke, and what religion he practiced. Gov't C.A. Supp. E.R. 51-52, 90. Bouamama responded that he was from Morocco, that he had been speaking French, that he also spoke Arabic, and that he was Muslim. *Id.* at 52, 90. After Villeneuve promoted Bouamama to the Inbound Sales Manager position, Bouamama complained to Heather Slezak, petitioner's Director of Personnel, about this questioning from Villeneuve. *Id.* at 28-29, 33, 78, 79. Slezak stated either that she would talk to Villeneuve, or that "[Villeneuve] is the way [he] is, don't worry about him, he don't really mean stuff." *Id.* at 79. Slezak stated that when she receives complaints of discrimination, she speaks to the alleged discriminator, conducts a full investigation of the allega-

tion, and takes any necessary corrective action. *Id.* at 36-37. Although Bouamama expected Slezak to "take [his] complaint into consideration," she never followed up with him. *Id.* at 79.

On another occasion, Villeneuve made a comment in Bouamama's presence, while speaking to other employees, that "[t]he Muslims need to die" or "[t]he bastard Muslims need to die." Gov't C.A. Supp. E.R. 58. Bouamama felt hurt by this comment, but said nothing to Villeneuve because Bouamama understood that at that time "[w]e were at war. * * * After September 11 things changed, people are hurt, you know, I was hurt and, you know, it was devastating for everybody, it was horrible, and, you know, you try to be compassionate. I understand maybe the anger that some people are expressing, and that's why I don't say nothing." *Id.* at 59. Bouamama added that he did not want to "make an issue in the company" or to be looked at as a "troublemaker," and he hoped that "maybe some day they'll see me as Youssef, you know, maybe they'll be more knowledgeable about, you know, my work ethic, my performance and they [will] look at me as Youssef, not as, you know, where he's from, what religion he practice or something like that." *Id.* at 60. Bouamama also added that he did not complain about the "Muslims need to die" comment because "[t]here's a culture in Go Daddy. You complain you get fired." *Ibid.* Bouamama had witnessed that culture in action—seeing others complain and get fired—and he wanted to keep his job. *Ibid*.

In early April 2003, petitioner hired Craig Franklin as the Director of the call center. Gov't C.A. Supp. E.R. 29. Villeneuve stayed on, reporting to Franklin. *Id.* at 42. On April 2, Franklin announced there would be no changes under his management. *Id.* at 61. Bouamama

invited Franklin to attend an upcoming training session Bouamama was conducting in the sales department, in order to bring Franklin up to speed on the functioning of that department. *Id.* at 25, 61-62. Before the training session, Bouamama—who speaks with a "very strong accent" recognized by at least one of Bouamama's coworkers as "Middle East[ern]"—met with Franklin in his office. *Id.* at 43, 44, 61. After Franklin met Bouamama face-to-face for the first time, Franklin cancelled the training session meeting and two other meetings with Bouamama. *Id.* at 62.

Franklin decided instead to reorganize the call center. As part of the reorganization, Franklin chose to eliminate the 13 Team Lead positions, the weekend Operations Manager position, and Bouamama's Inbound Sales Manager position, replacing all with four newly created Sales Supervisor positions. Gov't C.A. Supp. E.R. 20-22; Pet. App. 9. Petitioner encouraged the employees in the eliminated positions to apply for the new Sales Supervisor positions. Gov't C.A. Supp. E.R. 26. Every employee whose position was being eliminated but chose not to apply or was not selected for the Sales Supervisor position had the option of taking a Sales Representative position, or taking a severance package and leaving the company. *Id.* at 99.

On April 4, 2003, Slezak, Villeneuve and Franklin together met with Bouamama to inform him that his Inbound Sales Manager position had been eliminated; they told him he could either apply for the Sales Supervisor position or just "walk away" from petitioner. Gov't C.A. Supp. E.R. 62, 62.5, 63. Franklin stated that he did not care about Bouamama's "background or history with the company, something like that." *Id.* at 62.5. Slezak repeated the "walk away" part of that message to Boua-

mama five times, which Bouamama understood as telling him he should quit. *Id.* at 62.

