
Unearthing Summary Judgment’s Concealed Standard of Review

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The common wisdom has it that the appellate standard of review for summary judgment is uniformly de novo. However, the general unreviewability of summary judgment denials renders as dicta most statements about the standard of review for summary judgment denials. This Article argues that courts of appeals should accord district courts discretion to deny summary judgment in (i) close cases that (ii) turn at least in part on an issue of fact (at least where a jury trial right is available and has been exercised). This standard will have the greatest impact in the limited universe of summary judgment denials that are immediately appealable — those cases where summary judgment is sought by government officials on the basis of immunity from suit. An empirical study of such cases decided by the courts of appeals confirms that the proposed standard would have a substantial effect on the treatment by courts of appeals of summary judgment denials in qualified immunity cases. Beyond the courts of appeals, implementation of the standard would have an effect on the treatment of qualified-immunity-based summary judgment motions by district courts and the Supreme Court.

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INTRODUCTION

It is commonly accepted by lawyers, law students, and legal academics alike that an appellate court reviews a district court's decision on a motion for summary judgment under a *de novo* standard of review.¹ In fact that commonly shared wisdom is only partially accurate.

It is certainly the case that the standard of review for *grants* of summary judgment is, and should be, *de novo*. But, owing to the general rule against interlocutory appeals,² the standard of review for *denials* of summary judgment is usually not addressed. Statements about the standard of review for summary judgment denials usually take the form of dicta. Thus, while those trained in law often think of *de novo* as the standard of review for summary judgment denials — whether because they assume the standard of review is symmetric (i.e., the same whether the court below granted or denied summary judgment) or because of reliance on dicta — in reality the standard of review is largely not revealed.

Despite the standard assumption about the standard of review for summary judgment denials, there are in fact reasons to think that the standard is *not de novo*. Courts of appeals over the years have sometimes spoken of the standard of review (sometimes in dicta, sometimes not) as being review for “abuse of discretion.”³

The Seventh Amendment provides yet another reason to believe that the standard of review for summary judgment denials is not uniformly *de novo*. Even while courts have rejected the argument that summary judgment is unconstitutionally inconsistent with the Seventh Amendment,⁴ still courts accept the fact that an improper grant of summary judgment raises Seventh Amendment concerns: Where summary judgment short circuits a jury trial where in fact there are genuine issues of material fact, there is a Seventh Amendment violation.⁵ That being the case, one can understand a laxer standard for summary judgment denials — at least in cases where a jury trial is available and has been requested — as a prophylactic necessary to vindicate and protect those Seventh Amendment concerns.

¹ See *infra* notes 87–88, 90 and accompanying text.

² See *infra* Part II.A.

³ See *infra* note 100 and accompanying text.

⁴ This argument has been forcefully advanced by Professor Suja Thomas. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 145-79 (2007).

⁵ See *infra* note 144 and accompanying text.

In this Article, I unearth the concealed standard of review for summary judgment denials, and argue that courts of appeals should accord district courts discretion to deny summary judgment in (i) close cases that (ii) turn at least in part on an issue of fact⁶ (at least where a jury trial right is available and has been exercised). Such a standard is true to the language of Rule 56 and existing caselaw. It also vindicates and protects Seventh Amendment interests.

Owing to the final judgment rule,⁷ this standard will have the greatest effect in the setting of government officers' motions for summary judgment on the basis of qualified immunity. Qualified immunity offers government officials who face claims under federal civil rights actions both a defense to liability and an entitlement not to stand trial at all.⁸ While the final judgment rule renders denials of motions for summary judgment generally unappealable,⁹ denials of summary judgment in the immunity context (other than those based entirely on issues of fact) are deemed "collateral orders" that are immediately appealable.¹⁰ In this setting, the proper standard of appellate review is not dicta, and may have important ramifications for the outcome of the case.

The deferential standard of review in close cases where the district court has denied summary judgment is important for several reasons. First, it is broadly consistent with the language of Rule 56, while also succeeding at largely squaring odd — and sometimes seemingly inconsistent — case precedent.

Second, the laxer standard for summary judgment denials vindicates and protects Seventh Amendment interests. It thus integrates the tension between summary judgment and the Seventh Amendment into summary judgment jurisprudence (although without reaching the conclusion that summary judgment is flatly inconsistent with the Seventh Amendment).

Third, by setting out with clarity the proper appellate standard, it elucidates how district courts should consider and decide motions for summary judgment. Specifically, district judges should put a "thumb on the scale" in favor of denying a fact-based summary judgment motion when the question is a close one.

⁶ Where a summary judgment motion turns on a pure question of law, it should be reviewed under a de novo standard, whether or not the motion was granted or denied. *See infra* note 93 and accompanying text.

⁷ *See infra* text accompanying notes 15–16.

⁸ *See infra* text accompanying notes 57–58.

⁹ *See infra* text accompanying notes 15–16, 65–66.

¹⁰ *See infra* text accompanying notes 67–73.

Fourth, incorporating the proper standard of review has major ramifications for the federal courts of appeals. I conducted an empirical study of cases decided by the federal courts of appeals decided between June 1, 2014 and May 31, 2015 that addressed district court resolutions of summary judgment motions in the context of qualified immunity. The data indicate that the courts of appeals treat district court summary judgment denials far less favorably than summary judgment grants. Considering court of appeals cases decided by published opinion (a subset of cases likely to consist of closer cases¹¹), the courts of appeals were more than nine times more likely to completely reverse or vacate a district court denial, than a district court grant, of summary judgment.¹² And the courts of appeals reversed at least in part a whopping 49.1% of summary judgment denials during the time period.¹³

Fifth, seeing the standard for what it is helps to explain how the Supreme Court has dealt with cases where the district court and court of appeals below both have ruled in favor of denying summary judgment motions.¹⁴ With the correct standard in mind, it is surprising neither that there is a dearth of such cases, nor that the cases where the Court reverses the lower courts are *not* close cases — or, at least, they are not cases that the Court paints as being close calls.

This Article proceeds as follows. Part II presents the relevant doctrinal backdrop. It discusses federal appellate jurisdiction, the basics of summary judgment, appellate jurisdiction over summary judgment dispositions, and the appellate standard of review for summary judgment dispositions.

Part III argues in favor of the asymmetry of the standard of review for summary judgment — that is, in favor of the idea that, even though the standard of review for summary judgment grants is uniformly *de novo*, that need not be and should not be the case for summary judgment denials. It first highlights other standards of review that are asymmetric. It then argues that the summary judgment standard is a logical one to be asymmetric, and counters arguments one might raise in opposition to asymmetry.

With Part III having established the logic of an asymmetric standard of review for summary judgment — and in particular of a laxer standard for summary judgment denials — Part IV turns to filling out

¹¹ See *infra* note 171 and accompanying text.

¹² See *infra* note 177 and accompanying text.

¹³ See *infra* text accompanying note 178; Appendix tbl. A5.

¹⁴ See, e.g., *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372 (2007); see *infra* text accompanying notes 180-186.

the contours of that laxer standard. It argues that a court of appeals should err on the side of affirming a summary judgment denial where the motion turns at least in part on a question of fact and the resolution of the motion was a close one. Part IV then explains the import of identifying and implementing this standard. It also includes the empirical study of the treatment by the courts of appeals of summary judgment in the context of qualified immunity.

I. DOCTRINAL BACKDROP

This Part presents the doctrinal backdrop against which the rest of the Article plays out. It first discusses federal appellate jurisdiction and the basics of summary judgment. It then hones in on federal appellate jurisdiction over summary judgment dispositions, and the appellate standard of review for summary judgment dispositions.

A. *The Court of Appeals' Appellate Jurisdiction over the District Courts*

Section 1291 of the federal judicial code confers upon the federal courts of appeals “jurisdiction” over “appeals from all final decisions of the district courts.”¹⁵ The Court has explained that “[a] ‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment.”¹⁶

Section 1291’s grant of appellate jurisdiction to “final decisions” generally does not extend to interlocutory district court decisions, that is, decisions that the district court renders prior to a final decision. The Court has read “final decisions” under section 1291 to include so-called “collateral orders” — orders by a district court that “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”¹⁷ Still, the Court has emphasized that collateral orders constitute but a “small class” of district court orders.¹⁸

Rule 54(b) of the Federal Rules of Civil Procedure provides an opportunity — also narrow — for district courts to certify dispositions of final determinations as to particular claims as final judgments “when an action presents more than one claim for relief . . . or when

¹⁵ 28 U.S.C. § 1291 (2012).

¹⁶ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

¹⁷ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

¹⁸ *Id.*

multiple parties are involved,” provided that “the court expressly determines that there is no just reason for delay” in entering judgment.¹⁹ The rule does not (and indeed could not) expand upon the statutory definition of “final judgment.”²⁰ It merely authorizes district courts to divide civil actions into constituent parts, and in so doing to recognize final judgments.²¹ The limitation that the district court find “no just reason for delay” provides a substantial constraint on the proliferation of appealable final judgments.

Section 1292 allows for appeals of district court interlocutory orders in limited settings — including dispositions of injunctions and certain admiralty matters²² — and where the district judge certifies a legal

¹⁹ FED. R. CIV. P. 54(b). In pertinent part, Rule 54(b) of the Federal Rules of Civil Procedure provides:

When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

Id. The United States Court of Appeals for the Second Circuit has elucidated:

[T]o have a final judgment under . . . [R]ule [54(b)], (1) multiple *claims* or multiple *parties* must be present, (2) at least one claim, or the rights and liabilities of at least one party, must be finally decided within the meaning of 28 U.S.C. § 1291, and (3) the district court must make “an express determination that there is no just reason for delay” and expressly direct the clerk to enter judgment.

Ginett v. Computer Task Grp., Inc., 962 F.2d 1085, 1091 (2d Cir. 1992) (quoting FED. R. CIV. P. 54(b)).

²⁰ See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956) (upholding the validity of Rule 54(b), and observing that the rule “scrupulously recognizes the statutory requirement of a ‘final decision’ under § 1291 as a basic requirement for an appeal to the Court of Appeals”).

²¹ See *id.* (“[Rule 54(b)] merely administers [the final judgment] requirement in a practical manner in multiple claims actions and does so by rule instead of by judicial decision.”); *Chapple v. Levinsky*, 961 F.2d 372, 374 (2d Cir. 1992) (“An order that adjudicates fewer than all of the claims remaining in the action or adjudicates the rights and liabilities of fewer than all of the parties is not a final order unless the court directs the entry of a final judgment as to the dismissed claims or parties [pursuant to Rule 54(b)] . . .”).

²² See 28 U.S.C. § 1292(a) (2012). Section 1292(a) provides in pertinent part:

[T]he courts of appeals shall have jurisdiction of appeals from:

- (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or

issue for interlocutory appeal and the court of appeals consents to hear the appeal.²³ As a general matter, however, the authorization for interlocutory appeals is highly circumscribed and barely displaces section 1291's insistence on final orders as a prerequisite for a valid appeal.²⁴

Finally, if no other avenue for immediate appeal is available, a party might try nevertheless to obtain appellate review via a writ of mandamus²⁵ under the All Writs Act.²⁶ However, the mandamus

dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Id.

²³ See *id.* § 1292(b). Section 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id. (emphasis omitted).

²⁴ See Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1193 (1990) (“[C]ommentators generally discount its effectiveness as a safety valve for interlocutory appeals, since it has been historically utilized infrequently.”); *id.* at 1176 tbl.1a (presenting data demonstrating that district courts make few section 1292(b) certifications, and that courts of appeals accept few of those certifications); see, e.g., *Chapple*, 961 F.2d at 373-74 (“When the decision of the district court does not pertain to an injunction, a receivership, or a case in admiralty, and is not an interlocutory order as to which we have granted leave to appeal, the court of appeals lacks jurisdiction to hear the appeal unless the decision is a ‘final’ order within the meaning of 28 U.S.C. § 1291”) (citations omitted).

²⁵ See, e.g., *Schlagenhauf v. Holder*, 379 U.S. 104, 109-12 (1964) (reversing court of appeals’ denial of mandamus to review district court’s conclusion ordering defendant to undergo mental and physical examination under governing Federal Rule of Civil Procedure).

remedy is an “extraordinary” one,²⁷ and the Court has erected substantial prerequisites to its use that render it unavailable except in rare cases.²⁸

B. *The Basics of Summary Judgment*

A motion for summary judgment is a means by which a party defending against a claim (or arguing against an asserted defense) may seek dismissal of all or part²⁹ of that claim (or of that defense) before trial.³⁰ It is also a way for a party asserting a claim to assert that the party is entitled to a favorable judgment on that claim without the need for trial. Under Rule 56 of the Federal Rules of Civil Procedure, the party seeking summary judgment is supposed to rely on the record to identify facts that “cannot be . . . disputed.”³¹ Similarly, the party

²⁶ See 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3932 (3d ed. 2016); see also 28 U.S.C. § 1651(a) (2012) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”); *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (“The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a).”).

²⁷ See, e.g., *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (“The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or ‘usurpation of judicial power’” (quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945))).

²⁸ The Supreme Court has identified “three conditions” that must be met for the issuance of a writ of mandamus. *Cheney*, 542 U.S. at 380. First, in order to “ensure that the writ will not be used as a substitute for the regular appeals process,” the party seeking the writ must have “no other adequate means” of obtaining the relief he or she desires. *Id.* at 380-81 (citing *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)). Second, the party seeking the writ has “the burden of showing that [his or her] right to issuance of the writ is ‘clear and indisputable.’” *Bankers Life*, 346 U.S. at 384 (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)). And, third, “even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Cheney*, 542 U.S. at 381.

