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The Principle of Party Presentation

Jeffrey M. Anderson

Samford University Cumberland School of Law

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The Principle of Party Presentation

JEFFREY M. ANDERSON†

ABSTRACT

Our adversarial system of adjudication is characterized by active parties and (relatively) passive judges; the parties identify the issues in dispute, and the judge decides those issues. Sua sponte decision-making—whereby a judge raises and decides new issues not presented by the parties—undermines this adversarial system. For decades, courts and commentators have struggled to explain when sua sponte decision-making may be appropriate. That issue was particularly important to the late Justice Ruth Bader Ginsburg, who has been described as “The Great Proceduralist.” In a series of oral arguments and opinions during her tenure on the Supreme Court, Justice Ginsburg repeatedly invoked the “principle of party presentation”—a term used in comparative procedure literature to describe the principle that the parties, not the judge, should determine the issues to be decided in a case—and identified real limits to judicial discretion in raising new issues. One of her last

†Assistant Professor of Law and Director, Lawyering and Legal Reasoning Program, Samford University Cumberland School of Law. B.A., Furman University; J.D./M.A. (Legal History), University of Virginia School of Law. The author thanks Ramona Albin, Brannon Denning, and Tim McFarlin for their helpful comments and suggestions.

opinions, in United States v. Sineneng-Smith (2020), reaffirmed a robust principle of party presentation and rebuked a court of appeals that raised a new issue without sufficient justification, relegated the parties to a secondary role in the litigation, and ultimately disregarded the issues they presented. In Justice Ginsburg's opinions, including Sineneng-Smith, litigants and judges alike may find useful guideposts that constrain judicial discretion in deciding whether to raise new issues sua sponte. Judges considering whether to raise a new issue sua sponte should determine whether they are required, forbidden, or permitted to do so; and where permitted, they should explain how specific institutional interests of the judiciary balance or outweigh the parties' interest in controlling the litigation. If a judge wishes to depart from the principle of party presentation, the judge should explain the specific circumstances and the interests that make the case exceptional—something more than the judge's having what he or she thinks is a "better" theory of the case.

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INTRODUCTION

Although she is perhaps best known as a decades-long advocate for women’s equality under law, the late Justice Ruth Bader Ginsburg also made significant contributions to the fields of civil and appellate procedure—the rules that govern how issues may be presented to courts, and how courts may consider them, distinct from rules of substantive law.¹ A former professor of federal jurisdiction, remedies, conflict of laws, and civil procedure at Rutgers and Columbia,² Justice Ginsburg once confessed, “I would love to write all of the procedure decisions at the Supreme Court,

1. See Zachary D. Tripp & Gillian E. Metzger, *Professor Justice Ginsburg: Justice Ginsburg’s Love of Procedure and Jurisdiction*, 121 COLUM. L. REV. 729, 729 (2021) (describing Justice Ginsburg as “the Supreme Court’s leading civil procedure and federal jurisdiction maven”); Jeffrey S. Sutton, *Ruth Bader Ginsburg, The Great Proceduralist*, 81 OHIO ST. L.J. 605, 606 (2020) (stating that Justice Ginsburg “was the go-to justice when it came to untangling vexing procedural disputes”).

2. See Herma Hill Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 1, 11, 15 (2004). Professor Ginsburg also taught comparative law and comparative procedure at Rutgers. *Id.* at 11.

but none of us are allowed to be specialists.”³ In more than twenty-seven years on the Supreme Court, Justice Ginsburg authored more than eighty opinions addressing various aspects of federal civil procedure and jurisdiction.⁴ She was, in the estimation of at least one federal appellate judge, “the Great Proceduralist.”⁵

Among her colleagues on the Court, Justice Ginsburg was the most frequent expositor of the “principle of party presentation,” which generally requires a court to refrain from deciding issues that the parties in a lawsuit did not choose to present.⁶ This principle is crucial to an adversarial

3. *A Conversation with Justice Ruth Bader Ginsburg and Professor Aaron Saiger*, 85 *FORDHAM L. REV.* 1497, 1513–14 (2017) [hereinafter *Conversation*]. Former law clerks recalled that Justice Ginsburg “had a deep and abiding love for these foundational (but less flashy) parts of the legal system” and “eagerly sought out assignments to write the opinions in [procedural] cases.” Tripp & Metzger, *supra* note 1, at 729.

4. Tripp & Metzger, *supra* note 1, at 729 & n.3 (estimating that these decisions account for roughly one-third of all of Justice Ginsburg’s majority opinions). For examples of Justice Ginsburg’s procedural decisions, see *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (personal jurisdiction); *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014) (removal procedure); *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (personal jurisdiction); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (same); *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007) (subject-matter jurisdiction and *forum non conveniens*); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (jurisdictional requirements under Title VII); *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006) (citizenship of national banks); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) (*Rooker-Feldman* doctrine); *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) (amendment of pleadings); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (personal jurisdiction and subject-matter jurisdiction); and *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (removal procedure).

5. Sutton, *supra* note 1, at 609. Justice Ginsburg’s academic writings also addressed procedural issues. See, e.g., Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 *HARV. L. REV.* 798 (1969); Ruth B. Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 *COLUM. L. REV.* 256 (1965); Ruth B. Ginsburg, *The Competent Court in Private International Law: Some Observations on Current Views in the United States*, 20 *RUTGERS L. REV.* 89 (1965).

6. See Amanda Frost, *The Limits of Advocacy*, 59 *DUKE L.J.* 447, 455 (2009) (describing “the norm in favor of ‘party presentation’ and against ‘judicial issue creation’” as “the conventional view that the parties to litigation, and not the

system of adjudication, which emphasizes party control of litigation and the judge's impartial evaluation of the parties' arguments.⁷

Party presentation makes good sense in the abstract—especially in a system marked by constitutional limitations on judicial power—but in litigation the parties do not always identify or press every potential issue in a case, whether by inadvertence or strategic choice.⁸ In that situation, a judge may fear that party-driven litigation will not produce the clearest, fairest, or most efficient outcome. And that concern may prompt the judge to raise an issue *sua sponte*—on his or her own motion—such that the judge may end up deciding the case on a ground that the parties never presented for decision.⁹

Such a result does not comfortably fit the adversarial system of adjudication that is “[t]he heart of the American legal system.”¹⁰ It raises questions about the neutrality and

judge, are responsible for raising the legal questions that will ultimately be resolved by the court”); Luke Ryan, *How the Party Presentation Rule Limits Judicial Discretion*, 4 ST. THOMAS J. COMPLEX LITIG., Summer 2017, at 31, 32 (stating that the principle of party presentation is “a norm against judicially created legal arguments”).

7. See Frost, *supra* note 6, at 495 (describing party presentation as “a central tenet of the adversarial system of justice”); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) (“The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard.”).

8. See Frost, *supra* note 6, at 495 (stating that the adversarial system threatens to “break[] down . . . when the parties have either intentionally or accidentally overlooked a legal argument relevant to the dispute”).

9. See Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487, 495–96 (1980) [hereinafter Landsman, *Decline of the Adversary System*] (observing that when counsel “fail to carry out their duty,” judges may “assume responsibility for the development of cases” because of a desire to discover the truth or simply to ensure a balanced presentation).

10. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 247 (2002); see Frost, *supra* note 6, at 495 (“[J]udicial power to raise new legal claims and theories, and

impartiality of the judge, which in turn raises questions about the integrity of the judicial proceeding itself.¹¹ Nevertheless, departure from the principle of party presentation may be necessary to serve other interests of the judicial branch—including the interest in correctly stating the law for the particular case and for later cases.¹²

The line between permissible and impermissible sua sponte rulings is not clearly marked. Courts generally have discretion to raise new issues sua sponte, and until recently there were few, if any, clear limits on judicial discretion. In a system where judges have discretion to decide whether and when to raise new issues, the principle of party presentation may be eroded by unexplained, seemingly ad hoc exceptions.¹³ Although the Supreme Court has attempted to explain the principles that should guide judges' decisions whether to raise new issues sua sponte, such decisions

then to decide cases on grounds that the parties did not identify and perhaps do not wish to assert, is seemingly at odds with the judicial role in the American legal system.”); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in judgment) (“The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.”).