After this meeting, Franklin stopped by Bouamama's cubicle, looked at Bouamama's pictures, and asked where they were taken.[1] Gov't C.A. Supp. E.R. 63. Bouamama replied that they were taken in Morocco, and Franklin asked if Bouamama was from Morocco and if he was Muslim. *Ibid.* Bouamama answered yes to both questions, and Franklin replied "[y]ou know, you're lucky that I like you," and then walked away. *Ibid.* Later that day Bouamama reported Franklin's comments to Slezak:

> [T]his is the second time that people are concerned and taking interest about, you know, where I'm from, my religion. You know, I can understand that it was happening with [Villeneuve] but this guy here [Franklin], I don't know him and two days ago he came and telling me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for who I am and where I'm from. So I wanted her to look into it.

Id. at 64. Slezak said she would look into the matter. Pet. C.A. E.R. 107-108.

Almost all the employees affected by Franklin's reorganization, including Bouamama, applied for a Sales Supervisor position. On April 9 and 10, 2003, a panel of petitioner's management personnel—Franklin, Ville-

---

[1] Bouamama's trial testimony suggests this exchange and the events immediately following it took place on April 5, while his charge of discrimination filed with the Commission states the exchange it took place on April 7. Compare Gov't C.A. Supp. E.R. 63 with Pet. C.A. E.R. 86-87. In either case, the event fell between the April 4 meeting regarding the elimination of Bouamama's position and his April 17 termination.

neuve, and Slezak—interviewed the Sales Supervisor candidates. On April 14, 2003, Bob Parsons, petitioner's CEO, informed Bouamama that he did not get a Sales Supervisor position. Gov't C.A. Supp. E.R. 65. Parsons told Bouamama that, instead of the Sales Supervisor position, Bouamama would be "doing sales statistics" for the company, and he did not want Bouamama to "worry about what's going on in the sales department." *Ibid.* Bouamama left the meeting with Parsons with the impression that he would "be moving to another department doing statistics, sales or statistics analysis." *Id.* at 67. Unlike every other unsuccessful candidate for the Sales Supervisor position, Bouamama was not offered the opportunity to return to a Sales Representative position. *Id.* at 62.

As Bouamama passed Franklin's office on his way back to his cubicle, Franklin saw Bouamama and said "come here," and called Bouamama "the F word." Gov't C.A. Supp. E.R. 67. Bouamama responded by "look[ing] at him like, 'What?'" and then Franklin again said "come here." *Id.* at 67-68. Bouamama responded that he had just spoken to Parsons, and he went home. *Id.* at 68. That evening, Bouamama received an e-mail from Barb Rechterman, petitioner's Executive Vice President, stating that Bouamama was to meet with Franklin and her. *Id.* at 70, 104.

At that meeting the next day, Rechterman asked Bouamama to prepare a report for her "related to sales product and cost." Gov't C.A. Supp. E.R. 70. The request was made at around 10 a.m., and Rechterman told Bouamama to get it to her by noon. *Ibid*. Bouamama provided Rechterman a preliminary report a half hour early at 11:30 a.m. and asked if his report was what she was expecting. *Id.* at 71. Rechterman did not respond.

Ibid. Bouamama turned in the completed report at 2:30 p.m. and a short time later went to Rechterman's office and asked if it met her expectations. *Ibid*. Rechterman responded that she did not know why Bouamama was sent to her department, and directed him to speak with Franklin about why he did not get a Sales Supervisor position. *Ibid*. Bouamama went to Franklin's office as directed, where Franklin told him "[o]h, I thought I took care of you." *Id.* at 72. Bouamama asked why he did not get the Sales Supervisor position, and Franklin told him that he needed to go speak to Rechterman. *Id.* at 73. Bouamama responded that he was "tired of all this," and, as his shift had ended, he went home. *Ibid*.

On April 17, 2003, Bouamama met with Slezak and Franklin. Gov't C.A. Supp. E.R. 75. Slezak told him "[y]ou did not get the Sales Supervisor position and you're not going to go back to the [sales] floor," and she offered Bouamama the severance package. *Ibid*. Bouamama asked if he was being terminated, and they responded "effective today immediately. You [are] no longer with the company." *Id.* at 76.

b. At the close of the evidence before the district court, petitioner made a Rule 50(a) motion, arguing "[w]ith regard to the Commission's retaliation claim":

> [T]here hasn't been any evidence that Miss Slezak told any other panel members regarding the alleged reports made to her by Mr. Bouamama. Mr. Franklin and Mr. Villeneuve both testified that, in fact, Miss Slezak had not reported any protected activity to them, and without this knowledge, knowledge by one of three panel members is insufficient for the jury to return a verdict on retaliation.