²⁹ See FED. R. CIV. P. 56(a) (explaining that a party may bring a motion for summary judgment with respect to either a “claim or defense” or a “part of [a] claim or defense”); *Hotel 71 Mezz Lender LLC v. Nat’l Ret. Fund*, 778 F.3d 593, 606 (7th Cir. 2015) (“Nothing in Rule 56 demands an all-or-nothing approach to summary judgment. Requests for (and grants of) partial summary judgment, including summary judgment as to fewer than all parties and claims, are nothing new.”).

³⁰ See FED. R. CIV. P. 56(b) (“Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.”).

³¹ FED. R. CIV. P. 56(c)(1). Rule 56(c)(1) of the Federal Rules of Civil Procedure provides, in pertinent part:

opposing summary judgments is to identify facts that are “genuinely disputed,” also by reference to the record.³² The court is to grant summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”³³

A motion for summary judgment essentially takes one of two forms:³⁴ Either it can argue that there are no material facts in dispute, so that the movant is entitled to judgment under the law³⁵; or it can

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Id.

³² *See id.*

³³ FED. R. CIV. P. 56(a).

³⁴ *See, e.g.,* 10A WRIGHT ET AL., *supra* note 26, § 2712 (“The summary-judgment procedure authorized by Rule 56 is a method for promptly disposing of actions in which there is no genuine issue as to any material fact or in which only a question of law is involved.”); Mac Asbill & Willis B. Snell, *Summary Judgment Under the Federal Rules — When an Issue of Fact is Presented*, 51 MICH. L. REV. 1143, 1143 (1953) (“[T]he movant in order to obtain a summary judgment must show: (1) that there is no genuine issue as to any material fact . . . , and (2) that he is entitled to a judgment in his favor as a matter of law.”); *see also* William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 489-90 (1984) (arguing that the universe of summary judgment motions consist of (i) motions that involve decision of a pure question of law, (ii) motions that involve decision as to whether the proffered facts are insufficient to raise a genuine issue of fact, and (iii) motions that involve decision of “an ultimate issue of fact” that either (a) “are predominantly legal and hence for the court rather than the jury,” or (b) “are decided by the court on motion because there is no claim to a jury trial and witness credibility and demeanor are not implicated”).

³⁵ *See, e.g.,* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-98 (1986) (setting out the legal standard and finding in the case at bar no genuine issue of material fact for trial); Pavoni v. Chrysler Grp., LLC, 789 F.3d 1095, 1098 (9th Cir. 2015) (“Reviewing the record in the light most favorable to the Plaintiffs, we find that genuine issues of material fact exist”); Thomas, *supra* note 4, at 161-62 (“Upon a motion for summary judgment, the moving party argues that a reasonable jury could not find for the nonmoving party, and the nonmoving party argues, to the contrary, that a reasonable jury could find for him. In other words, the parties disagree on what their evidence demonstrates. The court must resolve this difference and decide what the evidence could show.”).

argue for a particular interpretation or application of the governing law — to undisputed or largely undisputed facts — that entitles the movant to judgment.³⁶ Both of these are questions of law; however, the former question — whether there is a genuine issue of material fact for trial — cannot be said to be detached from the facts in the case. Thus, the Court has explained that, while the question of the existence of a genuine issue of material fact is a question of law, it is an inquiry into “fact-related legal issues,”³⁷ that is, an inquiry that “sits near the law–fact divide.”³⁸

In the 1980s, the Supreme Court issued a trilogy of opinions³⁹ that, scholars aid, were designed to encourage greater reliance on summary judgment.⁴⁰ In those cases, the Court (i) detailed the applicable burdens of production, persuasion, and proof in connection with summary judgment motions;⁴¹ (ii) held that courts considering summary judgment with respect to a claim should factor in the standard of proof ordinarily applicable to the claim in question;⁴² and (iii) held that summary judgment should be granted where a claim is inherently implausible.⁴³

³⁶ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 253 n.6, 257 (2003) (noting that the case reached the Supreme Court after cross-motions for summary judgments, and that Supreme Court’s description of the facts was taken “in large part” from the parties’ joint proposed summary of the “Undisputed Facts”); *Spieler v. Rossman*, 798 F.3d 502, 507-09 (7th Cir. 2015) (upholding award of summary judgment where defendants “[relied] solely on citations to facts alleged in the complaint” and “brought their motions with no additional evidence”).

³⁷ *Johnson v. Jones*, 515 U.S. 304, 314 (1995).

³⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 674 (2009).

³⁹ *Matsushita*, 475 U.S. 574; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

⁴⁰ See, e.g., Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 *LOY. U. CHI. L.J.* 561, 561 (2012) (“The not-so-veiled purpose of the summary judgment trilogy . . . was to nudge federal judges out of their normal predisposition against summary judgment.”). *But see id.* at 561-62, 561 n.2 (discussing empirical evidence that the trilogy has had “scant impact on judicial reception to enhanced utilization of summary judgment”); *id.* at 568-76 (presenting empirical evidence that the *Celotex* case from the trilogy is not commonly cited by lower courts considering summary judgment).

⁴¹ See *Celotex Corp.*, 477 U.S. at 322-27 (detailing the applicable burdens of production, persuasion, and proof in connection with summary judgment motions).

⁴² See *Anderson*, 477 U.S. at 252 (“We are convinced that the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.”).

⁴³ See *Matsushita*, 475 U.S. at 597-98.

Despite the absence of any reference to district court discretion in the text of Rule 56,⁴⁴ courts over the years have sometimes suggested that district judges enjoy some discretion to deny summary judgment. In the 1986 case *Anderson v. Liberty Lobby, Inc.* — one of the “trilogy” cases — the Supreme Court emphasized that it was *not* “suggest[ing] that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.”⁴⁵ Both before⁴⁶ and after

⁴⁴ See, e.g., 11 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE – CIVIL § 56.07[3][a] (3d ed. 1997) (“Read literally, Rule 56 may appear to establish an entitlement to summary judgment when the movant shows that he or she is entitled to judgment as a matter of law and that there is no genuine factual dispute precluding the court from rendering this judgment.”); Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 103 (2002) (“The *Celotex* opinion is surely correct that the ‘plain language’ of Rule 56 mandates that courts enter summary judgment when the movant has demonstrated that no disputed issues of material fact exist.” (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986))). But cf. EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 6:6 (2016 ed.) (“The language of the Rule itself provides textual support for the presence of a degree of discretion to deny summary judgment”); 10A WRIGHT ET AL., *supra* note 26, § 2728 (arguing that, while the language of Rule 56 permits a district court to grant summary judgment “only when the test set forth therein has been met,” and requires a district court to “deny the motion as long as a material issue remains for trial,” it allows the district court discretion to deny summary judgment even where the requirements for it technically have been met).

⁴⁵ 477 U.S. at 255. Muddying the waters is a statement from another of the trilogy of cases — *Celotex Corp. v. Catrett*, handed down the same day as *Anderson* — that

the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

For discussion of the “inconsistency” between the cases, see Friedenthal & Gardner, *supra* note 44, at 101-03. The authors conclude that, while Rule 56’s plain language seems to mandate the entry of summary judgment where the technical requirements are met, “as a matter of sound policy, as well as historical practice and understanding, the *Anderson* Court’s notion that judges may at times deny an otherwise appropriate summary judgment motion seems eminently reasonable and sensible.” *Id.* at 103.

⁴⁶ See, e.g., *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) (“Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it.”); *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979) (“[E]ven if a district judge feels that summary judgment in a given case is technically proper, sound judicial policy and the proper exercise of judicial discretion may prompt him to deny the

Anderson,⁴⁷ lower courts have at times endorsed the notion that district judges enjoy discretion to deny summary judgment motions.

There is a general consensus among commentators⁴⁸ as well that Rule 56 confers implicit authority⁴⁹ on district judges to deny summary judgment,⁵⁰ although the justifications offered and the scope

motion and permit the case to be developed fully at trial. The ultimate legal rights of the movant can always be protected in the course of or even after trial.”); *Nat'l Screen Serv. Corp. v. Poster Exch., Inc.*, 305 F.2d 647, 651 (5th Cir. 1962) (“Even in cases where the movant has technically discharged his burden, the trial court in the exercise of a sound discretion may decline to grant summary judgment.”); Friedenthal & Gardner, *supra* note 44, at 96 (“[T]he notion of judicial discretion to deny an otherwise appropriate summary judgment motion has been evidenced in judicial opinions since the earliest decisions regarding summary judgment under the Federal Rules.”).

⁴⁷ See, e.g., *Andrew v. Clark*, 561 F.3d 261, 271 (4th Cir. 2009) (noting “the discretion accorded district courts in deciding whether or not to grant motions for summary judgment,” and “conclud[ing] that the district court did not abuse its discretion in denying [a] motion for partial summary judgment”); *United States v. Certain Real & Pers. Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991) (“A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing.”); *Saint John's African Methodist Episcopal Church v. GuideOne Specialty Mut. Ins. Co.*, 902 F. Supp. 2d 783, 788 (E.D. Va. 2012) (“The court may exercise its discretion to deny a motion for summary judgment ‘even when the standard appears to have been met.’” (quoting *Andrew*, 561 F.3d at 271)); Friedenthal & Gardner, *supra* note 44, at 104 (“The majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties’ submissions would justify granting the motion.”).

⁴⁸ But see Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 311 (2005) (“Th[e] [modern] view apparently rejects some earlier case law that had held that a denial is reviewed only for abuse of discretion. Given the newer trend favoring summary judgments, . . . it is likely that courts will increasingly encourage its use by giving no deference to denials where dismissal under the Rule 56(c) standard is appropriate.” (citations omitted)).

⁴⁹ As amended in 2010, Rule 56(e) now confers on district judges some measure of explicit discretion in response to summary judgment motions where “a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact.” FED. R. CIV. P. 56(e). Under those circumstances, the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
- (4) issue any other appropriate order.

Id. For discussion, see 10A WRIGHT ET AL., *supra* note 26, § 2728.

⁵⁰ Here, I mean to refer to the discretion a district judge might enjoy to deny a

of the discretion vary. Commentators speak variously of broad or somewhat cabined discretion.⁵¹ They ground the discretion variously in (among other things⁵²) (i) district courts' inherent equitable powers under the Federal Rules of Civil Procedure;⁵³ (ii) the propriety of leaving the district judge free to decide that a trial is the better course;⁵⁴ (iii) Supreme Court precedent confirming the existence of such discretion;⁵⁵ and (iv) the "inherent discretion" that arises out of

summary judgment motion with prejudice. District judges often deny summary judgment without prejudice to raise the motion again when they feel that additional discovery might be useful for the summary judgment determination. See 10A WRIGHT ET AL., *supra* note 26, § 2728 ("[A]fter the pleadings are closed courts have denied summary judgment without prejudice to renewing the motion after discovery or at trial, a procedure that occasionally has led to a subsequent grant of the motion.").

⁵¹ Compare BRUNET ET AL., *supra* note 26, § 6:6 (describing the ability of a district judge to deny summary judgment simply by "find[ing] a single issue of disputed fact" as "vest[ing] a huge quantum of authority in the hands of a judge inclined to deny summary judgment" and rendering summary judgment "inherently discretionary"), and Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1168 (2010) (same), with MOORE ET AL., *supra* note 44, § 56.07[3][a] (describing district courts as having "some discretion" to deny summary judgment). Lying somewhat ambiguously between these two positions is the *Federal Practice and Procedure* treatise, which on the one hand explains that, "even though the summary-judgment standard appears to have been met, the court should have the freedom to allow the case to continue when it has any doubt as to the wisdom of terminating the action prior to a full trial," but also cautions that, insofar as "too frequent exercise of discretion to deny summary judgment by the courts could vitiate the utility of the procedure." 10A WRIGHT ET AL., *supra* note 26, § 2728.

⁵² Cf. Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 MICH. ST. L. REV. 895, 905 n.15 (describing the *Federal Practice and Procedure* treatise as "speaking in support" of district court discretion to deny summary judgment "for various reasons").

⁵³ See Friedenthal & Gardner, *supra* note 44, at 99-100 ("[T]he belief that judges retain an equitable power to deny motions for summary judgment that technically are proper has been stated in many modern decisions."); see also Brunet, *supra* note 51, at 1170-71 (endorsing the view of Friedenthal and Gardner).

⁵⁴ See MOORE ET AL., *supra* note 44, § 56.07[3][a] (describing district court discretion to deny summary judgment as extending to settings where either "[f]urther pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision," or "[f]urther development of the facts may enhance the court's legal analysis, even if the technical requirements for summary judgment have been met"); 10A WRIGHT ET AL., *supra* note 26, § 2728 ("[I]n situations in which the moving party seems to have discharged his burden of demonstrating that no genuine issue of fact exists, the court has discretion to deny a Rule 56 motion."); *id.* ("[D]ifficult or complicated legal issues should not be adjudicated upon an inadequate record. As a result, an appraisal of the legal issues may lead a court to exercise its discretion and deny summary judgment in order to obtain the fuller factual foundation afforded by a plenary trial." (footnote omitted)).