11. See *Milani & Smith*, *supra* note 10, at 279 (“Sua sponte decisions are . . . contrary to the adversary process’s reliance ‘on a neutral and passive decision maker to adjudicate disputes after they have been aired by the adversaries in a contested proceeding.’” (quoting STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 35–39 (1988))); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”).

12. See *Frost*, *supra* note 6, at 470–71 (arguing that “federal courts have the power to ‘say what the law is,’ and thus must be able to take notice of legal sources, arguments, and claims omitted by the parties when necessary to avoid issuing inaccurate or incomplete statements of law”).

13. See Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 11–12 (2014) (describing the rule against considering new issues as merely a “presumption, pockmarked by exceptions”); *Frost*, *supra* note 6, at 463 (observing that federal appellate courts have acted “with little rhyme or reason” in raising new merits issues); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1256 (2002) (stating that federal courts have “failed to follow any consistent practice about sua sponte holdings”).

remain controversial; some commentators argue that courts generally should refrain from raising and deciding new issues,¹⁴ while others have called for a more active approach.¹⁵

This Article analyzes Justice Ginsburg's approach to sua sponte decision-making in federal courts, most recently in *United States v. Sineneng-Smith*. Part I describes the principle of party presentation as one critical aspect of our adversarial system of adjudication, which helps ensure that judgments command the respect of parties and the public alike. Part II examines the operation of the principle of party presentation from the 1920s (when a comparative procedure scholar first coined the term) through the 1980s, when judges had seemingly unbounded discretion to raise new issues sua sponte. Parts III and IV analyze Justice Ginsburg's

14. See, e.g., Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The "Gorilla Rule" Revisited*, 17 J. APP. PRAC. & PROCESS 113, 116 (2016) (arguing that "allowing an appellate court to reach out and grant relief not requested, based on arguments not made, both disserves the litigants and exercises a power that appellate courts should be loath to use"); Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1619–20 (2012) (arguing that the Supreme Court and federal appellate courts "should confine the manner in which they exercise their discretion [to raise new issues]"); Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 971 (2011) (arguing that the Supreme Court's practice of appointing an *amicus curiae* to defend a lower court judgment when no party defends the judgment has "tested the extreme outer bounds of our adversary system"); Milani & Smith, *supra* note 10, at 315 (arguing that "[w]hile appellate courts have the power to raise issues sua sponte, they should cease deciding cases on such issues without giving the parties an opportunity to be heard through supplemental briefing and argument").

15. See, e.g., Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 321 (2014) (arguing that courts should identify "the full range of pertinent issues and arguments in a case" and invite the parties and others to address them); Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 294 (2004) ("strongly urging judges to follow their instincts about unargued points that they believe may be important to resolution of a particular case"); Frost, *supra* note 6, at 447 ("defend[ing] judicial issue creation as a necessary corollary to the federal judiciary's constitutional obligation to articulate the meaning of contested questions of law").

exposition and application of the principle in a series of opinions during her tenure on the Court, culminating in *Sineneng-Smith*—opinions that reasserted the primacy of party presentation and identified certain limits to judicial discretion. Part V argues that judges considering whether to raise a new issue sua sponte should determine whether they are required, forbidden, or permitted to do so; and where permitted, they should explain how specific institutional interests of the judiciary balance or outweigh the parties' interest in controlling the litigation. In other words, if a judge would depart from the principle of party presentation, then he or she should explain the specific circumstances and the interests that make the case exceptional—something more than the judge's having what he or she thinks is a “better” theory of the case.

I. THE PRINCIPLE OF PARTY PRESENTATION IN AN ADVERSARIAL SYSTEM OF ADJUDICATION

In an important work of comparative procedure written in 1923, Professor Robert Millar identified the “principle of party-presentation” as “the idea that the scope and content of the judicial controversy are to be defined by the parties or, conversely, that the court is restricted to a consideration of what the parties have put before it.”¹⁶ Related to the

16. Robert W. Millar, *The Formative Principles of Civil Procedure—I*, 18 ILL. L. REV. 1, 9 (1923) [hereinafter Millar, *Principles of Civil Procedure*]; see also Robert Wyness Millar, *The Fortunes of the Demurrer*, 31 ILL. L. REV. 429, 432–33 (1936) (stating that “[t]he Germanic proceeding was governed in the fullest degree by the principle of party-presentation,” whereby “[t]he court, so far as concerns the controversy itself, was wholly passive” and “the parties absolutely controlled the course of the proceeding, with the court as an umpire in the [strictest] sense”). This principle was opposed to the “principle of judicial investigation,” which required a court to search for the absolute truth in any matter, regardless of the parties' presentations. Millar, *Principles of Civil Procedure*, *supra*, at 11; see also Courtland H. Peterson, *An Introduction to the History of Continental Civil Procedure*, 41 U. COLO. L. REV. 61, 65 (1969) (contrasting the “principle of party presentation,” which “suggests that a court should be restricted to a consideration of the controversy which the parties have presented to it,” with the principle of “judicial investigation,” which “would allow the court to seek out controversy for decision . . . to define its scope”).

principle of party presentation, Millar explained, was the “principle of dispositive election”—the principle that a party in litigation “has full control over his substantive law and procedural rights involved in the cause and denotes his power of free election as to the exercise or non-exercise of these rights.”¹⁷ Taken together, these principles mean that the parties to litigation have the primary *responsibility* to identify the issues for decision and the *freedom* to choose which issues (among all possible issues) to present.

The principle of party presentation, which “effectuat[es]” the principle of dispositive election, “enjoyed almost uninterrupted dominance” in civil procedure from the Roman system to then-existing systems throughout Europe.¹⁸ Not surprisingly, American procedure also “conform[ed] to the principle of party-presentation.”¹⁹ In civil litigation (at least), the parties—not the court—usually decided which issues the court should decide.

Indeed, the principle of party presentation is a critical aspect of the adversarial system of adjudication that is the hallmark of American law.²⁰ In an adversarial system—

17. Millar, *Principles of Civil Procedure*, *supra* note 16, at 12.

18. *Id.* at 15; *see also* Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 215 (1937) (describing party presentation as “the controlling principle which had characterized civil procedure in England, and indeed throughout western continental Europe, since the Norman conquest”).

19. Millar, *Principles of Civil Procedure*, *supra* note 16, at 16; *see also* Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737 (1939) (“English and American civil procedure, following the Germanic tradition, has tended to rely exclusively upon the [system of party presentation.]”); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 517 (1925) (“Our system calls for the development of issues by the parties themselves in formal manner in advance of the actual trial.” (emphasis omitted)).

20. *See* Sward, *supra* note 7, at 301–02 (describing the adversarial system as “[t]he hallmark of American adjudication,” which is “characterized by party control of the investigation and presentation of evidence and argument”). Indeed, the adversarial system has been employed by American courts since at least the Revolution. *See* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983) [hereinafter Landsman,

distinguished from an inquisitorial system—the parties are active litigants, identifying and developing facts and legal arguments for evaluation by a passive, neutral judge.²¹ The “central precept” of an adversarial system is that the combination of active litigants and passive, neutral judges most likely produces results that are “acceptable both to the parties and to society.”²²

A. *Active Parties*

In our adversarial system of litigation, a court relies on the parties (and usually their counsel) to identify the most relevant issues and arguments in any case.²³ The “basic principle” of our system is that “the parties, not the judge, have the major responsibility for and control over the definition of the dispute.”²⁴ Active litigants have the strongest incentives to prepare and present factual and legal arguments that advance their respective positions in a

Development of the Adversary System]; Stephan Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in That System*, 18 SAN DIEGO L. REV. 251, 252 (1981) [hereinafter Landsman, *Changing Role of the Advocate*]; Landsman, *Decline of the Adversary System*, *supra* note 9, at 487.

21. See Dodson, *supra* note 13, at 2 (“The American system of adversarial litigation and judicial passivity assumes that the parties get to frame the lawsuit structure, factual predicates, and legal arguments, while the court intervenes only to decide any motions the parties choose to make.”); Milani & Smith, *supra* note 10, at 247; Sward, *supra* note 7, at 302; Landsman, *Development of the Adversary System*, *supra* note 20, at 713.