Gov't C.A. Supp. E.R. 112. This was the entirety of peti-

tioner's argument in support of its Rule 50(a) motion on the Commission's retaliation claim. The court stated it would take "that motion under advisement but submit the case to the jury." *Ibid.*

The jury returned a verdict in favor of the Commission on its retaliatory discharge claim (based on petitioner's failure to permit Bouamama to return to the Sales Representative position), but found for petitioner on the remaining claims. Gov't C.A. Supp. E.R. 8-12.

2. As relevant here, petitioner moved for judgment as a matter of law under Rule 50(b). Pet. C.A. E.R. 20-34. In its Rule 50(b) motion and in support of its motion for a new trial, petitioner argued, as it had in support of its Rule 50(a) motion, that the evidence was insufficient to show that Franklin had knowledge of Bouamama's complaints to Slezak (and hence the complaints could not have caused Bouamama's termination). *Id.* at 26-27. In addition, petitioner argued for the first time that (among other things) the evidence was insufficient to demonstrate that Bouamama engaged in activity protected under Title VII. *Id.* at 21-24.

The district court denied petitioner's Rule 50(b) motion. Pet. App. 43-64. As relevant here, the district court refused to address petitioner's argument that the Commission failed to introduce sufficient evidence to establish that Bouamama engaged in activity protected under Title VII, holding that the argument was not properly before the court because petitioner had not raised it in its Rule 50(a) motion. *Id.* at 44-45 (citing *Freund* v. *Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)).

3. The court of appeals affirmed in a divided opinion.[2] Pet. App. 1-40. As relevant here, the court began with settled law that a Rule 50(b) motion for judgment as a matter of law may only be based on arguments presented in a Rule 50(a) motion, because a Rule 50(b) motion is properly understood as a renewed Rule 50(a) motion. *Id.* at 19-20. Accordingly, the court of appeals reviewed only for plain error petitioner's claim that Bouamama did not engage in protected activity—a standard of review the court of appeals described as "extraordinarily deferential" and "limited to whether there was *any* evidence to support the jury's verdict." *Id.* at 20, 23 (quoting *Yeti by Molly Ltd.* v. *Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001)).

The court of appeals rejected petitioner's argument that Bouamama's complaint did not constitute protected activity under the standard enunciated in *Clark County School District* v. *Breeden*, 532 U.S. 268 (2001) (per curiam). The court explained that under the *Breeden* standard, complaints about only isolated incidents are not protected "unless a reasonable person would believe that the isolated incident violated Title VII." Pet. App. 25. The court elaborated that the reasonable person determination requires examination of "all the circumstances," including the frequency and severity of the conduct. *Ibid.* (quoting *Breeden*, 532 U.S. at 270-271).

The court of appeals disagreed with petitioner's narrow characterization of the protected conduct at issue, explaining that it was not, as petitioner had asserted, "at most, a complaint about an 'offhand comment' or an 'isolated incident.'" Pet. App. 25-27. Rather, the court rec-

[2] The Commission cross-appealed the district court's denial of equitable reinstatement relief, see Pet. App. 57-59, but dismissed the cross-appeal before oral argument.

ognized, Bouamama's "actual testimony" was that "he complained to Slezak two or three times" about comments relating to his religion and national origin. *Id.* at 26. Moreover, although Bouamama had not complained about Villeneuve's comment that "[t]he Muslims need to die," Bouamama testified that he did not do so because of the "culture in Go Daddy. You complain you get fired." *Ibid.* The court noted that the fact that Bouamama did not complain about these comments "d[id] not make them irrelevant to the inquiry concerning the reasonableness of his belief that a violation of Title VII had occurred." *Ibid*.

Concentrating on the surrounding context, the court of appeals observed that Franklin's comments "were not 'isolated' from the terms and conditions of Bouamama's employment," because Bouamama had just been told that "his position had been eliminated and that his only option to avoid demotion involved an application process to be headed by Franklin." Pet. App. 26-27. This demonstrated a "strong nexus between Franklin's comments and the terms of Bouamama's continued employment, as noted by Bouamama himself in his final report to Slezak." *Id*. at 27. Taking the comments and circumstances together, the court of appeals found the evidence at trial was sufficient to "satisf[y] the 'any evidence' standard applicable to a faulty Rule 50(b) motion." *Id*. at 27 (quoting *Yeti by Molly*, 259 F.3d at 1109).