⁵⁵ See Friedenthal & Gardner, *supra* note 44, at 103 (noting the inconsistency

the combination of (a) the ability in most cases for a district judge to identify an issue in dispute if she wishes, and (b) the general unreviewability of summary judgment denials.⁵⁶

All of this said, district court discretion to deny a summary judgment motion asserting qualified immunity is a much more dubious proposition. Qualified immunity shields government officials from liability for civil damages to the extent that their conduct does not violate clearly established constitutional or statutory rights.⁵⁷ It is “both a defense to liability and a limited ‘entitlement not to stand trial or face the other burdens of litigation.’”⁵⁸ It readily follows that “the concept of a discretionary denial of summary judgment conflicts with the defendant’s substantive immunity rights.”⁵⁹ A defendant’s right, under qualified immunity, to avoid trial is frustrated to the extent that a district judge exercises discretion not to award summary judgment when the legal standard for summary judgment is met. Thus, courts faced with motions for summary judgment based on qualified immunity do not recite a discretionary standard,⁶⁰ and some courts and commentators explicitly disclaim discretion in the context of qualified immunity.⁶¹

among the opinions, but concluding that the statement in *Anderson* endorsing discretion is consistent with both “sound policy” and “historical practice and understanding”). *But see* Brunet, *supra* note 51, at 1170 (“I see little in the 1986 trilogy to support [district court] discretion to deny summary judgment.”).

⁵⁶ See BRUNET ET AL., *supra* note 44, § 6:6 (explaining that the ability of a district judge to deny summary judgment simply by “find[ing] a single issue of disputed fact” practically “vests a huge quantum of authority in the hands of a judge inclined to deny summary judgment” and rendering summary judgment “inherently discretionary”); *see also* Brunet, *supra* note 51, at 1168.

⁵⁷ *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

⁵⁸ Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

⁵⁹ MOORE ET AL., *supra* note 44, § 56.07[3][d].

⁶⁰ *See, e.g.*, Castillo v. Day, 790 F.3d 1013, 1017 (10th Cir. 2015).

⁶¹ *See, e.g.*, Jones v. Johnson, 26 F.3d 727, 728 (7th Cir. 1994) (broadly asserting that “[s]ummary judgment is not a discretionary remedy,” but then linking the point to qualified immunity by adding, “[i]mmunity claims should be resolved as early in the case as possible — and by the court rather than the jury”), *affd.*, 515 U.S. 304 (1995); Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994) (noting, in dicta, that district court has discretion to deny summary judgment “except in cases of qualified or absolute immunity”); MOORE ET AL., *supra* note 44, § 56.07[3][d] (noting that, in the context of qualified immunity, “the concept of a discretionary denial of summary judgment conflicts with the defendant’s substantive immunity rights”).

C. *Appellate Jurisdiction over Summary Judgment Dispositions*

How do the rules limiting interlocutory appeals affect specifically the appealability of summary judgment motions?⁶² Some pretrial motions are rendered entirely unreviewable for all intents and purposes. For example, a discovery motion, whether granted or denied, does not terminate a litigation. Accordingly, rulings on discovery motions are not final judgments and are ordinarily unreviewable until the final judgment is entered (if at all). By this point, in most cases, the determination of the discovery motion will likely not be seen to affect the final judgment, and so the determination will likely be effectively unreviewable. And the unreviewability is complete and symmetric: A ruling on a discovery motion is unreviewable whether the court grants or denies it.

That symmetry does not hold for dispositive motions — including summary judgment motions. A decision to grant a summary judgment motion as to all claims and parties is a final judgment and thus immediately reviewable. But a decision to deny summary judgment in its entirety is generally not reviewable until (if at all) after judgment on the merits.⁶³ So, too, is a decision to grant “partial summary judgment” as to a claim — and concomitantly to deny summary judgment as to the rest of the claim — generally not immediately reviewable. Also usually not immediately reviewable is a decision to grant summary judgment as to some claims and parties, when other claims or parties remain active. To put it broadly (if perhaps at the cost of some precision), a decision that fully grants a summary judgment motion is reviewable, while a decision that does not fully

⁶² Some state jurisdictions allow for interlocutory appeal of summary judgment orders. *See, e.g., infra* note 86.

⁶³ *See Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015) (“[I]t is of course quite common for the finality of a decision to depend on which way the decision goes. An order granting a motion for summary judgment is final; an order denying such a motion is not.”). The Wright & Miller treatise explains:

A denial of summary judgment indicates that the moving party has failed to establish that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law; a trial therefore is necessary. As a result, the denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits. At that time, the party who unsuccessfully sought summary judgment may argue that the trial court’s denial of the Rule 56 motion was erroneous.

10A WRIGHT ET AL., *supra* note 26, § 2715 (footnotes omitted).

grant a summary judgment motion will generally not be immediately reviewable.⁶⁴

To elucidate the point, consider first that the grant of summary judgment that decides conclusively all claims as among all parties will meet section 1291's definition of appealable "final judgment." On the other hand, a denial of a summary judgment motion is not one "which ends the litigation on the merits and leaves nothing for the court to do but execute judgment."⁶⁵ As such, a denial of summary judgment will not be immediately reviewable unless it constitutes a collateral order.⁶⁶

Now it is the case that perhaps the most common, and most numerous, category of collateral orders that are immediately appealable are decisions by federal district courts⁶⁷ in civil rights actions that government officials⁶⁸ are not entitled to qualified immunity.⁶⁹ The Court has explained that, insofar as qualified immunity offers both a defense to liability and an entitlement not to

⁶⁴ See 10A WRIGHT ET AL., *supra* note 26, § 2715 ("[S]ubject to a few exceptions . . . , an appeal of a decision on a Rule 56 motion is available only if the trial court's determination has the effect of completely disposing of the action."); see, e.g., *Pac. Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1306 (1977) ("The order denying summary judgment which the applicants seek to have reviewed here . . . is not even appealable to the Court of Appeals under 28 U.S.C. § 1291, to say nothing of being directly appealable to this Court. Because it is not a 'final order or decision' within the meaning of that section, it is reviewable only pursuant to the provisions for interlocutory appeal set forth in 28 U.S.C. § 1292(b)."); *United States v. Florian*, 312 U.S. 656, 656 (1941) (reversing judgment of court of appeals reversing district court's denial of summary judgment "for want of jurisdiction in the Circuit Court of Appeals because of the absence of a final judgment in the District Court").

⁶⁵ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

⁶⁶ See *supra* notes 17–18 and accompanying text.

⁶⁷ That the federal court system considers denials of qualified immunity to be appealable collateral orders does not require state judiciaries to reach the same conclusion. See *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (holding that Idaho was free to treat a denial of qualified immunity as a non-final order that was not appealable; federal law guaranteed no immediate appeal).

⁶⁸ "Because a municipality is not entitled to qualified immunity, the collateral order doctrine does not extend to summary-judgment orders on municipal-liability claims." *Pollard v. City of Columbus*, 780 F.3d 395, 401 (6th Cir. 2015) (citation omitted). Still, the court of appeals may exercise "pendent jurisdiction over the appeal" over an appeal from the denial of summary judgment to a municipality when the claims there at issue are "inextricably intertwined" with claims raised by government officials who are entitled to assert qualified immunity. See *id.*

⁶⁹ Determinations of summary judgment motions raising claims of absolute immunity are immediately appealable like their counterparts raising claims of qualified immunity, but also far less common. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 741-42 (1982).

stand trial at all,⁷⁰ denials of summary judgment seeking qualified immunity can be immediately appealable.⁷¹ However, not all such denials qualify as immediately appealable collateral orders: The Court has excluded from the universe of immediately appealable collateral orders denials of summary judgment “entered in a ‘qualified immunity’ case . . . [that] determine[] only a question of . . . which facts a party may, or may not, be able to prove at trial.”⁷² Recently, the Court confirmed that immediate appeal remains available where the district court denies a motion for summary judgment seeking qualified immunity that rests on the application of the law to the facts.⁷³ At bottom, then, some — but not all — denials of summary judgment seeking qualified immunity are immediately appealable. And, across the ordinary run of cases, a denial of summary judgment will not constitute an immediately appealable collateral order.⁷⁴

Nor will section 1292’s limited authorization of interlocutory appeals generally allow for an appeal of a summary judgment denial.⁷⁵ The district court will not typically certify the denial of summary judgment for interlocutory appeal under section 1292(b), nor will the court of appeals typically exercise its discretion to hear the appeal.⁷⁶

⁷⁰ See *supra* text accompanying notes 57–58.

⁷¹ See *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985).

⁷² *Johnson v. Jones*, 515 U.S. 304, 313 (1995); *id.* at 319-20 (“[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court’s summary judgment order insofar as that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for trial.”); see also *Johnson v. Clifton*, 74 F.3d 1087, 1090-91 (11th Cir. 1996) (elucidating *Johnson v. Jones* and squaring it with preexisting precedent).

⁷³ See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014) (distinguishing *Johnson v. Jones* as a case involving “purely factual issues,” and concluding that denial of summary judgment motion grounded in application of law to disputed facts was immediately appealable).

⁷⁴ *But cf.* 10A WRIGHT ET AL., *supra* note 26, § 2715 (“[I]t has also been held that if the trial court’s order denying summary judgment is coupled with the grant of summary judgment to the opponent, both decisions are immediately appealable.”).

⁷⁵ *Id.* (“Although summary-judgment orders that are interlocutory usually will not be appealable until the litigation is completed, if they fall into one of the[] exceptions to the final judgment rule [under section 1292], an appeal will lie.”).

⁷⁶ *Cf. id.* (offering as an example of a setting where “the court of appeals declared that the district court had acted properly in certifying an appeal under Section 1292(b) from its denial of a summary judgment” a case where, “if defendant’s contentions were correct, plaintiff’s action was barred by a one-year limitations period and the validity of defendant’s allegations on this point presented serious questions of state law”).

Note that, even if a district court for some reason tries to certify the denial of summary judgment as a final order under Rule 54(b), that certification is not effective

And most cases will not fall within the scope of settings where immediate interlocutory appeals are authorized under section 1292(a). For example, while the statutory language allows for immediate interlocutory appeal of orders that “grant[], continu[e], modify[], refus[e] or dissolv[e] injunctions, or refus[e] to dissolve or modify injunctions,” the Supreme Court has confirmed that the denial of summary judgment on a request for an injunction is not appealable under section 1292.⁷⁷

Decisions on summary judgment that do not dispose conclusively of all claims among all parties in a case will meet a similar fate on appealability as do full denials of summary judgment. First, the decision by a district court to grant “partial summary judgment” under Rule 56(d) on a claim, by narrowing the scope of genuine issues of material fact but still leaving some issues for trial is clearly an interlocutory order.⁷⁸ Second, the decision by a district court to grant summary judgment as to an entire claim (or set of claims) while leaving in place other claims (whether against the same party or other parties to the case) is not a final judgment for section 1291 purposes, unless the district judge certifies the summary judgment order as a final judgment under Rule 54(b).⁷⁹

Nor, apparently, is mandamus a viable option to render reviewable the denial of a dispositive motion. It seems that the only means by which mandamus could allow for interlocutory review of a summary judgment denial was a situation where the court of appeals somehow compelled, via mandamus, the district court to certify the summary judgment denial under section 1292(b) for interlocutory review.⁸⁰ But

in converting the interlocutory order into a final one. See *Akerman v. Oryx Commc'ns, Inc.*, 810 F.2d 336, 339 (2d Cir. 1987).

⁷⁷ See *Switz. Cheese Ass'n v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24-25 (1966); see also 10A WRIGHT ET AL., *supra* note 26, § 2715 (“[T]here no longer is any doubt that the denial of a Rule 56 motion in a suit seeking an injunction is not appealable under that statute.”).

⁷⁸ See NOTES OF THE ADVISORY COMMITTEE ON THE 1946 AMENDMENTS TO THE RULES OF CIVIL PROCEDURE (1946) (“Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary ‘judgment’ is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved.”); 10A WRIGHT ET AL., *supra* note 26, § 2715 (“A partial summary judgment that is entered in accordance with Rule 56(d) is an interlocutory order.”).

⁷⁹ See 10A WRIGHT ET AL., *supra* note 26, § 2715 (“[U]nless the court certifies that its order is final under Rule 54(b), the grant of a summary judgment on less than all the claims and parties in the litigation normally is not appealable until the full case reaches judgment.”).

⁸⁰ See *Pac. Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S.

“[e]fforts to persuade a court of appeals to issue mandamus to compel certification by the district judge have generally proved unsuccessful.”⁸¹ Moreover, even leaving to the side the certification issue, the exacting requirements render mandamus unavailable in all but the most exceptional cases.⁸²

Thus, someone seeking to appeal the denial of summary judgment faces a serious obstacle. That said, the bar against interlocutory appeals standing alone does not render denials of summary judgment forever unreviewable; it only precludes the immediate appeal of the denial. In theory, an appellate court might revisit the summary judgment denial after final judgment.

Courts, however, have held that the entry of final judgment will generally moot appellate review of the typical summary judgment motion altogether. The typical motion for summary judgment is one that addresses whether there is a genuine issue of material fact; the denial of such a motion thus determines simply that a trial is necessary to resolve the existing factual disputes.⁸³ Therefore, assuming appeal of the summary judgment denial must await entry of judgment after trial (or some subsequent motion for judgment on the merits), the review of the final judgment on the merits renders unreviewable reconsideration of the summary judgment denial.⁸⁴

1305, 1307 (1977) (Rehnquist, Cir. J.) (“So far as I am aware, [mandamus] relief [to reverse the denial of summary judgment] is not available, pursuant to statute or otherwise, in the Court of Appeals. Since the Court of Appeals issued no opinion in this matter, it could have construed the petition as a request to order the District Court to certify the question for interlocutory review.”).