22. Landsman, *Development of the Adversary System*, *supra* note 20, at 714. Indeed, the Supreme Court has described a “fair trial” as “one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

23. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) (explaining that an adversarial system “relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication” (emphasis omitted)); Sward, *supra* note 7, at 354 (describing the adversarial system as “a highly individualistic method of dispute resolution, leaving the formulation and presentation of the dispute entirely to the parties”).

24. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982) (adding that “our tradition is considered more adversarial than most”).

dispute; indeed, “[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”²⁵

Party control of litigation may be seen at various stages of litigation. A plaintiff in a civil case may determine (in the first instance) whether the case will be decided in state or federal court by selecting the cause(s) of action to assert and the parties to sue.²⁶ She may select the venue.²⁷ The parties may stipulate certain facts at trial, and the court will accept those stipulated facts even if they are incorrect.²⁸ The parties to a contract may stipulate the applicable law in any future dispute.²⁹ In a civil action, the parties may stipulate to a trial without a jury, and may stipulate to dismissal of the entire

25. *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment).

26. *See* 28 U.S.C. §§ 1331–1332; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (stating that the well-pleaded complaint rule “makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law”); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (“Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a ‘suit arising under’ the patent or other law of the United States by his declaration or bill.” (punctuation added)). The defendant may have something to say about whether a case should proceed in state or federal court. *See* 28 U.S.C. § 1441.

27. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 63 (2013) (stating that under the “plaintiff’s venue privilege,” “plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations)”).

28. *See Gary Lawson, Stipulating the Law*, 109 MICH. L. REV. 1191, 1208 (2011) (“Because courts routinely accept stipulations—even objectively false stipulations, unless their falseness appears on the face of the record—party control must, at least ordinarily, predominate over truth finding as the driving goal of adjudication.”).

29. *See United States v. Kashamu*, 656 F.3d 679, 685 (7th Cir. 2011) (“Ordinarily a court will enforce the choice of law rule selected by the parties, no questions asked, unless they select a foreign law that would be too difficult for the federal court to apply”); *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 73 (5th Cir. 1987) (applying Texas choice-of-law rules and stating that “[f]or cases involving contracts with choice-of-law clauses, the rule remains that if the parties agree that the contract will be governed by the laws of a particular state, then that intention prevails”).

action, without court approval.³⁰

Of course, a system that relies on active litigants requires active lawyers.³¹ Indeed, our adversarial system relies upon “a class of skilled professional advocates to assemble and present the [evidence] upon which decisions will be based.”³² Courts expect those advocates “to provide the legal skills necessary to organize the evidence and formulate the issues.”³³ As the Supreme Court has explained, “[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice.”³⁴ In any contested case, counsel’s function “is to make the adversarial testing process work,”³⁵ such that “the integrity of the adjudicative process itself depends upon the participation of the advocate.”³⁶

30. See FED. R. CIV. P. 39(a)(1) (nonjury trial); FED. R. CIV. P. 41(a)(1)(A)(ii) (voluntary dismissal).

31. See Landsman, *Changing Role of the Advocate*, *supra* note 20, at 254; Landsman, *Development of the Adversary System*, *supra* note 20, at 716.

32. Landsman, *Development of the Adversary System*, *supra* note 20, at 716; *see also* Herring v. New York, 422 U.S. 853, 862 (1975) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”); Anders v. California, 386 U.S. 738, 744 (1967) (“The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*.”).

33. Landsman, *Development of the Adversary System*, *supra* note 20, at 716; *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) (stating that “[t]he right to counsel plays a crucial role in the adversarial system . . . since access to counsel’s skill and knowledge is necessary” to enable criminal defendants to make use of their constitutional rights at trial). Indeed, “[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Strickland*, 466 U.S. at 685.

34. *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

35. *Strickland*, 466 U.S. at 690; *see* Landsman, *Declining Adversary System*, *supra* note 9, at 495 (stating that the advocates’ “job is to insure a sharp adversarial contest”).

36. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382 (1978); *see* Landsman, *Changing Role of the Advocate*, *supra* note 20, at 254 (stating that “[b]oth the litigating parties and the decisionmaker depend on

This “party control” aspect of the adversarial system enhances the parties’ and the public’s acceptance of court decisions.³⁷ When a party perceives that he has been allowed to make his own decisions about the conduct of the litigation and to make the case that seems best to him, “he is more likely to accept the result whether favorable or not.”³⁸ At the same time, “by allowing each litigant maximum control over the kinds of claims [a party] can assert and the way in which they will be asserted,” the adversarial system “tends to individualize the law.”³⁹ Thus, relying on active litigants to frame and define the factual and legal issues for resolution helps ensure that the ultimate decision will be “tailored to [the] needs” of the parties to the dispute.⁴⁰

B. *Passive Judges*

In comparison with the parties, the judge in an adversarial system is expected to be “passive” and neutral.⁴¹ The judge “is expected to refrain from making any judgments until the conclusion of the contest and is prohibited from becoming actively involved in the gathering of evidence or in the parties’ settlement of the case.”⁴² That feature of

[the] efforts” of trained advocates).

37. See Landsman, *Changing Role of the Advocate*, *supra* note 20, at 253.

38. Landsman, *Decline of the Adversary System*, *supra* note 9, at 526; Goldman, *supra* note 14, at 943 (explaining that the adversary system promotes the acceptability of judgments “by providing parties with procedural justice: control over their own cases and a fair opportunity to be heard. Whether a party wins or loses, she is more likely to accept the outcome when her autonomy has been respected and her arguments fully considered.” (citation omitted)).

39. Landsman, *Changing Role of the Advocate*, *supra* note 20, at 253.

40. Landsman, *Development of the Adversary System*, *supra* note 20, at 715.

41. See *id.* at 714; see also *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 181 (1989) (Scalia, J., dissenting) (describing a court’s “passive” role as “one of the natural components of a system in which courts are not inquisitors of justice but arbiters of adversarial claims”).

42. See Landsman, *Development of the Adversary System*, *supra* note 20, at 715; Sward, *supra* note 7, at 302 (explaining that “the adversary system is characterized by . . . a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard”); see also Fuller, *supra* note

American practice was apparent to Alexis de Tocqueville, who observed almost two centuries ago that “[t]here [was] nothing naturally active about judicial power [in the United States]; to act, it must be set in motion. . . . [I]t does not on its own prosecute criminals, seek out injustices, or investigate facts.”⁴³ As more recent authorities have explained, “what makes a system adversarial rather than inquisitorial” is “the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments . . . adduced by the parties.”⁴⁴

Not only does the presence of a passive, neutral decision-maker help ensure “an evenhanded consideration of each case,” but it also helps “convince society that the judicial system is trustworthy.”⁴⁵ The institutional integrity of the judicial branch depends on the judge’s demonstrating neutrality, because society has a “legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve . . . disputes with detachment and impartiality.”⁴⁶

Not just the fact, but also the appearance: For decades, the Supreme Court has recognized that “justice must satisfy the appearance of justice.”⁴⁷ That is so because “preserv[ing]

36, at 384 (“The deciding tribunal . . . comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant’s case is the most effective expression of its merits.”).

43. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 100 (J.P. Mayer ed., George Lawrence trans., 1969).

44. *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991); *see Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006).

45. Landsman, *Development of the Adversary System*, *supra* note 20, at 715.

46. *Liteky v. U.S.*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring in the judgment).

47. *Offutt v. United States*, 348 U.S. 11, 14 (1954); *see Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988); *In re Murchison*, 349 U.S. 133, 136 (1955). As the Court explained in *Offutt*, a judge must “represent[] the impersonal authority of law” and should not become “personally embroiled” with the parties or their counsel.

both the appearance and reality of fairness” in the adjudicative process “generat[es] the feeling, so important to popular government, that justice has been done.”⁴⁸ In other words, the perception of justice—by the parties to litigation and the public alike—depends, in significant part, on the appearance of a fair process. And “[j]udicial passivity . . . helps to ensure the appearance of fairness.”⁴⁹

A passive, neutral judge cannot be (or be perceived to be) an advocate for either party or for any particular outcome.⁵⁰ As Professor Lon Fuller explained, the distinct roles of advocate and judge “must be played to the full without being muted by qualifications derived from the others.”⁵¹ Of course, a judge—like any lawyer—must be able to consider a legal issue *both* objectively *and* from the perspective of an interested party. But unlike any other lawyer, the judge must actually decide the contested issue and enter a judgment that commands the respect of the parties and the public alike. “The difficulties of [the] undertaking”—setting aside neutrality long enough to see the case from an interested party’s perspective, and then reclaiming neutrality to render a decision—“are obvious.”⁵² “If it is true,” Professor Fuller wrote, “that a man in his time must play many parts, it is scarcely given to him to play them all at once.”⁵³ To maximize the likelihood of a neutral, impartial

348 U.S. at 17.

48. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (Frankfurter, J., concurring)); *see also* *Lankford v. Idaho*, 500 U.S. 110, 121–22 (1991).