Judge Noonan dissented on the facts presented. Pet. App. 32-40. He "accept[ed] the majority's view that [the court] review[ed] the jury's verdict under the plain error standard." *Id.* at 40. But, disagreeing with the majority's characterization of the evidence, Judge Noonan found nothing he believed could be "construe[d] * * * as 'discriminatory behavior.'" *Id.* at 35. He viewed Vil-

leneuve's comments about how "Muslims need to die" as random remarks not directed at Bouamama and "irrelevant" to the retaliation claim. *Id.* at 35-36. Similarly, Judge Noonan regarded Villeneuve's and Franklin's comments to Bouamama about his national origin and religion as separate, "isolated incident[s]." *Id.* at 37.

ARGUMENT

The fact-bound decision of the court of appeals upholding the jury's verdict is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner relies entirely on the principles that "offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment," and that a complaint about the same is not protected activity for purposes of Title VII's antiretaliation provision, 42 U.S.C. 2000e-3(a). *E.g.*, Pet. 20-21. But those principles—applicable to complaints about a hostile work environment—do not apply here, where Bouamama complained about what he reasonably believed was a discriminatory change to the formal terms and conditions of his employment, *i.e.*, elimination of his Inbound Sales Manager position. Thus, the jury's verdict here was amply justified by the Commission's showing that Bouamama's complaints were based on his reasonable belief that his job was being eliminated by a manager who made comments indicative of prejudice against Bouamama's religion and national origin. As Bouamama himself put it: "[T]his guy here [Franklin], I don't know him and two days ago he came and telling [sic] me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for

who I am and where I'm from. So I wanted [Slezak] to look into it." Gov't C.A. Supp. E.R. 64.

In any event, the argument petitioner now makes was not offered in its Rule 50(a) motion. That forfeiture precludes this Court from reexamining the jury's verdict. Although the court of appeals applied "plain error" review, that was too generous to petitioner; under this Court's precedents, Rule 50 and the Seventh Amendment do not permit *any* appellate review of a federal civil jury verdict on grounds not raised in a Rule 50(a) motion. Further review is not warranted.

1. The Commission introduced sufficient evidence to support the jury's verdict against petitioner on the Commission's retaliatory discharge claim.

a. Title VII's antiretaliation provision makes it "an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. 2000e-3(a). This Court has assumed that Title VII's antiretaliation provision extends protection for employee opposition conduct "not just to practices that are actually 'made . . . unlawful' by Title VII, but also to practices that the employee could reasonably believe were unlawful." *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 270 (2001) (per curiam) (citation omitted). This reasonable-belief legal standard for protected activity—which petitioner has never disputed—is routinely applied by the courts of appeals. See, *e.g.*, Pet. App. 25 (discussing *Breeden*, 532 U.S. at 270-271); *Wilkerson* v. *New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 322 (3d Cir. 2008); *Kessler* v. *Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 210 (2d Cir. 2006); *Jordan* v. *Alternative*

Res. Corp., 458 F.3d 332, 338-343 (4th Cir. 2006), cert. denied, 549 U.S. 1362 (2007).

b. Here, the evidence showed that Bouamama reasonably believed, based principally on Franklin's comments about Bouamama's religion and national origin, that Franklin was eliminating Bouamama's Inbound Sales Manager job because of Bouamama's religion or national origin. Eliminating a position because of the current occupant's religion or national origin is unlawful under Title VII. See 42 U.S.C. 2000e-2(a) ("It shall be an unlawful employment practice for an employer * * * to discriminate against any individual with respect to * * * terms, conditions, or privileges of employment, because of such individual's * * * religion * * * or national origin.").

As the jury heard, on several occasions Bouamama faced or heard inquiries and negative comments about his religion and national origin. In early 2002, after overhearing Bouamama speaking another language, Villeneuve asked Bouamama where he was from and what religion he practiced. Gov't C.A. Supp. E.R. 51-52. On another occasion, Villeneuve commented to a group of employees, with Bouamama present, that "[t]he Muslims need to die" or "[t]he bastard Muslims need to die." *Id.* at 58. A jury could infer that those episodes would make an employee such as Bouamama reasonably understand that inquiries about his religion and national origin were likely linked to prejudice against those characteristics.[3]

[3] Petitioner suggests that "[b]ecause Bouamama never complained about the remark, it simply cannot be the basis of protected activity." Pet. 31. But whether or not Bouamama reported Villenueve's comment, it still made reasonable Bouamama's belief that inquiries like Villenueve's—and later, Franklin's—were indicative of prejudice.