⁸¹ WRIGHT ET AL., *supra* note 26, § 3929.

⁸² See Steinman, *supra* note 52, at 903-06.

⁸³ See Switz. Cheese Ass’n, v. E. Horne’s Mkt., Inc., 385 U.S. 23, 25 (1966) (“[S]ummary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing — that the case should go to trial.”).

⁸⁴ See *Ortiz v. Jordan*, 562 U.S. 180, 189-90 (2011) (holding that, where summary judgment motion asserted absence of factual dispute, review of that motion was unavailable after trial). The Court explained that a party whose motion for summary judgment is denied can preserve the question of the sufficiency of the evidence — albeit based on the evidence actually presented at trial, not the pretrial record — via Rule 50 of the Federal Rules of Civil Procedure. See *id.* at 189; see also *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994) (“[A]fter trial, whether or not summary judgment should have been granted generally becomes moot.”).

The position reached by *Ortiz* is consistent with the conclusion reached in virtually all court of appeals cases to consider the appealability of denied summary judgment motions questioning the sufficiency of the evidence. See Steinman, *supra* note 52, at 910-23 (summarizing pre-*Ortiz* case law). But see *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 353 n.55 (7th Cir. 1988) (holding in a pre-*Ortiz* case that appeal of

Some courts — but not all — go further, and apply the bar against review even of denials of summary judgment grounded in pure issues of law.⁸⁵ In any event, the bottom line remains that virtually all courts hold that the denial of summary judgment will be not just immediately unreviewable, but altogether unreviewable, at least where the summary judgment sought to establish the absence of genuine issues of material fact.⁸⁶

summary judgment denial was not moot in the “rare case” where the movant “informed the court that if the court chose to deny summary judgment on [particular] claims . . . the [movant] would not try those issues and would ask the court to dismiss those claims with prejudice,” reasoning that “[t]his denial of summary judgment was not in essence an interlocutory order because it had the effect of ending any consideration of the claim[s] in district court”).

⁸⁵ The reviewability of denied summary judgment motions grounded in purely legal arguments has been clouded by a Supreme Court decision — *Ortiz*, 562 U.S. 180 — that was supposed to clarify the issue.

Before the Supreme Court’s decision in *Ortiz* a split divided the circuits as to the subsequent reviewability of the denial of a summary judgment motion that raised a purely legal argument. *Compare, e.g., Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-20 (7th Cir. 2003) (denial of summary judgment motion was preserved on appeal where motion raised purely a legal argument); *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1229 (10th Cir. 1995) (same); *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995) (denial of summary judgment not moot where motion advanced *res judicata* argument), *with Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1236 (4th Cir.1995) (precluding review regardless of the nature of the summary judgment motion); *Black v. J.I. Case Co.*, 22 F.3d 568, 570-71 (5th Cir. 1994) (same). *See generally* Steinman, *supra* note 52, at 910-23 (discussing the pre-*Ortiz* circuit split).

The Court in *Ortiz* granted certiorari, in its own words, “to decide” whether “a party . . . [may] appeal an order denying summary judgment after a full trial on the merits,” a question on which the circuits were “split.” 562 U.S. at 183-84. Immediately after stating the question, the Court stated tersely: “Our answer is no.” *Id.* at 184. Yet the case at bar in *Ortiz* involved a denied summary judgment motion that had argued that no genuine issue of material *fact* existed, and the Court grounded its decision that the denial was unreviewable on that point. *See id.* at 190. Thus, despite the broad statement of the question presented, the Court’s decision can be read narrowly *not to address* denials of summary judgment grounded in pure questions of law. Oddly, of course, that is the only issue on which the circuits had been split before *Ortiz*. In the end, “all the Court decided” in *Ortiz* was an issue on which “the courts of appeals all had agreed” in the first place. Steinman, *supra* note 52, at 927.

In *Ortiz*’s wake, lower courts have again divided as to whether to read the Supreme Court’s decision narrowly — as precluding review of denied summary judgment motions only based on factual dispute — or broadly — as precluding such review with respect to all summary judgment motions irrespective of content. *See id.* at 929-31.

⁸⁶ The same result obtains in the end even in state jurisdictions that authorize interlocutory appeals. For example, New York state procedural law allows for interlocutory appeals of summary judgment denials. *See* N.Y. C.P.L.R. 5701(a)(2)(iv) (McKinney 1999). Yet, while a summary judgment denial is

D. *Appellate Standard of Review for Summary Judgment Dispositions*

Appellate courts generally recite that they review grants of summary judgment *de novo*.⁸⁷ They explore the record independently,⁸⁸ employing the same standard as the district court below did (or in any event should have): Whether, viewing all the evidence and taking all inferences in the light most favorable to the nonmovant, there is no genuine issue as to any material fact, such that the movant is entitled to judgment as a matter of law.⁸⁹

Statements about the standard of review applicable to *denials* of summary judgment are less common. Moreover, when they do occur, they are often either dicta or arguably limited to the posture of the particular cases in which they arise.

Consider first that many opinions recite the *de novo* appellate standard of review for summary judgment as applicable to both grants and denials of summary judgment, even though in the vast run of cases the appeal lies from a grant of summary judgment.⁹⁰ In that

immediately appealable, such an appeal does not stay the trial court from moving forward with the case. *See, e.g.,* *Schwartz v. N.Y. City Hous. Auth.*, 641 N.Y.S.2d 885, 886-87 (N.Y. App. Div. 1996) (order denying summary judgment does not fall within the limited scope of N.Y. C.P.L.R. 5519(a), which provides stay without a court order); *Walker v. Del. & Hudson R.R. Co.*, 503 N.Y.S.2d 173, 174 (N.Y. App. Div. 1986) (same). Thus, absent a stay entered at the discretion of the trial court or appellate court, the case will move forward in the wake of a summary judgment denial.

New York state procedural law does allow for the appellate court to hear an appeal of the summary judgment denial in connection with an appeal of the final judgment, to the extent that the summary judgment denial “necessarily affects the final judgment.” N.Y. C.P.L.R. 5501(a)(1). (McKinney 1997).

⁸⁷ *See, e.g.,* *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992) (“[O]n summary judgment we may examine the record *de novo* without relying on the lower courts’ understanding . . .”); *United States v. Falcon*, 805 F.3d 873, 875 (9th Cir. 2015) (“We review *de novo* the district court’s summary judgment . . .”). *But see* Schwarzer, *supra* note 34, at 489 (urging that appellate courts should review summary judgment under “clearly erroneous” standard where trial court conclusion rests on ultimate issues of fact).

⁸⁸ *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam) (on direct appeal of grant of summary judgment by the district court, the Supreme Court conducted its own “study of the record”).

⁸⁹ *See, e.g.,* *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (“[A]t the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.”); *Scott v. Harris*, 550 U.S. 372, 378 (2007) (“[O]n summary judgment . . . courts are required to view the facts and draw reasonable inferences ‘in the light most favorable to the party opposing the [summary judgment] motion.’” (quoting *Diebold, Inc.*, 369 U.S. at 655)); *RSR Corp. v. Int’l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010); 10A WRIGHT ET AL., *supra* note 26, § 2716.

⁹⁰ For cases where review is of a grant of summary judgment, yet the court recites

sense the assertions in these cases about the standard applicable to review of summary judgment *denials* amount merely to dicta.⁹¹ (Many treatises that discuss the appellate standard of review for summary judgment similarly don't in general distinguish between review of appeals and review of denials.⁹²)

Sometimes appellate courts will refer to, and apply, a *de novo* standard of review. But as a consequence of the general unreviewability of summary judgment denials, such statements by courts will likely not be dicta only in settings where in fact the standard of review is indeed *de novo*. One such setting occurs where the trial court has addressed cross-motions for summary judgment, granting one and (necessarily) denying the other. In such a case, the denial of summary judgment is technically reviewable (along with the grant of the cross-motion). Such a case, however, will tend overwhelmingly to be one where the facts are essentially undisputed, and the parties argue simply over how the law applies to the facts.⁹³ But trial court resolution of questions of law are subject to *de novo* review in general;⁹⁴ that the same would hold in the summary

the standard of review as applying broadly to denials as well as grant, see, for example, *Williams v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 792 F.3d 1136, 1139 (9th Cir. 2015) (“We review *de novo* a district court’s grant or denial of summary judgment.”); see also *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769 (2015) (“Because this case arises in a summary judgment posture, we view the facts in the light most favorable to . . . the nonmoving party.”); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1347 (2015) (“[B]ecause we are at the summary judgment stage, and because there is a genuine dispute as to these facts, we view this evidence in the light most favorable to . . . the nonmoving party . . .”). *But see Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014) (“Because this case arises from the denial of the officers’ motion for summary judgment, we view the facts in the light most favorable to the nonmoving party . . .”).

⁹¹ See, e.g., *Friedenthal & Gardner*, *supra* note 44, at 114 (noting that, in “a number” of cases where courts have recited the *de novo* standard as applicable to summary judgment denials, “the statements are dicta . . . because the appeal is actually from a grant of summary judgment rather than a denial”).

⁹² See, e.g., 10A WRIGHT, *supra* note 26, § 2716 (treatise section entitled “Nature of the Review on Appeal From a Grant or Denial of Summary Judgment,” and explaining that “[t]he general standard that an appellate court applies in reviewing the grant or denial of a summary-judgment motion is the same as that employed by the trial court initially . . .”).

⁹³ For example, in *Arakaki v. Hawaii*, the Ninth Circuit reviewed *de novo* the district court’s resolution of a case on cross-motions for summary judgment. The court explained: “Neither side contends that there are any genuine issues of material fact. Therefore, our task is to determine whether the district court correctly applied the relevant substantive law.” *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002).

⁹⁴ See, e.g., *Estate of Riddle ex rel. Riddle v. S. Farm Bureau Life Ins. Co.*, 421 F.3d 400, 404 (6th Cir. 2005) (“It is well-settled that we review questions of law *de novo*.”

judgment context is hardly surprising. As such, it remains questionable the extent to which de novo review for a summary judgment grant in the context of cross-motions necessarily translates into broad application of de novo review to summary judgment denials writ large.⁹⁵

Another setting where the denial of summary judgment can be reviewable — and where courts sometimes invoke the de novo standard of review⁹⁶ — is where summary judgment was sought on the ground of immunity. However, even then, only certain types of summary judgment denials are reviewable. Specifically, the denial of summary judgment on the ground of qualified immunity based solely on matters of fact is *not* reviewable.⁹⁷ This leaves only two types of summary judgment denials on qualified immunity grounds that *are* reviewable. One is denials that rest entirely on questions of law; as above, these denials should be reviewed de novo.⁹⁸ But that result is neither surprising nor necessarily suggestive of what the standard of review ought to be in other procedural postures. The other is summary judgment denials grounded in qualified immunity that involve the application of the law to the facts.⁹⁹

Some courts occasionally refer to ‘abuse of discretion’ as the standard of review for denials of summary judgment.¹⁰⁰ Even these

(emphasis omitted)).

⁹⁵ See Friedenthal & Gardner, *supra* note 44, at 114-15 (noting that, in the “few” cases where courts describe de novo review as applicable to review of summary judgment denials, “the courts did not actually face the issue” of whether discretionary review was appropriate “because a careful review of the facts reveals that the decisions were not the product of the judge’s exercise of discretion,” but rather “turned on a precise question of law”).

⁹⁶ See, e.g., *United Review Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 396 n.3 (3d Cir. 2003) (“We exercise plenary review over a district court’s denial of a motion for summary judgment on the basis of qualified immunity Moreover, as with any appeal from the denial of summary judgment, we consider all facts in the light most favorable to the non-moving party.” (citation omitted)).

⁹⁷ See *supra* note 72 and accompanying text.

⁹⁸ See *supra* note 94 and accompanying text.

⁹⁹ See *supra* note 73 and accompanying text. In such settings, the Supreme Court has explained that the appeals court is free to adopt the factual analysis adopted by the district court (to the extent that the district court has provided such an analysis). See *Johnson v. Jones*, 515 U.S. 304, 319 (1995) (“When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.”).

¹⁰⁰ See *Univ. of Rochester v. G.D. Searle & Co.*, 358 F.3d 916, 919-20, 930 (Fed. Cir. 2004) (applying this standard to affirm grant of summary judgment and denial of

statements are generally dicta,¹⁰¹ owing to the general unreviewability of summary judgment denials.¹⁰² Commentators criticize invocations of the “abuse of discretion” standard of review for summary judgment denials.¹⁰³ (A few commentators do endorse the “abuse of discretion” standard,¹⁰⁴ but view it as aspirational, not as a valid statement of current law.¹⁰⁵)

In sum, appellate jurisdiction is generally restricted to final judgments. Grants of summary judgment constitute final judgments and are immediately appealable. But summary judgment denials are generally not final judgments; as such, they are generally not immediately appealable and practically often not appealable at all. While qualified immunity provides an opening for immediate appeal of summary judgment denials, that opening extends only to some denials; denials based on pure questions of fact remain unappealable.

Appellate courts sometimes announce broadly applicable standards of review for summary judgment, but the limited universe of appealable summary judgment dispositions renders many such statements dicta. It is well settled that summary judgment grants are subject to de novo review. Statements about the standard of review for summary judgment denials run the range from de novo review to review for abuse of discretion.

cross-motion for summary judgment); Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 327-28 (2002) (noting the Federal Circuit practice of reviewing summary judgment denials for abuse of discretion and summary judgment grants de novo); see, e.g., *Elekta Instrument S.A. v. O.U.R. Sci. Int'l, Inc.*, 214 F.3d 1302, 1306 (Fed. Cir. 2000) (“In reviewing a denial of a motion for summary judgment, we give considerable deference to the trial court, and ‘will not disturb the trial court’s denial of summary judgment unless we find that the court has indeed abused its discretion.’” (quoting *Suntiger, Inc. v. Scientific Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999))).