49. Landsman, *Development of the Adversary System*, *supra* note 20, at 715. As the Court in *Marshall* explained, the impartiality of the judge “serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.” 446 U.S. at 250.

50. *See* *Frost*, *supra* note 6, at 460–61 (“[B]ecause the decisionmaker must remain impartial, he cannot serve as an advocate for the interests of either party.”).

51. Fuller, *supra* note 36, at 382.

52. *Id.* at 383.

53. *Id.*

judgment that will command the respect of the parties and the public, a judge must not attempt to play the role of advocate in the course of resolving a dispute.⁵⁴

C. *The Problem of Sua Sponte Decision-Making in an Adversarial System*

The danger of “dispens[ing] with the distinct roles” of litigant and judge is often seen in the context of sua sponte decision-making—where the judge raises a new issue on his or her own motion, without prompting from any party.⁵⁵ This circumstance may arise in a district court, where the judge spots an issue that neither party has spotted. Or it may arise in a court of appeals, where a panel spots an issue that neither the parties nor the district court spotted. It may even arise in the Supreme Court, which may refine or recast questions presented in a petition for a writ of certiorari or decide different issues that are related to the questions presented.

Consider the context of appellate review. As a general matter, a court of appeals “will limit its review to the issues raised by the parties . . . and will not address issues that neither party has raised, matters raised in the first instance on appeal, matters not before the lower court, matters outside the record on appeal, or waived claims or arguments.”⁵⁶ This “rule against considering new issues on appeal is as old as appellate review.”⁵⁷

54. See *id.*; *Horne v. Elec. Eel Mfg. Co.*, 987 F.3d 704, 728 (7th Cir. 2021) (declining to consider a contractual limitation-of-remedies provision on appeal because doing so would “risk [the court’s] role as neutral arbiters to become advocates for one side of this dispute”); *Burgess v. United States*, 874 F.3d 1292, 1300 (11th Cir. 2017) (“If a court engages in what may be perceived as the bidding of one party by raising claims or defenses on its behalf, the court may cease to appear as a neutral arbiter, and that could be damaging to our system of justice.”).

55. Fuller, *supra* note 36, at 383.

56. 5 C.J.S. *Appeal and Error* § 817 (2022) (footnotes omitted).

57. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule*

In any appeal, there are two kinds of “party presentation” issues. *First*, the court of appeals often says that it will not consider issues that were improperly presented to the district court—that is, issues (or objections) that were improperly preserved for review.⁵⁸ More than a century ago, the Supreme Court explained that it would not consider an issue raised for the first time in that court, because “justice to [subordinate] courts requires that their alleged errors should be called directly to their attention” and the Supreme Court does not “retry . . . cases *de novo*.”⁵⁹ In a criminal case, “[a] party may preserve a claim of error by informing the [district] court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party’s objection to the court’s action and the grounds for that objection.”⁶⁰ Likewise in a civil case, a party “need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection.”⁶¹ No magic words are required, but the party

and the Gorilla Rule, 40 VAND. L. REV. 1023, 1026 (1987).

58. See, e.g., *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013) (“We generally refuse to consider issues that the parties have not raised below.”); *600 Marshall Ent. Concepts, LLC v. City of Memphis*, 705 F.3d 576, 585 (6th Cir. 2013) (stating that the function of the court of appeals “is to review the case presented to the district court, rather than a better case fashioned after a district court’s unfavorable order” (quoting *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005))); *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1145 (10th Cir. 2009) (“As a general matter, we do not consider issues that were not raised below.” (quoting *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 n.7 (10th Cir. 2007))); *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009) (“[A]bsent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal. An insignificant recitation of black letter law is not tantamount to raising an issue for adjudication.” (citations omitted)).

59. *J.M. Robinson & Co. v. Belt*, 187 U.S. 41, 50 (1902) (citing, among others, *Ins. Co. of Valley of Va. v. Mordecai*, 63 U.S. (22 How.) 111, 117 (1859) (stating that an issue “cannot be entertained” in the Supreme Court if it was not “made on the trial, or presented to the court for decision”)).

60. FED. R. CRIM. P. 51(b); see *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 764 (2020) (explaining that a party to a criminal case has two options to preserve a claimed error for appeal).

61. FED. R. CIV. P. 46.

claiming error on appeal must have given the district court a fair opportunity to understand and act on that party's position.⁶²

Second, the court of appeals often says that it will not consider issues that were not properly presented in the appeal—that is, issues that were not adequately identified or argued in the principal appellate brief.⁶³ Rule 28(a) of the Federal Rules of Appellate Procedure expressly requires an appellant to identify the issues presented for review and requires both parties to detail their “contentions and the reasons for them, with citations to the authorities and parts of the record on which [they] rel[y].”⁶⁴

These “party presentation” requirements—preservation in the district court and adequate presentation in the principal brief—ordinarily define the scope of issues to be decided in an appeal. But when the court of appeals, while

62. *See* *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988) (stating that counsel must “put[] the court on notice as to his concern”); *United States v. Abney*, 957 F.3d 241, 248 (D.C. Cir. 2020) (stating that a party need not “invoke magic words or talismanic language” to preserve an objection and “[a] party’s request for the desired action that reasonably apprises the district court of the error and gives the court an opportunity to correct it is alone enough”); *United States v. Greenspan*, 923 F.3d 138, 148 (3d Cir. 2019) (holding that counsel’s objection was sufficient to preserve a hearsay issue, even though counsel “did not use the magic words ‘not hearsay,’ ‘truth of the matter asserted,’ ‘state of mind,’ or ‘Rule 801(c),’” because he made the same points “in substance” and his objection was “specific enough to give the District Court notice of its basis”).

63. *See, e.g.,* *Braun v. Dep’t of Health & Hum. Servs.*, 983 F.3d 1295, 1305 (Fed. Cir. 2020) (“For reasons of fairness to appellees and of judicial efficiency, we generally refuse to consider an appellant’s challenge to particular rulings in a decision under review unless the challenge was raised and properly developed in the appellant’s opening brief—for which the reply brief and oral argument are not adequate substitutes.”); *Bekele v. Lyft, Inc.*, 918 F.3d 181, 186 (1st Cir. 2019) (stating that the court of appeals would not “consider arguments for reversing a decision of a district court when the argument is not raised in [the appellant’s] opening brief” (quoting *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015))); *United States v. Jim*, 891 F.3d 1242, 1252 (11th Cir. 2018) (“[A] party seeking to raise a claim or issue on appeal must plainly and prominently so indicate. Otherwise, the issue—even if properly preserved at trial—will be considered abandoned.” (quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003))).

64. FED. R. APP. P. 28(a)(5), (a)(8), (b).

reviewing the parties' briefs and the record on appeal, identifies a different issue that it believes could dispose of the appeal, it must decide whether to depart from the principle of party presentation and consider an issue that was not preserved below or raise the issue *sua sponte*.

Especially where the new issue is a pure legal issue, not requiring any further factual development, a court of appeals is certainly *competent* to consider the new issue. As then-Judge Antonin Scalia explained, however, “[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”⁶⁵ Considering an issue not adequately presented in the principal brief would “ultimately deprive [the court] in substantial measure of that assistance of counsel which the system assumes—a deficiency that [the court could] perhaps supply by other means, *but not without altering the character of [the] institution.*”⁶⁶ In then-Judge Scalia’s view, raising an issue *sua sponte*—even a pure issue of law such as an issue of statutory interpretation—would compromise the essential character of the court as a passive, neutral adjudicator of parties’ disputes.