Then, in early April 2003, after Franklin met Bouamama face-to-face for the first time, Franklin cancelled his future meetings with Bouamama, and Franklin reversed course on his plan to leave Bouamama's job in place. Gov't C.A. Supp. E.R. 20-21, 22, 43-44, 61-62. In the days that followed, Franklin informed Bouamama that his position was being eliminated and he "didn't care about [Bouamama's] background or history with the company," *id.* at 62-63; Franklin also asked Bouamama—just like Villeneuve had—if Bouamama was a Muslim from Morocco, and when Bouamama answered yes to both questions, Franklin responded "[y]ou know, you're lucky that I like you," *id.* at 63.

On this evidence, the jury could conclude that Bouamama reasonably believed that Franklin harbored animus against Bouamama because of his national origin and religion, and that that prejudice prompted Franklin's decision to eliminate Bouamama's position. In particular, a jury could conclude it was reasonable for Bouamama to believe (1) that Franklin—who asked the same religion and national origin questions as Villeneuve—harbored anti-Moroccan or anti-Muslim prejudice like that displayed by Villeneuve's "Muslims need to die" comment, and (2) that such bias was behind Franklin's decision to eliminate Bouamama's job without any regard for Bouamama's history with the company.[4]

[4] Petitioner also objects (Pet. 36, 38) that because Franklin decided to eliminate Bouamama's position before Bouamama complained to Slezak, Bouamama's termination could not have been based on a discriminatory motive. But that ignores ample evidence at trial that Franklin's decision to eliminate Bouamama's position was distinct from the company's ultimate decision to terminate his employment. See Pet. App. 29-31. In any case, that fact-bound issue does not warrant this Court's review.

c. Petitioner repeatedly objects (Pet. 12-14, 34-36) that the foregoing explanation of how the evidence supported the jury's retaliation verdict amounts to a "new argument on appeal"—suggesting there is something novel about the idea that Bouamama's complaint about Franklin encompassed not only Franklin's comments, but also Franklin's elimination of Bouamama's Inbound Sales Manager position. But there is nothing novel to the explanation. The Commission's argument at trial was simply that Bouamama complained about Franklin's conduct, and then petitioner terminated his employment. It was Bouamama's own testimony (see p. 6, *supra*) that established the precise nature of his complaint—which certainly included Bouamama's concern that "[Franklin] doesn't care about my history and he wanted to eliminate my position," Gov't C.A. Supp. E.R. 64. Petitioner's assertion that the Commission's closing argument focused "solely on the purported *offensiveness* of Franklin's *comments*," Pet. 35, is similarly misplaced. The portion of the transcript petitioner cites comes from the Commission's closing argument on its discrimination claims, not its closing argument on the retaliation claim.

In any event, petitioner did not suggest to the court of appeals that the Commission's explanation of the sufficiency of the evidence was somehow inappropriate, and there is no reason for this Court to take up that contention now. See, *e.g.*, *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 39 (1989) (declining to address argument not raised in court of appeals).

2. Petitioner contends (Pet. 20-41) that the court of appeals' decision conflicts with this Court's decision in *Breeden* and decisions similar to *Breeden* from other courts of appeals. Petitioner is mistaken. *Breeden* and the courts of appeals decisions petitioner cites are

inapposite because they concern employee complaints about one type of unlawful employment practice (a hostile work environment), while Bouamama complained about another type of unlawful employment practice (discriminatory change to the formal terms and conditions of his employment by outright elimination of his Inbound Sales Manager position). Those different factual situations call for different legal analyses.

a. A hostile work environment based on discriminatory harrassment is an "unlawful employment practice [under Title VII]," 42 U.S.C. 2000e-3(a). See, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998) "[Harassment] so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment' violates Title VII.") (quoting *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986)) (brackets in original; citation omitted). So too, discriminatory elimination of an employee's position is an "unlawful employment practice [under Title VII]," 42 U.S.C. 2000e-3(a), because eliminating an employee's position typically results (at a minimum) in a change to the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1).