¹⁰¹ See, e.g., BRUNET ET AL., *supra* note 44, § 11:1 (“[I]n several cases the Federal Circuit has stated, in dicta, that a district court’s denial of a summary judgment motion will be reviewed for an abuse of discretion.”).

¹⁰² See *supra* Part II.C.

¹⁰³ See, e.g., BRUNET ET AL., *supra* note 44, § 11:1 (decrying the abuse of discretion standard as “incompatible” with de novo review and as having “no place in summary judgment”).

¹⁰⁴ See Friedenthal & Gardner, *supra* note 44, at 114.

¹⁰⁵ See *id.* (“[E]ven those appellate courts that purport to sanction district court discretion in denying an otherwise appropriate motion for summary judgment flatly state that they review a denial de novo without distinguishing cases in which the denial may be based all or in part on the judge’s exercise of discretion.”).

II. THE CASE FOR AN ASYMMETRIC STANDARD OF REVIEW FOR SUMMARY JUDGMENT

In this Part, I argue that the standard of review for summary judgment can be, and indeed is, asymmetric. Where a summary judgment motion was based at least to some degree on questions of fact — i.e., either pure questions of fact or mixed questions of fact and law — the standard of review that courts apply in examining summary judgment grants — i.e., *de novo* review — does not correspond to the standard of review for summary judgment denials. Specifically, I argue that the standard of review for summary judgment denials is to some extent at least less stringent than its counterpart for summary judgment grants (where a jury trial looms). Having established this, I turn in the next Part to the precise contours of the laxer standard that should apply to summary judgment denials.

The argument proceeds in four parts. First, I explain that, considerable dicta to the contrary notwithstanding, there is a dearth of binding precedent on the question of the proper standard of review for summary judgment denials, at least when it comes to rulings that there is a genuine issue of material fact for trial. Second, I demonstrate the law's acceptance of asymmetric standards of review in general. Third, I elucidate reasons to think that indeed the standard of review for summary judgment should be asymmetric. Finally, I debunk as unconvincing reasons to doubt the asymmetry of the standard of review for summary judgment.

A. *Existing Precedent Hardly Precludes the Possibility of an Asymmetric Standard of Review for Summary Judgment*

Courts routinely invoke, and apply, the *de novo* standard of review for summary judgment grants, and then proceed to apply that standard to review. However, as discussed above, the same cannot be said for summary judgment denials. Many times courts will recite that the *de novo* standard applies to grants and denials alike, but such statements usually arise in the context of summary judgment grants, and thus (with respect to denials) are mere dicta.¹⁰⁶

¹⁰⁶ See *supra* notes 90–91 and accompanying text.

Indeed, none of the Supreme Court's trilogy cases — in other words, the cases where the Supreme Court explicated Rule 56 and laid out the modern procedures and standard for summary judgment — was a case where the district court had denied summary judgment. For all the talk about the trilogy cases expressing the Supreme Court's displeasure over the lower courts' reluctance to grant summary judgment, the district court in all three cases had *granted* summary judgment. See *Celotex Corp. v.*

There are a few settings when appellate courts will actually have occasion to review summary judgment denials, but even these are not paradigmatic settings where the core issue is whether there is a genuine issue of material fact for trial. As discussed above, courts of appeals will only hear appeals from summary judgment denials — and hence only have occasion to discuss the applicable standard of review other than in dicta — in three limited circumstances: Setting (i): when cross motions for summary judgment are lodged, and the district court has granted one motion and (necessarily) denied the other;¹⁰⁷ Setting (ii): in cases where qualified immunity is available, where summary judgment was denied pretrial, provided that the motion was not grounded on a pure question of evidentiary fact;¹⁰⁸ and Setting (iii): post-trial where summary judgment based on a legal argument was denied pretrial, but only in those circuit courts that allow for such post-trial review.¹⁰⁹

But my claim about the asymmetry of the standard of review extends only to summary judgment decisions that turn at least in part on the existence of a factual dispute. In other words, it does not apply where the facts are undisputed and summary judgment turns on a purely legal questions. As such, my claim doesn't apply to Setting (iii). It similarly doesn't apply to Setting (ii) where the dispute is purely legal, only where there is a mixed question of law and fact. Finally, my claim doesn't often apply in Setting (i): Where there are cross-motions, the odds are that they are cross-motions based on undisputed facts where the focus is the proper law to apply.¹¹⁰

Catrett, 477 U.S. 317, 319 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578-79 (1986). It was the courts of appeals in those cases that had not affirmed the summary judgment grants. *See Celotex Corp.*, 477 U.S. at 319 (court of appeals reversed district court); *Anderson*, 477 U.S. at 246-47 (court of appeals partially reversed and partially affirmed district court); *Matsushita Elec. Indus. Co.*, 475 U.S. at 580 (court of appeals reversed district court).

¹⁰⁷ *See supra* text accompanying notes 93–95.

¹⁰⁸ *See supra* notes 72–73 and accompanying text. Before the Court in its 2015 decision in *Plumhoff v. Rickard* clarified the limited reach of *Johnson v. Jones's* carveout to the collateral order doctrine's application to qualified immunity, *see supra* note 70 and accompanying text, the number of cases falling within Setting (ii) may have been even smaller, i.e., the opportunity for a court to announce the appellate standard of review of a summary judgment denial other than in dicta may have been even smaller, than it is today.

¹⁰⁹ *See supra* notes 83–85 and accompanying text.

¹¹⁰ *See supra* text accompanying notes 93–95.

To the extent that the cross-motions indeed center on the existence of disputed issues of fact, then the denial of one motion will be reviewable only where the district

In short, the contours of the landscape of the standard of review for summary judgment denials remain largely cloaked in darkness. The few statements by courts about that standard are mere flares that shed meager light on that terrain.¹¹¹

B. There Are Other Examples of Asymmetric Standards of Review

Appellate standards of review are typically seen to vary in the degree to which they are searching, or deferential to the lower court's decision. Typically invoked for review of a district court's resolution of questions of law, *de novo* review affords the lower court decision no deference. Appellate courts ordinarily review a district court's findings of fact by asking whether those findings are clearly erroneous, a more deferential standard of review. On some matters, an appellate court will reverse a district judge's decision if it finds that the district judge abused his or her discretion, a very deferential standard of review. Finally, deference to the district judge is at its apex where no appellate review is to be had.

Usually, the extent to which appellate review is searching is a function purely of the nature of the question the appellate court is reviewing. For example, questions of law tend to attract *de novo* review, while factual questions are usually subjected to "clearly erroneous" review on appeal.¹¹² As a general rule, these presumptive standards of review are applied symmetrically, that is, they remain static irrespective of the actual "direction" of the conclusion reached

court has in fact granted the other, i.e., where the district court has found no disputed issue of material fact. Then, in order for there even to be a chance that the appellate court will reverse the district court's denial of the first summary judgment motion, the district court first must reverse the grant of the other motion. But it seems unlikely that, after the trial court found the facts undisputed in favor of one party, the appellate court would find the facts undisputed in favor of the *other* party. Rather, it seems much more likely that the appellate court would simply reverse the grant of summary judgment, affirm the denial of summary judgment, and remand the case for further proceedings. And, if that is true, then the decision to affirm the summary judgment denial would in every likelihood be the same regardless of whether the standard of review was *de novo* or more lenient.

¹¹¹ Cf. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 890 (2000) (analogizing four Supreme Court cases on the constitutional meaning of property to "flare[s] that briefly illuminate[] a darkened landscape and then fade[] away").

¹¹² See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." (emphasis omitted)).

by the trial court. For example, the appellate court will affirm a district court's finding of fact unless the finding is clearly erroneous, without regard to what the actual finding is, i.e., whether it is found in a way that favors the plaintiff or the defendant.

But some standards of review are asymmetric — they vary depending upon the “direction” of the lower court's conclusion. The most extreme cases of such asymmetries are settings where an outcome one way is reviewable on appeal while the opposite outcome is not.¹¹³ One remarkable historical example of such an asymmetry is the grant afforded by the first Judiciary Act of 1789 to the Supreme Court to review decisions by state courts that rejected assertions of federal rights and privileges,¹¹⁴ but not to review state court decisions that upheld federal rights and privileges.¹¹⁵ Thus, from the founding of the United States, the reviewability of state court decisions turned on whether those decisions ruled in favor of, or against, federal rights and privileges; this remained the case until 1914.¹¹⁶

An extant example of such extreme asymmetry in review power appears in the context of review of decisions determining motions to remand actions removed from state court back to federal court.

¹¹³ My use of asymmetric to describe a standard of review differs from Professors Jonathan Masur and Lisa Ouellette's use of the term. Professors Masur and Ouellette refer to a standard of review as affording asymmetric deference where only particular categories of parties — such as the government or the holders of intellectual property rights — “will ever be the beneficiaries of the more deferential standard of review.” Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 699 (2015). My use of asymmetry, in contrast, does not turn on whether a particular category of parties will receive a more beneficial standard of review, but rather where a decision by the district court in a particular direction will receive a more beneficial standard.

¹¹⁴ The First Judiciary Act provided only for limited Supreme Court review of state court decisions. In particular, section 25 authorized Supreme Court review only where a state decision drew in question (1) “the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity”; (2) “the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity”; (3) “the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party.” Judiciary Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-86; see, e.g., Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 983 (2010).

¹¹⁵ See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1617 (2008).

¹¹⁶ See Act of Dec. 23, 1914, Pub. L. No. 224, ch. 2, 38 Stat. 790, 790; see, e.g., Mazzone, *supra* note 114, at 984 (“Not until 1914 did the Supreme Court receive statutory authority to review state court decisions upholding federal claims against state government.”).

Section 1447(c) of the Judicial Code directs a district court to remand a removed case back to state court “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction.”¹¹⁷ At the same time, section 1447(d) generally renders an order remanding a case to state court under section 1447(c) “not reviewable on appeal or otherwise.”¹¹⁸ Yet no statutory bar analogously precludes review of orders declining motions to remand.¹¹⁹

Sometimes a conclusion by a district court is subject to review regardless of its direction, but the direction of the district court’s decision *does have an effect* on the extent to which the appellate court will afford the lower court’s decision deference. By way of example, under section 1367 of the Judicial Code (and the constitutional common-law regime that predated it¹²⁰ and that section 1367 codified¹²¹), an appellate court reviews for abuse of discretion a

¹¹⁷ 28 U.S.C. § 1447(c) (2012).

¹¹⁸ *Id.* § 1447(d); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (“If a trial judge purports to remand a case on the ground that it was removed ‘improvidently and without jurisdiction,’ his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise.”).

That section 1447(d)’s ban on reviewability of remand orders extends only to remand orders falling within the scope of section 1447(c) is well accepted. *See id.* (“It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ.”); *see also* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (“The District Court’s abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure.”).

¹¹⁹ Another extreme example of asymmetry in review power exists in the context of developing plans for a debtor to pay back debts under Chapter 13 of the Bankruptcy Code. Under the holding of the Court in *Bullard v. Blue Hills Bank*, “[i]f the bankruptcy court sustains an objection and denies [plan] confirmation, the debtor (always the plan proponent in Chapter 13) must go back to the drafting table and try again; but if the bankruptcy court overrules an objection and grants confirmation, a creditor can appeal without delay.” *Bullard v. Blue*, 135 S. Ct. 1686, 1694-95 (2015). The Court in *Bullard* defended this “asymmetry” as not necessarily uniformly favoring some parties over others, and in any event as not unreasonable given “our confidence that bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time,” and the fact that, “even when they slip, many of their errors . . . will not be of a sort that justifies the costs entailed by a system of universal immediate appeals.” *Id.* at 1695.

¹²⁰ *See generally* *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725-27 (1966) (applying the federal common law and asking whether the state and federal claim arise from the same nucleus of operative fact).

¹²¹ *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 173 (1997) (noting that

district court's decision to extend "supplemental jurisdiction" as to state-law claims based on an "anchor claim," which the district court enjoys as an independent basis for subject matter jurisdiction.¹²² At the same time, when all anchor claims are dismissed at the outset of a case, the "usual" outcome will be for the district court to decline to exercise supplemental jurisdiction.¹²³ Thus, even though the supplemental jurisdiction scheme does not require a district court to dismiss state claims when anchor claims are dismissed early on in a case,¹²⁴ some courts of appeals have indicated that they will examine a

"[t]he supplemental jurisdiction statute codifies the[] principles" set forth in *Gibbs* and its progeny).

¹²² Under section 1367(a), subject to certain exceptions, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (2012). Section 1367(c) then authorizes district courts to

decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. § 1367(c). District courts enjoy discretion as to whether to exercise or decline to exercise supplemental jurisdiction under subsection (c). See *Int'l Coll. of Surgeons*, 522 U.S. at 173 ("[T]he statute confirms the discretionary nature of supplemental jurisdiction."). In turn, review of those decisions is conducted under an "abuse of discretion" standard. See, e.g., *Maier Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 104 (3d Cir. 2015).