Others argue, however, that appellate courts should

65. *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

66. *Id.* (emphasis added). In *Carducci*, the D.C. Circuit declined to decide whether the district court properly dismissed the appellant’s claim that certain agency action violated constitutional due process because the appellant failed to adequately present that issue on appeal. *See id.* Resolution of that issue would “require[] a determination whether the provisions of the Civil Service Reform Act of 1978 which set forth those personnel actions that can only be taken ‘for cause,’ are intended to establish the exclusive elements of status and tenure to which civil service employees are entitled.” *Id.* That was an issue of first impression and an issue “of major importance to all employees in the federal competitive service.” *Id.* But the appellant’s argument on that issue “literally consisted of no more than the assertion of violation of due process rights, with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question of the exclusiveness of entitlements set forth in the CSRA.” *Id.*

raise issues *sua sponte* because the purpose of adjudication is not simply to resolve the parties' dispute but also to make a complete and correct statement of legal rules.⁶⁷ Important as the adversarial system may be, it "provides no guarantee that all pertinent arguments or theories will be presented to the court."⁶⁸ Litigants and lawyers do not always see all the issues in a case; and even when they see the issues in a case, they may have strategic reasons not to raise all of them.⁶⁹ If a court recognizes an issue that may dispose of the case—with precedential effects for other cases—then there may be a public interest in raising and resolving that issue notwithstanding the failure of party presentation.⁷⁰

The problem of *sua sponte* decision-making thus challenges a court to consider both the integrity of the adversarial system—including the principle of party

67. See Frost, *supra* note 6, at 451–52 (stating that federal judges “serve a dual role,” resolving concrete disputes between litigants and “mak[ing] accurate statements about the meaning of law that govern beyond the parameters of the parties and their dispute”); Miller, *supra* note 13, at 1273 (observing that appellate courts are concerned with “doing justice for the parties before the court” and “provid[ing] broad rules for future cases”).

68. Cravens, *supra* note 15, at 253.

69. See Morley, *supra* note 15, at 330–31 (stating that “attorneys sometimes overlook issues and arguments,” while “institutional litigants often have strategic reasons for avoiding certain issues or refusing to make certain arguments that may benefit them in a particular case but be against their long-term or broader interests”); Cravens, *supra* note 15, at 252–53 (“[P]arties may simply fail to see all of the possible arguments relevant to the issues they have raised, or they may have tactical or strategic reasons for arguing an issue in a particular way that omits relevant legal arguments.”); Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 *FORDHAM L. REV.* 477, 477 (1958) (“The failure to argue the point to the appellate court may be a matter of either inadvertence or intention.”).

70. See Morley, *supra* note 15, at 333 (“Even when courts are playing a primarily dispute-resolution function, litigants, the public, and the judiciary itself all have strong interests in maximizing the accuracy of courts’ rulings and cases’ outcomes.”); Frost, *supra* note 6, at 472 (“When the parties fail to fully and accurately describe applicable legal standards, the norm against judicial issue creation comes into conflict with the judiciary’s law pronouncement power. Because judicial decisions are objective statements about the meaning of law, not statements about how the parties subjectively interpret the law, courts must be able to take notice of legal arguments that the parties fail to see.”).

presentation—and the need to produce complete and correct statements of legal rules.

II. THE PRINCIPLE OF PARTY PRESENTATION BEFORE JUSTICE GINSBURG

The question whether a court—especially an appellate court—should raise or decide *sua sponte* an issue not presented by the parties has vexed courts and commentators for decades. For at least sixty years before Justice Ginsburg arrived at the Supreme Court in 1994, academic commentators examined the circumstances in which state and federal courts departed from the principle of party presentation.⁷¹

In a series of articles published in 1932, Professor Richard Campbell addressed the problem that arose when counsel “fail[ed] to perform [their] duty” in presenting and preserving issues in trial and appellate courts.⁷² In those situations, courts were “forced to determine how far they [could] relieve a client from the consequences of his attorney’s fault, and consider questions not properly raised and preserved.”⁷³ The “general rule” was that reviewing courts would “refuse to consider questions which [were] not

71. See generally Rhetta R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985 (1989); Martineau, *supra* note 57; Note, *Appellate-Court Sua Sponte Activity: Remaking Disputes and the Rule of Non-Intervention*, 40 S. CAL. L. REV. 352 (1967); Vestal, *supra* note 69; Note, *Reformulation of the Rule Against Introducing New Matter in Appellate Courts—The Hormel Case*, 50 YALE L.J. 1460 (1941) [hereinafter *Reformulation of the Rule*]; Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pts. 1–3), 7 WIS. L. REV. 91 (1932) [hereinafter Campbell, *Part I*], 7 WIS. L. REV. 160 (1932) [hereinafter Campbell, *Part II*], and 8 WIS. L. REV. 147 (1932) [hereinafter Campbell, *Part III*].

72. Campbell, *Part I*, *supra* note 71, at 92; see also Vestal, *supra* note 69, at 477 (observing that when counsel fails to argue an issue that the court “feels is decisive of the case,” the court “must then decide, either consciously or unconsciously, whether it will be restricted to the issues posed by the litigants”).

73. Campbell, *Part I*, *supra* note 71, at 92.

. . . raised and preserved in the trial court.”⁷⁴ Similarly, “[i]n determining the legal issues” in an appeal, courts generally “decide[d] only the issues presented by the parties.”⁷⁵ In other words, the principle of party presentation was the default rule for appellate courts.

This general rule against considering new issues on appeal reflected several important policies, including the nature of appellate review (determining whether a lower court committed an error), fairness to lower courts (which had no opportunity to consider the new issue), and the need to avoid unfair surprise or prejudice to the appellee.⁷⁶ And then, as Professor Allan Vestal explained, there was the principle of party presentation: “[T]he litigants have a right to control the litigation.”⁷⁷ “Our courts,” Professor Vestal wrote, “are passive instrumentalities, available to right wrongs, but the initiative is never theirs.”⁷⁸ Of course, there were exceptions to the general rule against considering new issues on appeal.⁷⁹ Professor Campbell identified *twenty-three* categories of exceptions that he found in decisions of appellate courts in civil and criminal cases.⁸⁰

The Supreme Court’s decision in *Hormel v. Helvering* (1941)⁸¹ arguably “enlarge[d] the powers of appellate courts”

74. *Id.*; see also *Reformulation of the Rule*, *supra* note 71, at 1460. Although failure to preserve an issue in the trial court is distinct from failure to raise an issue at all, both circumstances require the appellate court to decide whether to consider a new issue on appeal—and thus whether to disregard the principle of party presentation.

75. Vestal, *supra* note 69, at 481.

76. See Campbell, *Part I*, *supra* note 71, at 93; see also Vestal, *supra* note 69, at 487, 491; *Reformulation of the Rule*, *supra* note 71, at 1460 n.2.

77. Vestal, *supra* note 69, at 487.

78. *Id.*

79. See *Reformulation of the Rule*, *supra* note 71, at 1460; see also Vestal, *supra* note 69, at 508; Campbell, *Part I*, *supra* note 71, at 93.

80. See Campbell, *Part I*, *supra* note 71, at 96–107; Campbell, *Part II*, *supra* note 71, at 160–81.

81. 312 U.S. 552 (1941).

to consider new issues.⁸² In this tax case, the IRS assessed a deficiency against Jay Hormel for failure to include certain trust income in his tax returns for 1934 and 1935.⁸³ The IRS argued that the trust income was taxable under 26 U.S.C. §§ 166 and 167 as income from revocable trusts.⁸⁴ The Board of Tax Appeals rejected the IRS's position, holding that the income was not taxable under § 166 or 167.⁸⁵ In an appeal to the Eighth Circuit, the IRS abandoned its argument based on § 166, argued that the income was taxable under § 167, and further argued that the income was taxable under § 22(a).⁸⁶ The Eighth Circuit held that the income was not taxable under § 166 or 167 but was taxable under § 22(a).⁸⁷

In the Supreme Court, Hormel argued that the Eighth Circuit should not have considered the new § 22(a) issue, because the IRS failed to present that issue to the Board of Tax Appeals.⁸⁸ The Supreme Court agreed that ordinarily, a court of appeals should not consider an issue that was not presented to a lower court—because the parties did not have an opportunity to “offer all the evidence they believe[d] relevant to the issues which the [lower court was] alone competent to decide.”⁸⁹ Nevertheless, “[t]here may always be *exceptional cases or particular circumstances* which will prompt a reviewing or appellate court, *where injustice might otherwise result*, to consider questions of law which were neither pressed nor passed upon by the court or

82. *Reformulation of the Rule*, *supra* note 71, at 1463; *see id.* at 1461 (stating that *Hormel* had “reformed” the general rule that new issues should not be considered on appeal).