But the similarities between those two unlawful employment practices end when it comes to the merits inquiry Title VII prescribes. "[W]hether an environment is sufficiently hostile or abusive" to violate Title VII requires "'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher*, 524 U.S. at 787-788 (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

By contrast, no analogous factual assessment is necessary to decide whether the discriminatory elimination of a position violates Title VII. Eliminating an employee's position almost by definition changes the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1); if it was done for discriminatory reasons, Title VII makes it unlawful.

In other words, *Harris* and *Faragher* recognize that "discourtesy or rudeness should not be confused with racial harassment," *Faragher*, 524 U.S. at 787 (alteration and citation omitted), because only the latter is an unlawful change in the terms or conditions of employment. But outright elimination of an employee's position poses no such line-drawing exercise.

b. That critical difference carries over when *Breeden*'s overlay for retaliation claims is put in place: For a complaint about a hostile environment to be protected activity, the employee must "reasonably believe" that the complained-of harassment met the hostile-work-environment standard above. *Breeden*, 532 U.S. at 270. Thus, in *Breeden* this Court considered whether an employee's complaint—made in response to her supervisor's and co-worker's comments about a sexual reference in an employee application file—was protected activity. *Id.* at 269-271. The Court concluded that the complaints were not protected activity: "No reasonable person could have believed that the single incident * * * violated Title VII[]" because the supervisor's and co-worker's comments were "at worst an 'isolated inciden[t]' that cannot remotely be considered 'extremely serious'" as *Faragher* requires. *Id.* at 271 (second set of brackets in original; citation omitted).

By contrast, an employee's complaint that his position is being eliminated for a discriminatory reason—

Bouamama's complaint here—is protected activity so long as (1) he reasonably believes that his position is being eliminated (indisputably true, as Bouamama was told exactly that, see Gov't C.A. Supp. E.R. 62-62.5, 64) and (2) he reasonably believes it was on the basis of a protected characteristic (here, Bouamama's religion or national origin). Bouamama summed that up in his own testimony: "[T]his guy here [Franklin], I don't know him and two days ago he came and telling me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for who I am and where I'm from. So I wanted [Slezak] to look into it." *Id.* at 64.

Breeden is therefore largely inapposite. Indeed, petitioner's effort to analyze this case under *Breeden*'s framework is no more sensible than rejecting a retaliation claim by an employee who is fired for objecting to his employer's policy of giving every white employee an extra two weeks of vacation, on the theory that *Breeden* absolutely requires a showing of racial harassment in the workplace for any retaliation claim. While the latter showing would be sufficient to support a retaliation claim, it is simply not necessary when (as here) the employee complains about another kind of unlawful employment practice.[5]

[5] Although the court of appeals did not expressly treat Bouamama's complaints as categorically different from *Breeden*-like complaints of a hostile work environment, its analysis is quite consistent with that approach. The court of appeals put special emphasis on the "context in which [Franklin's comments] were made," and identified Bouamama's awareness that "his position had been eliminated and that his only option to avoid demotion involved an application process to be headed by Franklin." Pet. App. 26-27. That "strong nexus between Franklin's comments and the terms of Bouamama's continued employment," *id.* at

c. Nor does petitioner demonstrate a conflict with any decision of another court of appeals. Many decisions it cites do not even address retaliation claims. See *Al-Zubaidy* v. *TEK Indus., Inc.*, 406 F.3d 1030, 1036 (8th Cir. 2005) (retaliation claim abandoned on appeal); *Canady* v. *Wal-Mart Stores, Inc.*, 440 F.3d 1031 (8th Cir. 2006); *Ngeunjuntr* v. *Metropolitan Life Ins. Co.*, 146 F.3d 464 (7th Cir. 1998). The few decisions that do address retaliation claims do not involve a direct change to the formal terms or conditions of employment like the elimination of Bouamama's Inbound Sales Manager position here; rather, in each case the plaintiff employee's complaint was about his or her work environment. See *Jordan*, 458 F.3d at 339-340 (retaliation claim predicated on co-worker's isolated racist exclamation); *George* v. *Leavitt*, 407 F.3d 405, 416-417 (D.C. Cir. 2005) (retaliation claim predicated on complaints about "confrontations with [plaintiff's] co-workers and [plaintiff's] allegation that she was thrice told to 'go back where she came from'").