¹²³ *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine — judicial economy, convenience, fairness, and comity — will point toward declining to exercise jurisdiction over the remaining state-law claims."); *id.* at 351 ("When the single federal-law claim in the action was eliminated at an early stage of the litigation, the District Court had a powerful reason to choose not to continue to exercise jurisdiction."); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.").

¹²⁴ See, e.g., *Blakely v. United States*, 276 F.3d 853, 863 (6th Cir. 2002) (where district court dismisses pretrial all anchor claims, "28 U.S.C. § 1367(c), itself, makes

district court's discretionary decision more closely for abuse when the district court opts *against* dismissal under such circumstances.¹²⁵

Appeals of resolutions of motions for a new trial¹²⁶ provide another example of asymmetric appellate review. In general, courts of appeals review a district court's determination of a motion for a new trial under an "abuse of discretion" standard.¹²⁷ Some courts of appeals, however, assert that the standard of review is more exacting when the district court grants a new trial than when it denies one.¹²⁸

Finally, some appellate standards of review put a simple "thumb on the scale" in favor of one outcome over another. Such a standard exists in the context of a federal habeas court trying to determine whether a constitutional error that it has identified in reviewing a state-court criminal judgment is harmless. There, the Supreme Court has instructed that, if the federal habeas court is "in *grave doubt* about whether or not that error is harmless"¹²⁹ — that is, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error"¹³⁰ — then "the uncertain

clear that a district court may, not must, decline to exercise supplemental jurisdiction").

¹²⁵ See, e.g., *Enochs v. Lampasas Cty.*, 641 F.3d 155, 161-62 (5th Cir. 2011) (while "we . . . hesitate in rejecting the district court's exercise of its discretionary authority," "such discretion is founded upon and guided by a [district] court's consideration of the prescribed statutory and common law factors," and "[o]ur deference cannot stretch so far as to find no abuse of discretion where . . . all federal claims were deleted at the infancy of the case and the balance of the statutory and common law factors weighs heavily in favor of remand").

¹²⁶ See FED. R. CIV. P. 59.

¹²⁷ See, e.g., *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 472 (5th Cir. 2015) ("A district court's resolution of a motion for new trial is reviewed for abuse of discretion, and '[t]he district court abuses its discretion by denying a new trial only when there is an absolute absence of evidence to support the jury's verdict.'" (internal quotation marks omitted) (quoting *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013))); *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014) ("We afford considerable deference to the district court's new trial decision and will not overturn the district court's decision to grant a new trial absent an abuse of discretion . . .").

¹²⁸ See *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 269 (5th Cir. 1998) ("It goes without saying that review of the denial of a new trial motion is more limited than when one is granted."); *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995) ("When the trial judge disagrees with a jury verdict, the Seventh Amendment's limitations on the judge's power to reexamine the jury's verdict is implicated and a more exacting standard of review applies." (footnote omitted)).

¹²⁹ *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

¹³⁰ *Id.*

judge should treat the error, not as if it were harmless, but as if it affected the verdict.”¹³¹

C. *There Are Reasons to Think that the Standard of Review for Summary Judgment Should Be Asymmetric*

The previous Section established the viability of an asymmetric standard of review for summary judgment. But are there reasons to think that an asymmetric standard of review is not only viable, but appropriate?

Several considerations support the conclusion that an asymmetric standard of review is indeed appropriate in the summary judgment context. First, the final judgment rule combines with the supposed “de novo” standard to provide a de facto “abuse of discretion” standard.¹³² To be sure, this understanding of discretion seems to go beyond both the language and intent of Rule 56, inviting judges almost to identify (if not at some level fabricate) a lone disputed fact in order to evade an otherwise mandatory grant of summary judgment. Moreover, the district judge surely understands that the denial of summary judgment is almost certain to be effective given the limited opportunity for appellate review of summary judgment denials. Additionally, the logic underlying this “discretion” problematically does not extend to settings where the final judgment rule does not preclude review of the denial.¹³³ Still, the fact remains that the unreviewability of most summary judgment denials strongly suggests a level of comfort with district court summary judgment denials that does not exist with district court summary judgment grants.¹³⁴

¹³¹ *Id.*

¹³² See *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994) (stating that district courts enjoy discretion to deny summary judgment even where the technical requirements are met, and then explaining that, “[i]f we were to review denied motions for summary judgment, the district court would no longer have this discretion”); *BRUNET ET AL.*, *supra* note 44, § 6:6 (explaining that the ability of a district judge to deny summary judgment simply by finding “a single . . . issue of disputed fact” as “vest[ing] a huge quantum of authority in the hands of a judge inclined to deny summary judgment” and rendering summary judgment “inherently discretionary”); *supra* notes 100–105 and accompanying text (noting that some courts occasionally invoke the abuse of discretion standard as applicable to reviewing summary judgment denials).

¹³³ See *Black*, 22 F.3d at 572 (noting, in dicta, that district court has discretion to deny summary judgment “except in cases of qualified or absolute immunity”); *supra* text accompanying note 71.

¹³⁴ Professor Edward Cooper has explained that, in deciding on whether interlocutory appeals should be heard or whether appeals should be held until the

Second, the Supreme Court has acknowledged that, even if the existence of a question of material fact for trial is a question of law, it nevertheless is one that is close to the law–fact divide.¹³⁵ Indeed, the Supreme Court has explained that the process of determining whether there is genuine issue of material fact for trial is one that “generally involves matters more within a district court’s ken.”¹³⁶

Third, the constitutional concerns that have dogged — and continue to dog — summary judgment suggest that a purely de novo standard of review for summary judgment grants is undesirable (at least where a jury trial is in the offing). Federal courts have long upheld summary judgment as consistent with the Seventh Amendment¹³⁷ right to a jury trial.¹³⁸ The standard reasoning proceeds that, insofar as summary judgment is only to be granted where there is no genuine issue of material fact to try to a jury, it cannot violate the Seventh Amendment.¹³⁹ Even in the wake of Professor Suja Thomas’s more recent assiduous argument to the contrary,¹⁴⁰ courts have repeatedly reaffirmed the constitutionality of granting summary judgment.¹⁴¹

entry of final judgment, “[t]he nature and quality of the federal district judges is the single most important factor to be counted. The better judges are, the less need there is for frequent interlocutory appeal — they will make fewer mistakes, and more often correct their own mistakes before serious harm is done.” Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 L. & CONTEMP. PROBS. 157, 158 (1984); cf. Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 352 (1961) (“[T]o allow an appeal from every order to which an objection is lodged might reduce respect for the authority of the trial judge.”).

¹³⁵ See *supra* text accompanying notes 37–38.

¹³⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 674 (2009) (Determining whether there is a genuine issue of material fact for trial is a process that may require a court to “consult a ‘vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials,’” and as such is a “process [that] generally involves matters more within a district court’s ken.” (quoting *Johnson v. Jones*, 515 U.S. 304, 316 (1995))).

¹³⁷ The Seventh Amendment to the Constitution provides (in pertinent part): “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” U.S. CONST. amend. VII.

¹³⁸ See *Fid. & Deposit Co. of Md. v. United States*, 187 U.S. 315, 319–21 (1902).

¹³⁹ Summary judgment procedure merely “prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues.” See *id.* at 320.

¹⁴⁰ See generally Thomas, *supra* note 4, at 145–79 (arguing that summary judgment is unconstitutional).

¹⁴¹ See *Cook v. McPherson*, 273 Fed.App’x 421, 425 (6th Cir. 2008) (acknowledging Professor Thomas’s argument, but adhering to the constitutionality of summary judgment procedure); see also *Adams v. City of Chicago*, 798 F.3d 539, 546 (7th Cir. 2015) (noting in dicta that, even in the wake of Professor Thomas’s argument, “it would be bold indeed for a court of appeals” to hold summary judgment inconsistent with the Seventh Amendment, “given what the Supreme Court has said on the topic”).

My point here is not to resuscitate a broad constitutional assault on summary judgment, but rather to advance a far narrower version of Professor Thomas's thesis. Even accepting that granting summary judgment in appropriate cases does not violate the Seventh Amendment, it still is the case that granting summary judgment *where there is in fact an issue of material fact* is inconsistent with the Seventh Amendment.¹⁴² Now it seems safe to assume (given the size of the federal courts' docket) that a substantial number of cases each year fall close to (and on either side of) the summary judgment line.¹⁴³ For those cases where the district court has decided to grant summary judgment, the *de novo* standard of appellate review provides protection that the Seventh Amendment will not be violated by affording the district court's determination no deference. However, for those cases where the district court has decided to deny summary judgment, *de novo* review might serve to create Seventh Amendment violations. After all, there is no constitutional violation in having a trial when there is at bottom no genuine issue of material fact, but the Seventh Amendment is violated where (assuming a right to jury trial exists and has been properly exercised) no jury trial is held when there at bottom is a genuine issue of material fact.¹⁴⁴ While across-the-

¹⁴² See, e.g., *LaLonde v. County of Riverside*, 204 F.3d 947, 963 (9th Cir. 2000) (“[T]he facts are disputed, and the disputed facts here should have been submitted to the jury, even when qualified immunity *from suit* was an issue. Issues of credibility belong to the trier of fact. The Seventh Amendment to the Constitution so requires.”); *McGhee v. Danzig*, No. CIV AMD 99-3362, 2001 WL 410052, at *12 (D. Md. Apr. 19, 2001) (“[A]lthough it is a close question, I am persuaded that, *drawing all reasonable inferences in favor of McGhee* (which, frankly, is not what a reasonable fact finder is likely to do, but McGhee's Seventh Amendment right to a jury trial secures to him the opportunity to try to so persuade a jury), a reasonable fact finder *could* conclude that Frentzel acted out of a gender-based animus in reassigning McGhee.”).

¹⁴³ See *Tolan v. Cotton*, 134 S. Ct. 1861, 1868-69 (2014) (Alito, J., concurring) (“In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment.”).

¹⁴⁴ See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1075 (2003) (“To the extent that summary judgment grants deny litigants access to jury trial, it obviously unhinges the judge–jury decisionmaking balance. Conversely, as elaborated below, if no ‘genuine issue of material fact’ exists and the movant is entitled to judgment ‘as a matter of law,’ pretrial disposition does not raise questions of constitutional dimensions.” (footnote omitted)); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 42 n.29 (1988) (“[T]he seventh amendment mandates that we not equate erroneous denials of summary judgment with erroneous grants of summary judgment.

board de novo review gives rise to both kinds of errors, the two types of errors are not equivalent.¹⁴⁵

While it would be a stretch (in light of the courts' rejection of Professor Thomas's argument¹⁴⁶) to conclude that de novo review of summary judgment grants are a constitutionally infirm procedure,¹⁴⁷ still one reasonably might conclude that an asymmetric standard of review is desirable as a constitutional prophylactic. Indeed, it is well within the Court's power and consistent with the Court's practice to announce prophylactic rules to protect important constitutional interests.¹⁴⁸ An asymmetric standard of review would tend to minimize Seventh Amendment violations by bolstering a district judge's conclusion that a matter should be tried. The appropriateness of the prophylactic is confirmed by the fact that the process of identifying genuine issues of material fact for trial lies within the district court's peculiar ken.¹⁴⁹ And the notion that the Seventh Amendment right to a jury trial is entitled to prophylactic protection is beyond doubt: The Court has held that the right sweeps more broadly than purely its constitutional reach.¹⁵⁰ Finally, the fact that the Federal Rules of Civil Procedure themselves direct that the Seventh Amendment be

No one has a constitutional right to a summary judgment, but everyone has a constitutional right to a jury trial under the seventh amendment. Since we cannot eliminate error, we are obliged to structure our procedures to err on the side of the Constitution.”).

¹⁴⁵ See Risinger, *supra* note 144, at 42 n.29.

¹⁴⁶ See *supra* notes 141–142 and accompanying text.

¹⁴⁷ Cf. *Tolan v. Cotton*, 134 S. Ct. 1861, 1869 (2014) (Alito, J., concurring) (characterizing cases in the courts of appeals where “the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party” as “utterly routine,” and arguing that Supreme Court review of such cases is not a wise use of resources).

¹⁴⁸ See, e.g., Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 515–16 (2008) (“The Supreme Court has fashioned numerous ‘prophylactic rules’ that are not called for by the language of the Constitution but are designed to minimize the chances that constitutional violations will in fact occur.” (footnote omitted)).

¹⁴⁹ See *Ashcroft v. Iqbal*, 556 U.S. 662, 674 (2009) (explaining that the process of resolving whether there is a genuine issue of material fact “generally involves matters more within a district court’s ken”).

¹⁵⁰ See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537–39 (1958) (deciding in the context of an *Erie* question that federal court should not follow the state-court rule of submitting issue to judge for decision and instead submit issue to jury, based upon the “influence — if not the command — of the Seventh Amendment” (footnote omitted)).

“preserved inviolate”¹⁵¹ lends support to a prophylactically protective standard of review for summary judgment.¹⁵²

D. The Reasons to Think that the Standard of Review for Summary Judgment Should Be Symmetric Are Unconvincing

The last Section highlighted reasons to believe that the standard of review for summary judgment should be asymmetric. But are there not reasons to believe otherwise? This Section discusses some of those reasons, and explains why they are ultimately unpersuasive.