83. *See Hormel*, 312 U.S. at 553.

84. *See id.* at 554.

85. *See id.*

86. *See id.* at 554–55.

87. *See id.* at 555.

88. *See id.*

89. *Id.* at 556.

administrative agency below.”⁹⁰ Rules of appellate procedure—such as the general rule against considering issues not raised below—“are devised to promote the ends of justice,” the Court explained, and “[a] rigid and undeviating” practice of refusing to consider new issues “would be out of harmony with this policy.”⁹¹ Thus, the general rule “should not be applied where the obvious result would be a plain miscarriage of justice.”⁹² Rather, an appellate court should apply procedural rules “as justice may require.”⁹³ Because declining to consider the § 22(a) issue would result in allowing Hormel “wholly to escape payment of a tax which . . . he clearly owe[d],” the Court held that the court of appeals properly considered the new § 22(a) issue even though the IRS never presented that issue to the Board of Tax Appeals.⁹⁴

“[R]ather than compress the *Hormel* case into hitherto recognized exceptions, the Court rested its decision upon the broader ground that appellate courts should hear new matter ‘as justice may require.’”⁹⁵ This “broad, expansive exception to the rule against raising new matter on appeal” significantly increased appellate courts’ discretion to consider new issues that the parties had not presented below.⁹⁶ Recognizing the potential for the “as justice may require” exception to swallow the general rule against considering new issues, one commentator argued that “the ultimate wisdom of the *Hormel* decision [would] depend[], in large measure, upon the manner in which the courts exercise

90. *Id.* at 557 (emphasis added).

91. *Id.*

92. *Id.* at 558. The Court in *Hormel* explained that when the Court had followed the general rule against considering new issues on appeal, it was “careful to point out the circumstances justifying application of the practice”—such as “express waiver” of the issue. *Id.* at 557.

93. *Id.* at 559.

94. *Id.* at 560.

95. *Reformulation of the Rule*, *supra* note 71, at 1462.

96. *Id.* at 1463.

their discretionary power to shape the rules of procedure so that they may best promote the ends of justice.”⁹⁷

After *Hormel*, courts of appeals were “generally reluctant to cast . . . exceptions [to the general rule against considering new issues] in absolutes; rather they seem[ed] to want to maintain freedom of action, so that the exceptions [were] articulated in terms of ‘grace’ and ‘discretion’ with no rigid rules established.”⁹⁸ Although commentators continued to identify various circumstances in which courts departed from the general rule, they could only describe those circumstances in “rough categories.”⁹⁹ There were no clear boundaries for the exercise of discretion in departing from the general rule against considering new issues.¹⁰⁰

Thirty-five years after *Hormel* was decided, the Supreme Court confirmed that courts of appeals had broad discretion to consider new issues that the parties had not presented. In *Singleton v. Wulff*, the Court considered a challenge to a Missouri statute excluding from Medicaid coverage abortions that were not “medically indicated.”¹⁰¹ Two physicians who performed non-medically-indicated abortions sued to enjoin application of the statute, arguing that it was unconstitutional for several reasons.¹⁰² The defendant, a

97. *Id.* at 1466. For decades, courts of appeals have cited *Hormel* to justify raising issues sua sponte. *See, e.g.*, *Syngenta Crop Prot., LLC v. Willowood, LLC*, 944 F.3d 1344, 1365 n.9 (Fed. Cir. 2019); *Manning v. Caldwell*, 930 F.3d 264, 271 (4th Cir. 2019); *Ninestar Tech. Co. v. Int’l Trade Comm’n*, 667 F.3d 1373, 1382 (Fed. Cir. 2012); *Cent. Wayne Energy Recovery, L.P. v. EPA*, No. 97-3290, 97-4009, 1999 WL 137624, at *7 (6th Cir. 1999); *City of Waco v. Bridges*, 710 F.2d 220, 228 (5th Cir. 1983); *Wilson v. Comm’r*, 500 F.2d 645, 649 (2d Cir. 1974); *Ketler v. Comm’r*, 196 F.2d 822, 827–28 (7th Cir. 1952).

98. *Vestal*, *supra* note 69, at 508–09.

99. *Id.* at 509.

100. *See Note, Raising New Issues on Appeal*, 64 HARV. L. REV. 652, 655 (1951) (“Despite the frequent assertion of the rule against new issues, courts have been willing to hear them in certain circumstances although they have failed to develop any consistent rationale for these exceptions.”).

101. 428 U.S. 106, 108–09 (1976).

102. *See id.* at 109–10. Although the complaint contained other claims directed

state official responsible for administering the Medicaid program, moved to dismiss for lack of standing (among other grounds).¹⁰³ The district court granted the motion to dismiss for lack of standing.¹⁰⁴ The Eighth Circuit reversed, holding that the physicians had standing to challenge the statute and further that the statute was unconstitutional.¹⁰⁵

The Supreme Court granted certiorari to address two questions: (1) whether the physicians had standing; and (2) whether the court of appeals, having found standing, “properly proceeded to a determination of the merits”—when the parties had not addressed the merits in the district court.¹⁰⁶ On the second question, the state official argued that the Eighth Circuit lacked jurisdiction to decide the merits issue because the district court was a three-judge court whose merits rulings were appealable only to the Supreme Court.¹⁰⁷ The physicians argued that the Eighth Circuit properly exercised its discretion to decide the merits of the case because *Hormel* recognized that an appellate court may decide an issue not decided by a lower court “when circumstances and justice dictate.”¹⁰⁸

Rather than decide whether the court of appeals had authority to decide a merits issue that a three-judge district court had not decided, the Supreme Court held that the Eighth Circuit’s resolution of the merits issue was “an unacceptable exercise of its appellate jurisdiction.”¹⁰⁹ While the Court recognized that an appellate court ordinarily “does

at other statutes, those claims were not at issue in the Supreme Court. *See id.* at 109 n.2.

103. *See id.* at 110.

104. *See id.* at 111.

105. *See id.* at 111–12.

106. *Id.* at 108.

107. *See* Brief for the Petitioner at *29–41, *Singleton*, 428 U.S. 106 (No. 74-1393), 1975 WL 173538.

108. Brief for Respondents at *32, *Singleton*, 428 U.S. 106 (No. 74-1393), 1975 WL 173539.

109. *Singleton*, 428 U.S. at 119–20.

not consider an issue not passed upon below,” the Court also explained that “[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.”¹¹⁰ An appellate court could raise a new issue, for example, “where the proper resolution is beyond any doubt” or (based on *Hormel*) “where injustice might otherwise result.”¹¹¹

In this case, the defendant had filed only a motion to dismiss in the district court and had not filed any answer or other pleading directed to the merits of the dispute; on appeal, the defendant had addressed only the standing issue that prompted the dismissal.¹¹² Although “there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below,”¹¹³ such circumstances were not present in this case; rather, “injustice was more likely to be caused than avoided by deciding the issue without [the defendant’s] having had an opportunity to be heard.”¹¹⁴ Nevertheless, the Court “announce[d] no general rule” with respect to considering a new issue on appeal.¹¹⁵

Thus, by the late 1970s, courts had broad discretion to determine whether to consider an issue that was not previously presented by the parties, with little direction other than that they should avoid injustice in doing so.¹¹⁶

110. *Id.* at 120–21.

111. *Id.* at 121 (first citing *Turner v. City of Memphis*, 369 U.S. 350 (1962); and then quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)). Those examples, the Court made clear, were “not intended to be exclusive.” *Id.* at 121 n.8.

112. See *id.* at 120.

113. *Id.* at 121.

114. *Id.*

115. *Id.* In *Singleton*, “[t]he Supreme Court essentially had found this area of the law a mess and left it a mess.” Dennerline, *supra* note 71, at 1004–05 (observing that among the federal circuits, and even within circuits, there was “no discernable set of guidelines for deciding when a new issue should be heard”).