Like *Breeden*, those cases evaluate "all the circumstances," *Harris*, 510 U.S. at 23, to determine whether the environment was hostile enough that a reasonable person could believe it amounted to a change in the terms and conditions of employment. And like *Breeden*, those cases do not speak to the proper analysis when an employee, such as Bouamama here, complains about an unlawful employment practice different from a discriminatorily hostile work environment.

3. In any event, petitioner's central contention—that the evidence at trial was insufficient as a matter of

---

27, is precisely what sets this case far apart from the facts of *Breeden* and similar cases.

law to establish that Bouamama engaged in protected activity—is not suitably presented for review. Petitioner did not make this argument in a pre-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). It is therefore forfeited. As petitioner tacitly concedes, this Court's review of the claim in the petition would (at best) be only for plain error. Correctly understood, however, Rule 50, the Seventh Amendment, and this Court's cases preclude *any* appellate reexamination of a federal civil jury verdict on grounds not advanced in a Rule 50(a) motion. Regardless of whether this Court would be constrained to apply plain error review, or would be entirely unable to consider the merits of the question presented, this case is an unattractive vehicle for the Court to reach any significant legal question.

a. A post-verdict motion under Rule 50(b) for judgment as a matter of law is a renewal of a pre-verdict Rule 50(a) motion, and is conditioned on making a Rule 50(a) motion. This is dictated by Rule 50(b) itself: "If the court does not grant a motion for judgment as a matter of law made under subdivision (a), * * * [t]he movant may renew its request for judgment as a matter of law * * * after the entry of judgment." Fed. R. Civ. P. 50(b) (effective Dec. 1, 2006).[6]

Moreover, the practice of the court reserving judgment on the Rule 50(a) motion and the movant renewing its request in a Rule 50(b) motion is required by the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of

[6] This version of the Rule was in effect at the time of the December 2006 trial in this case. The Rule has since been restyled without significant substantive change. See Fed. R. Civ. P. 50 advisory committee's notes (2007, 2009).

the United States, than according to the rules of the common law," U.S. Const. Amend. VII. Granting a post-judgment motion for judgment contrary to the jury's verdict would be inconsistent with the Seventh Amendment. See *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913). But the "rules of the common law" preserved by the Seventh Amendment did include "a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved." *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 659 (1935). "[U]nder this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict." *Ibid.*; see *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250 & n.7 (1940). A pre-verdict motion is thus a constitutional prerequisite to a post-verdict entry of judgment as a matter of law, and failure to make a motion under Rule 50(a) precludes obtaining post-verdict judgment as a matter of law.

For that reason, arguments not pressed on a Rule 50(a) motion are forfeited for purposes of a Rule 50(b) motion. See Fed. R. Civ. P. 50(b) (effective Dec. 1, 2006) ("If the court does not grant a motion for judgment as a matter of law made under subdivision (a), 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*.") (emphasis added). The advisory committee notes to Rule 50 reinforce this limitation: "A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50 advisory committee's note (1991); see also Fed. R. Civ. P. 50 advisory committee's note (2006)

("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion."). This rule of forfeiture is recognized and enforced by every court of appeals.[7]

The Commission's retaliation claim had three elements: (1) that Bouamama engaged in protected activity; (2) that petitioner took adverse employment action against him; and (3) that the protected activity was a substantial or motivating factor in the adverse employment action. See Pet. C.A. Supp. E.R. 5 (jury instructions). Petitioner's Rule 50(a) motion was directed only at the last of these elements—specifically to whether the decisionmakers who terminated Bouamama were aware of his protected activity. See p. 8, *supra*. Petitioner did not argue until after the jury's verdict that the evidence was insufficient to establish the first element of the Commission's retaliation claim. Pet. App. 44. The district court was therefore correct to reject at the