First, one might argue the symmetry of the standard of review for summary judgment should mimic the symmetry of standards applicable to other dispositive motions. But this argument falls short. For one thing, as I have discussed above, some courts have described as asymmetric the standard of review for other related dispositive motions — such as the motion for a new trial.¹⁵³ However, even to the extent that most standards of review for other dispositive motions are symmetric, the fact remains that summary judgment differs from most other dispositive motions.¹⁵⁴

Second, to the extent that the more relaxed standard of review for summary judgment denials is prophylactic,¹⁵⁵ one might argue that the prophylactic relaxed standard should be trumped by the vital goal of qualified immunity — allowing those who are entitled to its protection to *avoid suit altogether*.¹⁵⁶ Tempting though that conclusion may be, in fact the opposite is true: The prophylactic protection of the jury trial right should trump, and apply even in the context of, qualified immunity. To see this, consider that the immediate appeal of denials of qualified immunity on grounds of summary judgment is *not* uniformly guaranteed by the Constitution. To the contrary, states are

¹⁵¹ Rule 38(a) of the Federal Rules of Civil Procedure provides: “The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.” FED. R. CIV. P. 38(a).

¹⁵² See Miller, *supra* note 144, at 1075 (“As the Supreme Court itself made clear, the motion must be employed consistently with a litigant’s right to a day in court and our constitutional commitment, echoed in Federal Rule 38 . . .”).

¹⁵³ See *supra* text accompanying notes 126–128.

¹⁵⁴ See Thomas, *supra* note 4, at 176-77 (discussing differences — based on both timing and history — between summary judgment on the one hand, and directed verdict and judgment notwithstanding the verdict).

¹⁵⁵ See *supra* text accompanying notes 147–153.

¹⁵⁶ See MOORE ET AL., *supra* note 44, § 56.07[3][d] (noting that, in the context of qualified immunity, “the concept of a discretionary denial of summary judgment conflicts with the defendant’s substantive immunity rights”).

free to apply their own final judgment rules.¹⁵⁷ If that is true, then it is hard to see how there can be an absolute right to de novo review of qualified immunity denials on summary judgment.

III. THE CONTOURS OF THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT DENIALS

The previous Part established the viability, and indeed the logic, of an asymmetric standard of review for summary judgment; in particular, the standard of review should be more lax when the district court has denied the motion for summary judgment. This Part picks up where the previous Part left off, by trying to lay out the proper contours of the appellate standard of review for summary judgment.

To begin, recall that the asymmetric standard would apply only in decisions that turn at least in part on the existence of a factual dispute. It would *not* apply where the question at issue is a pure one of law.

There are two versions of the standard that are consistent with the language of Rule 56 and existing case law. The first — and broader — version provides discretion to a district judge to deny summary judgment where the judge determines that the existence of a genuine issue of material issue of fact for trial is close to the line. As a result, a court of appeals faced with such a case¹⁵⁸ should review the district court's denial under an "abuse of discretion" standard. Put another way, the court of appeals should put a "thumb on the scale" in favor of affirming the summary judgment denial: A court of appeals that is in substantial equipoise as to whether the summary judgment denial was properly denied should affirm the denial.¹⁵⁹

A second, narrower version would keep the laxer standard for denials, but only in cases where there is a right to a jury trial that has been exercised. This version follows from the notion that the laxer standard is a prophylactic to protect the Seventh Amendment jury trial

¹⁵⁷ See *Johnson v. Fankell*, 520 U.S. 911, 921 (1997) ("The right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in § 1291. The former right is fully protected by Idaho. The latter right, however, is a federal procedural right that simply does not apply in a nonfederal forum.").

¹⁵⁸ It would fall to the reviewing court to determine whether the case is indeed a "close" one. Cf. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (calling on habeas court reviewing state court conviction to determine whether it is "in *grave doubt* about whether or not that error is harmless"). The determination should consider the proximity of the evidence to the relevant burden of proof.

¹⁵⁹ This is drawn from the Supreme Court's standard of review for harmlessness of error in habeas cases. See *id.*; see also *supra* text accompanying notes 128–130.

right.¹⁶⁰ To be sure, the language of Rule 56 does not admit of a distinction between jury trials and bench trials.¹⁶¹ At the same time, one could say that the ordinary Rule 56 review standard gives way to the pressures of the Seventh Amendment. And, in any event, perhaps a laxer standard is implicitly acceptable where the judge who will decide the summary judgment motion would be the ultimate trier of fact.¹⁶²

A casual reader might acquiesce in the asymmetric standard, but be of the view that it doesn't matter very much (and perhaps acquiesce for that very reason) based on the belief that the effect of moving from a pure *de novo* standard to this would be *de minimis*. In fact, the effect is likely rather substantial. First, anecdotally at least there are many cases in the federal courts of appeals where the decision whether summary judgment is appropriate is close to the line.¹⁶³ Second, there is an argument that disputes that eventually generate actual litigation — and litigated cases that proceed further and further into the litigation process — are likely to be closer and closer.¹⁶⁴ This, in turn, suggests that many cases that survive to the summary judgment stage

¹⁶⁰ See *supra* text accompanying notes 142–152.

¹⁶¹ See, e.g., BRUNET ET AL., *supra* note 44, § 11:1 (“[T]here is nothing in Rule 56 that calls for judges to employ a different summary judgment process in bench trials from what they use in jury trials.”); Edward H. Cooper, *Revising Civil Rule 56: Judge Mark R. Kravitz and the Rules Enabling Act*, 18 LEWIS & CLARK L. REV. 591, 610 (2014) (“[T]here [is not] much reason to allow freer use of summary judgment in cases that are not to be tried to a jury, either because there is no right to a jury trial or because no party has demanded a jury trial.”).

¹⁶² See *Cook Inc. v. Bos. Sci. Corp.*, 333 F.3d 737, 741 (7th Cir. 2003) (“When litigants waive trial, and ask the judge to decide the case as if the record compiled in the pretrial proceedings were a trial record, appellate review is as of findings made after a trial, not as of a grant of summary judgment.”); Schwarzer, *supra* note 34, at 479 (“[I]n the absence of a genuine need to assess testimonial credibility or demeanor, the decision of issues which would otherwise go to the jury may be made on motion for summary judgment when trial is to the court.”); see also *U.S. Fid. & Guar. Co. v. Planters Bank & Tr. Co.*, 77 F.3d 863, 866 (5th Cir. 1996) (declining to decide whether “circuit law has recognized a ‘nonjury summary judgment standard’ different from the general summary judgment standard applied in jury cases”).

¹⁶³ See *Tolan v. Cotton*, 134 S. Ct. 1861, 1868–69 (2014) (noting Justice Alito’s observation that “a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment”).

¹⁶⁴ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 20 n.45 (1984) (presenting an economic model predicting a plaintiff success rate at trial that approaches 50 percent as the fraction of cases going to trial approaches zero); cf. Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661, 1675 (2010) (“Civil actions that cannot be resolved by negotiation and motions to dismiss are subject to more costly evaluative efforts, such as summary judgment after discovery or, once in a while, full-blown trial.”).

— let alone appeal of a summary judgment denial — will indeed be close cases.

There is no doubt that the proposed standard would have its biggest effect in cases where the summary judgment denial falls within the collateral order doctrine (and thus is immediately appealable). And the largest class of such denials is summary judgment motions that address whether government officials are entitled to qualified immunity. The effect of the proposed standard in these cases would extend both to the courts of appeals and to the Supreme Court.

Empirical study of the federal courts of appeals' treatment of appeals of summary judgment dispositions involving qualified immunity suggests that the asymmetric standard would have a substantial impact on the federal courts' docket. It seems that federal courts of appeals are, if anything, currently holding summary judgment denials to a more stringent standard than affirmances, i.e., in some sense affording more discretionary review to summary judgment *affirmances* than to denials.

To pursue the empirical analysis, I collected cases decided by three-judge federal courts of appeals panels between June 1, 2014¹⁶⁵ and May 31, 2015 that reviewed pretrial summary judgment decisions by district courts based on qualified immunity.¹⁶⁶ I excluded summary judgment denials where the court of appeals found an absence of

¹⁶⁵ Using June 1, 2014 as the starting date allowed me to ensure that all cases were decided after the Supreme Court clarified the standard of reviewability for interlocutory summary judgment denials in *Plumhoff v. Rickard*, which was decided on May 27, 2014. See *supra* note 73 and accompanying text.

¹⁶⁶ I employed the search 'advanced: DA(aft 05-31-2014 & bef 06-01-2015) & SY("summary judgment" & "qualified immunity") ("summary judgment" /p "qualified immunity")' in the federal courts of appeals database on WestlawNext.

This search pulled up both published and unpublished court opinions. It thus likely captured the vast majority of court of appeals actions on summary judgment in context of qualified immunity. And, even to the extent that the courts of appeals employ summary orders that do not make it onto Westlaw, still the Westlaw search revealed the universe of cases to which litigants and lawyers would look for information as to how the courts resolve these cases.

The dataset suffers from selection bias. While the dataset includes only cases ultimately resolved by both the district court and the court of appeals, not all district court decisions that can be appealed are in fact appealed (or are pursued through to a court of appeals decision). See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 150-54 (2002) (discussing the issue of who appeals and how often, and how that might impact empirical studies of courts); *id.* at 135-42 (same for settlement); *infra* note 172 (noting the possibility that district court qualified immunity denials might be appealed at a different rate from summary judgment grants).

appellate jurisdiction under *Johnson v. Jones*,¹⁶⁷ i.e., on the ground that the appeal sounded purely in questions of fact.¹⁶⁸ And, in order to have an equivalence between review of denials and grants, I excluded reviews of summary judgment grants that raised pure issues of fact. This left 259 cases in the dataset.

I explored in two ways the effect the district court's grant (or denial) of summary judgment¹⁶⁹ on whether the court of appeals reversed the district court. First, I coded for whether the court of appeals reversed or vacated the district court's ruling on summary judgment in its entirety ("complete reversals"), and, second, I coded for whether the court of appeals reversed or vacated any portion of the district court's qualified immunity-summary judgment ruling ("partial reversals") (or, put another way, whether the court of appeals did not completely affirm the district court's ruling).¹⁷⁰ I also coded for whether the court of appeals decision was "published" or "unpublished," with the thinking that the courts of appeals might be more inclined to publish opinions in more difficult, closer cases.¹⁷¹ Table A1 in the Appendix describes the data in the dataset.¹⁷²

¹⁶⁷ 515 U.S. 304, 313-14 (1995).

¹⁶⁸ See *supra* note 72 and accompanying text.

¹⁶⁹ To the extent that the district court granted in part and denied in part the summary judgment motion, I coded the district court action as a grant to the extent that the court of appeals considered the appeal of the non-movant, and as a denial to the extent that the court of appeals considered the appeal of the movant.

¹⁷⁰ Thus, all complete reversals by definition also qualify as partial reversals.

¹⁷¹ See Jonathan R. Nash, *Legal Defeasibility in Context and the Emergence of Substantial Indefeasibility*, in *THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY* 377, 394 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012) ("By agreeing that only some opinions handed down will be [published as] binding precedent, the judges on a court can focus their resources on deciding, and perfecting opinions in, cases that will, so to speak, 'really matter' going forward."); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 111 (2004) (explaining that staff attorneys on the courts of appeals screen cases for difficulty, with "light-weight" cases usually result[ing] in an unpublished disposition").

¹⁷² Of the 259 cases in the dataset, summary judgment was ultimately, after court of appeals review, completely denied in 77, or 29.7%, of the cases (63 cases where the court of appeals completely affirmed the district court's denial of qualified immunity plus 14 cases where the court of appeals completely reversed the district court's grant of immunity). This is broadly consistent with the finding of Professor Diana Hassel that district courts and courts of appeals together deny summary judgment approximately 20% of the time. See Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999). (I note that Professor Hassel includes district court cases that were not appealed; it is also unclear whether she counts a case twice where it was addressed by both the district court and court of appeals.)

Regardless of whether I looked at complete or partial reversals, and whether I focused only on published decisions or not, the data indicate that a court of appeals is far more likely to reverse or vacate a district court's denial, than affirmance, of a summary judgment motion in the context of qualified immunity. Consider first complete reversals. As summarized in Table A2 in the Appendix, in approximately 20.9% of the 259 cases in the dataset the court of appeals completely reversed the district court. Thus, in the absence of a relationship between the polarity of the district court's decision and the court of appeals' disposition, one would expect to see the court of appeals completely reverse the district court approximately 20.9% of the time, regardless of the outcome in the district court. For cases where the district court denied summary judgment, the court of appeals completely reversed the district court approximately 36.0% of the time; and for cases where the district court granted summary judgment, the court of appeals completely reversed approximately 9.5% of the time. The difference between the observed and expected values is statistically significant at the 1% level ($p = 0.000$) according to a chi-square test with one degree of freedom. The data indicate that a court of appeals panel was 5.36 times more likely to completely reverse a summary judgment denial than a summary judgment grant.¹⁷³

The data for partial reversals, summarized in Table A3 in the Appendix, are to similar effect. In approximately 27.0% of the 259 cases in the dataset the court of appeals at least partially reversed the district court. Thus, in the absence of a relationship between the polarity of the district court's decision and the court of appeals' disposition,¹⁷⁴ one would expect to see the court of appeals completely reverse the district court approximately 27.0% of the time, regardless of the outcome in the district court. For cases where the district court denied summary judgment, the court of appeals partially reversed the district court approximately 43.2% of the time; and for cases where the district court granted summary judgment, the court of appeals completely reversed approximately 14.9% of the time. The difference

¹⁷³ We can compare the chance of a complete reversal where the district court denied summary judgment with that where the district court granted summary judgment by dividing the odds of such a vote for summary judgment denials (.360/.640) by the odds of such a vote for summary judgment grants (.095/.905). The odds ratio (.563/.105) indicates that a court of appeals panel is 5.36 times more likely to completely reverse a summary judgment denial than a summary judgment grant.