116. The Court later described *Singleton* as having “stopped short of stating a

The absence of standards guiding the exercise of discretion seemed especially troubling in light of growing concerns that the judiciary's commitment to the adversarial process was weakening and judges were adopting a more active stance in litigation. As Professor Judith Resnik explained in a 1982 article, many federal judges were abandoning the classical view of the disengaged, dispassionate decision-maker in favor of a more active, "managerial" role.¹¹⁷ For the sake of speed and efficiency, she argued, many judges were involving themselves in lawsuits early and regularly—abandoning passivity and compromising their ability to remain neutral through final judgment.¹¹⁸ "Although the sword remain[ed] in place," she cautioned, "the blindfold and scales ha[d] all but disappeared."¹¹⁹

Consistent with this trend toward increasing judicial activity, Professor Robert Martineau observed that "courts increasingly [were] willing to consider new issues" not presented by the parties—raising a serious question as to "the continued validity of the general rule" against sua sponte consideration.¹²⁰ *Singleton* had created a regime in which "the general rule [against raising new issues sua sponte was] no longer a general rule."¹²¹ Appellate courts'

general principle to contain appellate courts' discretion" in deciding whether to consider new issues. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008).

117. Resnik, *supra* note 24, at 376. Professor Benjamin Kaplan perhaps observed the beginnings of that phenomenon two decades earlier. See Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 423 (1960) ("Clearly the judge's directive interest in and power over the conduct of the lawsuit is on the increase in this country.").

118. See Resnik, *supra* note 24, at 386–414.

119. *Id.* at 431.

120. Martineau, *supra* note 57, at 1025. Other commentators have observed that judges' raising new issues sua sponte has become common. See Frost, *supra* note 6, at 450 (stating that "judicial issue creation is not uncommon"); Miller, *supra* note 13, at 1255 (stating that while appellate courts often say that they will not decide issues that were not raised below, they "frequently fall off the wagon").

121. Martineau, *supra* note 57, at 1058.

applications of exceptions to the general rule were marked by “inconsistency,” “with no discernible basis for predicting” when a court would raise an issue that was not presented by the parties.¹²² According to Professor Martineau, the *Singleton* regime—coupled with more active judges—had led to “*ad hoc* decision making at its worst.”¹²³ Absent clear standards governing the exercise of discretion,

[t]he general rule [against sua sponte consideration] ha[d] been replaced by a system in which the question of whether an appellate court [would] consider a new issue [was] decided solely on the basis of whether a majority of the court consider[ed] the new issue necessary to decide the case in accordance with their view of the relative equities of the parties.¹²⁴

Professor Martineau described this regime of near-unbounded discretion as the “gorilla rule”—just as a gorilla sleeps “[a]nywhere it wants,” he argued, a court of appeals will consider a new issue “[a]ny time it wants.”¹²⁵ “The only consistent feature of [that] system,” Professor Martineau wrote, was “its inconsistency.”¹²⁶ As explained below, if Justice Ginsburg’s jurisprudence of party presentation did not fully tame the gorilla, at least she identified discernible limits to the gorilla’s freedom of action.

122. *Id.* at 1057–58.

123. *Id.* at 1058; see Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 253 (2012) (explaining that “courts have, collectively, identified no less than thirty . . . factors, considerations, or separate singular exceptions” to the rule that a court of appeals will not consider an issue not raised in the district court).

124. Martineau, *supra* note 57, at 1061.

125. *Id.* at 1023 & n.* (citation omitted); see Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 948 (1998) (“Unquestionably, a state or federal appellate court may consider a new issue any time it wishes.” (internal quotation marks omitted)).

126. Martineau, *supra* note 57, at 1061; see Dennerline, *supra* note 71, at 1005 (arguing that in this “purely discretionary” regime, “one [could not] clearly predict when, or even what, new issues may be heard on appeal”).

III. JUSTICE GINSBURG'S APPLICATION OF THE PRINCIPLE OF PARTY PRESENTATION

When she arrived at the Court in 1994, Justice Ginsburg brought with her decades of experience addressing complex issues relating to jurisdiction and procedure. In 1965, then-Professor Ginsburg coauthored a treatise describing the system of civil procedure in Sweden.¹²⁷ In a section addressing the adjudicatory authority of Swedish civil courts, she observed that “the principle of party control prevail[ed]” in civil proceedings that were amenable to settlement.¹²⁸ In such proceedings, “the court [could] not render a judgment providing for relief of a different or more extensive character than that sought by the litigants, nor [could] the court base its decision on facts other than those presented by the parties.”¹²⁹ Moreover, party admissions—“whether the plaintiff’s concession that all or part of his claim [was] invalid, or the defendant’s concession that all or part of the claim asserted against him [was] valid, or the acknowledgment by either party of the truth of allegations made by the other”—“must be accepted by the court in lieu of proof; the court [could] not elect to look beyond such admissions to determine whether they reflect[ed] accurately what occurred in fact.”¹³⁰ Thus, in the Swedish system of civil procedure, then-Professor Ginsburg recognized the principle

127. See RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965) [hereinafter GINSBURG & BRUZELIUS, CIVIL PROCEDURE IN SWEDEN]. Before this treatise was published, then-Professor Ginsburg wrote two articles addressing specific aspects of Swedish procedure. See Ruth Ginsburg, *The Jury and the Nämnd: Some Observations on Judicial Control of Lay Triers in Civil Proceedings in the United States and Sweden*, 48 CORNELL L.Q. 253 (1963); Ruth Ginsburg & Anders Bruzelius, *Professional Legal Assistance in Sweden*, 11 INT’L & COMPAR. L.Q. 997 (1962).

128. GINSBURG & BRUZELIUS, CIVIL PROCEDURE IN SWEDEN, *supra* note 127, at 139 (describing *dispositive* proceedings).

129. *Id.*

130. *Id.* In such a proceeding, the parties must present “[a]ll allegations, evidence, and legal arguments urged as a basis for judgment on the merits” to the full court. *Id.* at 228.

of party presentation (or “party control”) at work.

More than any other Justice during her tenure on the Supreme Court (1993–2020), Justice Ginsburg emphasized the importance of the adversarial system of adjudication and the principle of party presentation as a critical element of that system. Before *Sineneng-Smith* was decided in 2020, Justice Ginsburg addressed the principle of party presentation in six cases where a “new” issue—not presented by the parties—was raised in the Supreme Court, the court of appeals, or the district court. While Justice Ginsburg consistently described a robust principle of party presentation, she recognized that the principle admits certain exceptions. Those exceptions reflect appreciation of institutional interests of the judicial branch that balance, and sometimes outweigh, the interests of the parties in controlling litigation.

A. *Albright v. Oliver* (1994)

Justice Ginsburg signaled her appreciation for the principle of party presentation early in her tenure on the Supreme Court. In *Albright v. Oliver*, Justice Ginsburg wrote a concurring opinion agreeing with the plurality that the plaintiff’s substantive due process claim against an arresting officer was properly dismissed, even though a Fourth Amendment claim might have been appropriate.¹³¹

Kevin Albright sued an Illinois police detective under 42 U.S.C. § 1983, claiming that the detective violated his constitutional right—a substantive due process right—to be free from criminal prosecution absent probable cause.¹³² The district court dismissed the action, and the Seventh Circuit affirmed—on the ground that prosecution without probable cause is an actionable constitutional tort only if it results in

131. 510 U.S. 266, 276–81 (1994) (Ginsburg, J., concurring).

132. *See id.* at 269 (plurality opinion).

loss of employment or some other “palpable consequence.”¹³³ A plurality of the Supreme Court affirmed the Seventh Circuit’s judgment, but on a different ground—namely, that Albright’s complaint sounded in the Fourth Amendment, not substantive due process.¹³⁴

In a separate concurring opinion, Justice Ginsburg agreed that Albright’s claim was “properly analyzed under the Fourth Amendment rather than under the heading of substantive due process.”¹³⁵ She emphasized, however, that Albright had “deliberately subordinated invocation of the Fourth Amendment” in his presentation to the Court, instead pressing his substantive due process theory.¹³⁶ Although Justice Ginsburg believed the Fourth Amendment claim had merit, that was “a claim Albright abandoned in the District Court and did not attempt to reassert in [the Supreme] Court.”¹³⁷ “The principle of party presentation,” she wrote, “cautions decisionmakers against asserting it for him.”¹³⁸ This appears to be the first mention of “the principle of party presentation” in a Supreme Court opinion.