[7] See *Systematized of New England* v. *SCM, Inc.*, 732 F.2d 1030, 1035-1036 (1st Cir. 1984); *Cruz* v. *Local Union No. 3 of IBEW*, 34 F.3d 1148, 1155 (2d Cir. 1994); *Orlando* v. *Billicon Int'l, Inc.*, 822 F.2d 1294, 1297-1298 (3d Cir. 1987); *Tights, Inc.* v. *Acme-McCrary Corp.*, 541 F.2d 1047, 1058 (4th Cir.), cert. denied, 429 U.S. 980 (1976); *Morante* v. *American Gen. Fin. Ctr.*, 157 F.3d 1006, 1010 (5th Cir. 1998); *Preferred RX, Inc.* v. *American Prescription Plan, Inc.*, 46 F.3d 535, 544 (6th Cir. 1995); *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 826 F.2d 712, 716-717 (7th Cir. 1987); *Jones Truck Lines, Inc.* v. *Full Serv. Leasing Corp.*, 83 F.3d 253, 258 (8th Cir. 1996); *Freund* v. *Nycomed Amersham*, 347 F.3d 752, 760-762 (9th Cir. 2003); *Karns* v. *Emerson Elec. Co.*, 817 F.2d 1452, 1455 n.2 (10th Cir. 1987); *Collado* v. *UPS*, 419 F.3d 1143, 1158 (11th Cir. 2005); *United States Indus., Inc.* v. *Blake Constr. Co.*, 671 F.2d 539, 548 (D.C. Cir. 1982); *Duro-Last, Inc.* v. *Custom Seal, Inc.*, 321 F.3d 1098, 1105-1106 (Fed. Cir. 2003).

threshold petitioner's Rule 50(b) motion on that latter, forfeited ground. *Ibid*.

b. The court of appeals recognized petitioner's forfeiture. Pet. App. 22-23. It suggested that it could nonetheless review the verdict "under the deferential plain error standard applicable to arguments not made in a Rule 50(a) motion." *Id.* at 23. Under that "extraordinarily deferential" standard, "review * * * is limited to whether there was *any* evidence to support the jury's verdict." *Id.* at 20, 23 (quoting *Yeti by Molly Ltd*. v. *Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001)). Petitioner does not now challenge the court of appeals' forfeiture finding or its holding that plain error review applies. Assuming *arguendo* that the latter holding is correct (but see pp. 24-26, *infra*), the plain error posture makes this an unattractive vehicle for this Court's review.

c. Although the court of appeals' affirmance on the merits of the district court's judgment was correct, there is a more fundamental reason that the district court's judgment on the question presented should be affirmed: Petitioner's forfeiture absolutely precluded the court of appeals (and would preclude this Court) from reviewing petitioner's challenge to the verdict. The court of appeals' "plain error" concept does not apply to a case in this posture because, even if the record had contained *no* evidence supporting the first element of the Commission's retaliation claim, the district court would have committed no "error," plain or otherwise, in refusing to disturb the jury's verdict on a ground not identified in petitioner's pre-verdict Rule 50(a) motion. Rule 50's strict preservation requirements fully supported the district court's judgment, and the court of appeals should have looked no further. Indeed, appel-

late review on the merits, however deferential, risks nullifying the Rule's clear and constitutionally compelled preservation requirements.

This Court has recognized as much. In *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), the Court categorically rejected the "suggestion that * * * the courts of appeals [may] consider the sufficiency of the evidence underlying a civil jury verdict notwithstanding a party's failure to comply with Rule 50." *Id.* at 402 n.4.[8] Permitting such appellate examination would contradict the principle that "[d]etermination of whether * * * judgment [should be] 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." *Cone* v. *West Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). And *Unitherm* further recognizes that a plain error approach could raise serious Seventh Amendment concerns because, at common law, an appellate court could only reverse a trial court's legal errors—such as a "trial court's *ruling* respecting the sufficiency of the evidence"—but could not review issues of fact and itself direct a verdict for the defendant. 546 U.S. at 403 n.4 (quoting *Baltimore & Carolina Line*, 295 U.S. at 658).

---

[8] In *Unitherm*, this Court held that the court of appeals has no power to award a new trial when the appellant failed to make a proper Rule 50(b) motion (or a Rule 59 motion for a new trial). 546 U.S. at 396. *Unitherm*'s principles apply *a fortiori* to petitioner, because petitioner seeks greater relief than the *Unitherm* appellant (not merely a new trial, but entry of judgment in its favor) after committing at least as grave a forfeiture as the *Unitherm* appellant (not merely failing to renew its Rule 50 motion after verdict, but failing to make the constitutionally necessary pre-verdict motion to begin with).

The court of appeals therefore was constrained to reject on purely procedural grounds the claim petitioner now presses. The petition should be denied because petitioner's forfeiture would similarly preclude this Court's examination of the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

P. DAVID LOPEZ
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

JAMES M. TUCKER
Attorney
Equal Employment Opportunity Commission

JUNE 2010