¹⁷⁴ This expectation is subject to selection bias in the sample: It is conceivable (and perhaps likely), for example, that government officials will appeal district court summary judgment denials at a different rate than will plaintiffs appeal summary judgment grants.

between the observed and expected values is statistically significant at the 1% level ($p = 0.000$) according to a chi-square test with one degree of freedom. The data indicate that a court of appeals panel was 4.35 times more likely to partially reverse a summary judgment denial than a summary judgment grant.¹⁷⁵

The results are even more pointed if we limit our consideration to cases decided by the courts of appeals rendered by published opinion — cases, in other words, that one might expect to be “closer” cases.¹⁷⁶ Consider first complete reversals. As summarized in Table A4 in the Appendix, in approximately 23.8% of the 105 cases in the dataset ultimately resolved by published opinion, the court of appeals completely reversed the district court. Thus, in the absence of a relationship between the polarity of the district court’s decision and the court of appeals’ disposition, one would expect to see the court of appeals completely reverse the district court approximately 23.8% of the time, regardless of the outcome in the district court. For cases where the district court denied summary judgment, the court of appeals completely reversed the district court 38.6% of the time; and for cases where the district court granted summary judgment, the court of appeals completely reversed approximately 6.3% of the time. The difference between the observed and expected values is statistically significant at the 1% level ($p = 0.000$) according to a chi-square test with one degree of freedom. The data indicate that a court of appeals panel proceeding by published opinion was 9.39 times more likely to completely reverse a summary judgment denial than a summary judgment grant.¹⁷⁷

The data for partial reversals where the ultimate determination is by published opinion, summarized in Table A5 in the Appendix, are to similar effect as, but again more pronounced than, their counterparts

¹⁷⁵ We can compare the chance of a partial reversal where the district court denied summary judgment with that where the district court granted summary judgment by dividing the odds of such a vote for summary judgment denials (.432/.568) by the odds of such a vote for summary judgment grants (.149/.851). The odds ratio (.761/.175) indicates that a court of appeals panel is 4.35 times more likely to partially reverse a summary judgment denial than a summary judgment grant.

¹⁷⁶ See *supra* note 171 and accompanying text.

¹⁷⁷ We can compare, in cases with published court of appeals opinions, the chance of a complete reversal where the district court denied summary judgment with that where the district court granted summary judgment by dividing the odds of such a vote for summary judgment denials (.386/.614) by the odds of such a vote for summary judgment grants (.063/.938). The odds ratio (.629/.067) indicates that a court of appeals panel proceeding by published opinion is 9.39 times more likely to completely reverse a summary judgment denial than a summary judgment grant.

for the entire dataset. In approximately 40.5% of the 105 cases in the dataset ultimately resolved by published opinion, the court of appeals at least partially reversed the district court. Thus, in the absence of a relationship between the polarity of the district court's decision and the court of appeals' disposition, one would expect to see the court of appeals partially reverse the district court approximately 40.5% of the time, regardless of the outcome in the district court. For cases where the district court denied summary judgment, the court of appeals partially reversed the district court approximately 49.1% of the time; and for cases where the district court granted summary judgment, the court of appeals completely reversed approximately 16.7% of the time. The difference between the observed and expected values is statistically significant at the 1% level ($p = 0.000$) according to a chi-square test with one degree of freedom. The data indicate that a court of appeals panel proceeding by published opinion was 4.83 times more likely to partially reverse a summary judgment denial than a summary judgment grant.¹⁷⁸

In sum, across various metrics, the data indicate that courts of appeals currently are much more likely to reverse summary judgment denials than grants.¹⁷⁹ An asymmetric standard of review would thus likely have a substantial impact on summary judgment review by the courts of appeals.

¹⁷⁸ We can compare the chance of a partial reversal where the district court denied summary judgment with that where the district court granted summary judgment by dividing the odds of such a vote for summary judgment denials (.491/.509) by the odds of such a vote for summary judgment grants (.167/.833). The odds ratio (.965/.200) indicates that a circuit court judge is 4.83 times more likely to partially reverse a summary judgment denial than a summary judgment grant.

¹⁷⁹ The results are robust for the subset of cases involving *pro se* litigants. Of the 259 cases in the dataset, 42 involved a *pro se* litigant at the court of appeals. A Fisher's exact test revealed that the likelihood of having the court of appeals fully reverse a district court's summary judgment denial was, with statistical significance at the 1% level ($p = 0.001$), different from the likelihood of a reversal of a district court's summary judgment grant.

The results are also substantially robust when cases are examined for individual circuits. I considered circuits that contributed at least 20 cases to the dataset. The Fifth (37), Sixth (42), Eighth (40), Tenth (27), and Eleventh (40) Circuits met this criterion. The rate at which the court of appeals reversed district court summary judgment denials as opposed to grants was statistically significant for the Fifth ($p = 0.011$ for Fisher's exact test, significant at the 5% level), Eighth ($p = 0.000$ for chi-squared test, significant at the 1% level), and Tenth ($p = 0.004$ for Fisher's exact test, significant at the 1% level) Circuits. The result for the Eleventh Circuit approached significance at the 10% level ($p = 0.11$ for Fisher's exact test). Only the Sixth Circuit produced a result that did not even approach significance ($p = 0.554$ for chi-squared test).

The official adoption of an asymmetric standard of review has potential ramifications not only for the courts of appeals, but also for the Supreme Court. In particular, it may resonate in the context of Supreme Court review of a case where the court of appeals has affirmed the district court's denial of summary judgment. A laxer standard for summary judgment denials suggests the Supreme Court ought to be reluctant to reverse such denials, unless the case is not one where summary judgment is a close question. And, indeed, in two important cases decided over the last decade awarding summary judgment to a government defendant on the ground that no constitutional right was violated — *Scott v. Harris*¹⁸⁰ and *Plumhoff v. Rickard*¹⁸¹ — the Supreme Court has emphasized that summary judgment was *not* a close question. The Supreme Court rested its decision in *Scott* on videotape evidence that the eight-Justice majority found overwhelmingly supported summary judgment.¹⁸² The Court majority, it seems, viewed the videotape evidence as “harmproof” — that is, as “properly admitted evidence that is powerful enough to overcome other evidence . . . that might suggest another conclusion.”¹⁸³ One thus might defend *Scott* as consistent with a deferential standard of review for summary judgment denials in close cases, since the Court evidently viewed *Scott* as far from a close case¹⁸⁴ (though whether that is objectively the case is subject to much debate¹⁸⁵). Though there was no videotape or other “objective” evidence on which the Justices could rely in *Plumhoff*, the Justices there also — this time, unanimously — found the case not a close one, explaining that “the record conclusively disprove[d]” the plaintiff's position.¹⁸⁶

¹⁸⁰ 550 U.S. 372 (2012).

¹⁸¹ 134 S. Ct. 2012, 2024 (2014).

¹⁸² See *Scott*, 550 U.S. at 378-81.

¹⁸³ Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 205 (2012).

¹⁸⁴ See, e.g., *Scott*, 550 U.S. at 384 (“[I]t is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.”).

¹⁸⁵ See *id.* at 389 (Stevens, J., dissenting) (noting that, while the vote in favor of reversal was 8-1 in the Supreme Court, including the votes of the district judge and the unanimous court of appeals judges reduces the advantage to 8-5); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879-81 (2009) (providing empirical evidence that a person's cultural background might affect how one views the videotape).

¹⁸⁶ See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-22 (2014).

Before concluding, it is important to pause a moment and emphasize something that I have not established, and that — despite endorsement by some scholars — I believe neither the language of Rule 56 nor governing precedent supports: the notion that efficiency concerns should justify more deferential review of district court summary judgment denials. Some commentators argue that a district judge should have freedom to deny summary judgment when the cost to the judge of determining the summary judgment motion is (or at least can be assessed to be) greater than the cost of simply moving forward with trial.¹⁸⁷ Such a standard allows the costs to the judicial system to offset the interests of the parties. While this might make good sense from the standpoint of societal efficiency (and no doubt happens in practice¹⁸⁸), it finds no support in either the language of Rule 56 or in existing caselaw.¹⁸⁹

CONCLUSION

This Article has argued that, contrary to common statements in appellate court opinions, the standard of review for summary judgment — where the decision turns at least in part on the existence of a factual dispute — is not, and should not be, *de novo*. In cases where the decision concerns whether or not there is a genuine issue of material fact, the district courts ought to have some discretion to deny

¹⁸⁷ See, e.g., Friedenthal & Gardner, *supra* note 44, at 126 (advocating for amendment of Rule 56 such that, where “the cost upon the nonmovant in meeting a Rule 56 motion . . . is very high and it would be just as efficient to conduct the trial itself, a judge should have the discretion to deny summary judgment”).

¹⁸⁸ Former United States District Judge Nancy Gertner explains:

Under Rule 56 of the Federal Rules of Civil Procedure, the judge must “state on the record the reasons for granting or denying the motion,” which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement — “denied” — and the case moves on to trial. Of course, nothing prevents the judge from writing a formal decision, but given caseload pressures, few federal judges do. (During one case-management program in my district, the trainer, a senior judge, told the assembled judges, “If you write a decision, you have failed.” The message was clear: you would only write a decision when you absolutely had to.)

Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 113 (2012) (footnotes omitted) (quoting FED. R. CIV. P. 56(a)).

¹⁸⁹ See, e.g., Cooper, *supra* note 161, at 610 (explaining that “[t]he efficiency advantages of avoiding jury trial cannot be counted as justification” for a different summary judgment standard.)

I remain neutral here as to whether the language of the Rule should be amended to allow such a result.

summary judgment. Accordingly, an appellate court in such a case ought to review the district court's denial of summary judgment for abuse of discretion. Put another way, in a close summary judgment case where the district court has denied summary judgment, the court of appeals ought to put a thumb on the scale of affirming the denial.

This standard of review offers some validity to occasional statements by the Supreme Court and the courts of appeals that summary judgment denials warrant review under an "abuse of discretion" standard. By serving prophylactically to protect the Seventh Amendment right to a jury trial, it also aligns well with concerns expressed by scholars over the constitutionality of summary judgment.

APPENDIX

Table A1. Raw data on qualified immunity cases decided June 1, 2014-May 31, 2015 by the federal courts of appeals, broken down by whether the court of appeals completely affirmed, partially (but not fully) reversed, or completely reversed, the district court.

		All Cases	Published Cases
District Court Denied Summary Judgment	<i>Court of Appeals completely affirmed</i>	63	29
	<i>Court of Appeals partially reversed</i>	8	6
	<i>Court of Appeals completely reversed</i>	40	22
	TOTAL	111 (42.86%)	57 (54.29%)
District Court Granted Summary Judgment	<i>Court of Appeals completely affirmed</i>	126	40
	<i>Court of Appeals partially reversed</i>	8	3
	<i>Court of Appeals completely reversed</i>	14	5
	TOTAL	148 (57.14%)	48 (45.71%)
TOTAL	259 (100.00%)	105 (100.00%)	

Table A2. In qualified immunity cases decided June 1, 2014-May 31, 2015, correlation between whether the district court granted or denied summary judgment, and whether the court of appeals completely reversed the district court.

		<i>Whether the court of appeals completely reversed the district court.</i>		
		No	Yes	Total
<i>Whether the district court granted summary judgment.</i>	No	71 (63.96)	40 (36.04)	111 (100.00)
	Yes	134 (90.54)	14 (9.46)	148 (100.00)
Total		205 (79.15)	54 (20.85)	259 (100.00)

Note: Row percentages are reported in parentheses. The p -value from a chi-squared test is 0.000***.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table A3. In qualified immunity cases decided June 1, 2014-May 31, 2015, correlation between whether the district court granted or denied summary judgment, and whether the court of appeals reversed any part (or all) of the district court's decision.

		<i>Whether the court of appeals reversed any part (or all) of the district court's decision.</i>		
		No	Yes	Total
<i>Whether the district court granted summary judgment.</i>	No	63 (56.76)	48 (43.24)	111 (100.00)
	Yes	126 (85.14)	22 (14.86)	148 (100.00)
Total		189 (72.97)	70 (27.03)	259 (100.00)

Note: Row percentages are reported in parentheses. The p -value from a chi-squared test is 0.000***.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table A4. In *published* qualified immunity cases decided June 1, 2014-May 31, 2015, correlation between whether the district court granted or denied summary judgment, and whether the court of appeals completely reversed the district court.

		<i>Whether the court of appeals completely reversed the district court.</i>		
		No	Yes	Total
<i>Whether the district court granted summary judgment.</i>	No	35 (61.40)	22 (38.60)	57 (100.00)
	Yes	45 (93.75)	3 (6.25)	48 (100.00)
Total		80 (76.19)	25 (23.81)	105 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.000***.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table A5. In *published* qualified immunity cases decided June 1, 2014-May 31, 2015, correlation between whether the district court granted or denied summary judgment, and whether the court of appeals reversed any part (or all) of the district court's decision.

		<i>Whether the court of appeals reversed any part (or all) of the district court's decision.</i>		
		No	Yes	Total
<i>Whether the district court granted summary judgment.</i>	No	29 (50.88)	28 (49.12)	57 (100.00)
	Yes	40 (83.33)	8 (16.67)	48 (100.00)
Total		69 (59.46)	36 (40.54)	105 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.000***.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.