B. *Arizona v. California (2000)*

While *Albright* was decided in the context of the Supreme Court’s appellate-review function, in *Arizona v. California*, Justice Ginsburg addressed the principle of party presentation in the context of an original action—where the Supreme Court acted as the trial court.¹³⁹

Since 1952, the State of Arizona had been quarreling with the State of California over the extent of each State’s

133. *Id.* at 269–70 & 270 n.2.

134. *Id.* at 270–75.

135. *Id.* at 276 (Ginsburg, J., concurring).

136. *Id.* at 277.

137. *Id.* at 280.

138. *Id.* at 281.

139. 530 U.S. 392 (2000).

right to use water from the Colorado River.¹⁴⁰ Nevada, New Mexico, and Utah joined the original action, as did the United States (on behalf of several Indian reservations).¹⁴¹ In the latest installment of that decades-long litigation, the State parties argued that one of the claims asserted by the United States (on behalf of one of the reservations) was precluded by an earlier decision of the Court.¹⁴² Although the Special Master “relied on an improper ground” in rejecting that preclusion argument, the Supreme Court held that the preclusion argument was “inadmissible” because the State parties could have raised it in 1978 or 1982 but did not raise it until 1989.¹⁴³ “The State parties had every opportunity, and every incentive, to press their current preclusion argument at earlier stages in the litigation, yet failed to do so.”¹⁴⁴

The State parties argued that even if they failed to raise the preclusion defense in a timely manner, the Court should raise the defense *sua sponte*.¹⁴⁵ Justice Ginsburg’s opinion for the Court acknowledged that “[j]udicial initiative of this sort might be appropriate in special circumstances”—specifically, a court may dismiss an action *sua sponte* when it becomes aware that it previously decided the issue presented.¹⁴⁶ In that situation, *sua sponte* dismissal would serve the purposes of preclusion doctrine both to protect the defendant from the burden of defending the same suit twice and to avoid “unnecessary judicial waste.”¹⁴⁷ Nevertheless, Justice Ginsburg concluded that there were no “special circumstances” in this case, because the Court had not

140. *See id.* at 397.

141. *See id.*

142. *Id.* at 406.

143. *Id.* at 408.

144. *Id.* at 409.

145. *See id.* at 412.

146. *Id.*

147. *Id.*

actually decided the issue presented and there was no risk of unnecessary waste of judicial resources.¹⁴⁸ Justice Ginsburg explained that “where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication.”¹⁴⁹

C. *Day v. McDonough* (2006)

In her opinion for the Court in *Day v. McDonough*, Justice Ginsburg acknowledged that a district court may raise a timeliness issue *sua sponte* in a federal habeas action where the State mistakenly forfeited a timeliness argument.¹⁵⁰

In response to Patrick Day’s federal habeas petition, the State of Florida filed an answer expressly conceding that the petition was timely.¹⁵¹ The magistrate judge reviewing the pleadings determined that the State had miscalculated the time allowed for filing and that the petition was actually *untimely* under applicable statutes and circuit precedent.¹⁵² The magistrate judge gave Day an opportunity to show cause why his petition should not be dismissed; upon review of Day’s response, the magistrate judge recommended dismissal.¹⁵³ The district court dismissed the petition, and the Eleventh Circuit affirmed.¹⁵⁴

At oral argument in the Supreme Court, Justice Ginsburg focused on the distinction between waiver and forfeiture. In response to Day’s argument that a court should

148. *See id.*

149. *Id.* at 412–13.

150. 547 U.S. 198, 202 (2006).

151. *Id.* at 201.

152. *Id.* at 201–02.

153. *Id.* at 202.

154. *Id.*

not raise a limitations defense sua sponte, Justice Ginsburg asked whether the State's "computation error" was distinguishable from "a case where the State chose to waive the statute of limitations."¹⁵⁵ She also noted that the magistrate judge's raising the timeliness issue at the outset of the habeas proceeding had no practical consequence different from allowing the State to amend its answer.¹⁵⁶ At the same time, Justice Ginsburg challenged the State to respect the principle of party presentation. "[J]udges are not supposed to be intruding issues on their own, they are supposed to follow the party's presentation. So," she asked the State's counsel, "would it be at least 'hardly ever' that it's appropriate for a judge to interject an affirmative defense on his own motion?"¹⁵⁷ The State's counsel agreed that it would "hardly ever" be appropriate for a court to raise an affirmative defense that a party failed to raise.¹⁵⁸

The Supreme Court upheld the dismissal of Day's petition.¹⁵⁹ Writing for the Court, Justice Ginsburg explained that "district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition."¹⁶⁰ The Court had previously held that district courts could raise sua sponte other "threshold constraints on federal habeas petitioners"—including

155. Transcript of Oral Argument at 4, *Day*, 547 U.S. 198 (No. 04-1324).

156. *See id.* at 6.

157. *Id.* at 37.

158. *Id.* Justice Ginsburg pressed the same point in questioning the Assistant to the Solicitor General of the United States: "I don't think there's any rule that says a judge in the run-of-the-mine case acts properly by interjecting preclusion into a case where no party has raised it." *Id.* at 50. The "run-of-the-mine case" qualifier was significant, because the Court previously had stated that "waivers of res judicata need not always be accepted" and "trial courts may *in appropriate cases* raise the res judicata bar on their own motion." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (emphasis added). Five years later in *Arizona v. California*, Justice Ginsburg herself wrote that the Court could raise a preclusion defense sua sponte "in special circumstances." 530 U.S. 392, 412 (2000) (emphasis added).

159. *Day*, 547 U.S. at 210–11.

160. *Id.* at 209.

exhaustion of remedies, procedural default, and non-retroactivity.¹⁶¹ Although Justice Ginsburg “stress[ed] that a district court is not required to doublecheck the State’s math,” a court could raise the timeliness issue on its own if it “detect[ed] a clear computation error.”¹⁶²

Even in this context, however, Justice Ginsburg emphasized the need to balance the court’s interest in correcting a clear error with the expectations of the party presentation principle: “Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.”¹⁶³ Although the district court has discretion to raise and consider a time bar *sua sponte*, such discretion is “confined” by this requirement to give the parties notice and an opportunity to be heard.¹⁶⁴

Critical to Justice Ginsburg’s analysis was the distinction between the *forfeiture* that occurred here—the State simply failed to identify a valid limitations defense—and a knowing, voluntary *waiver* of a defense. In dicta, Justice Ginsburg warned that the Court “would count it an abuse of discretion to override a State’s deliberate waiver of a limitations defense.”¹⁶⁵ One aspect of the principle of party presentation is that a party should be held to its deliberate

161. *Id.*; see also *id.* at 205–06 (discussing *Granberry v. Greer*, 481 U.S. 129 (1987) (failure to exhaust state remedies), and *Caspari v. Bohlen*, 510 U.S. 383 (1994) (non-retroactivity)).

162. *Id.* at 209–10.

163. *Id.* at 210.

164. *Id.* at 210 n.11. In a different context, the Supreme Court explained that “[i]f notice is not given” when a court intends to take certain action or consider certain facts or circumstances in making a decision, “the adversary process is not permitted to function properly” and “there is an increased chance of error . . . and with that, the possibility of an incorrect result.” *Lankford v. Idaho*, 500 U.S. 110, 127 (1991). Indeed, as the Court explained in *Lankford*, “[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.” *Id.* at 126; see also *Milani & Smith, supra* note 10, at 315 (“While appellate courts have the power to raise issues *sua sponte*, they should cease deciding cases on such issues without giving the parties an opportunity to be heard through supplemental briefing and argument.”).

165. *Day*, 547 U.S. at 202.

choices; a court should not save a party from itself. Thus, “should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice.”¹⁶⁶

D. *Greenlaw v. United States (2008)*

Justice Ginsburg again addressed the principle of party presentation just two years later, in a criminal sentencing case involving the “cross-appeal rule.” In *Greenlaw v. United States*, Justice Ginsburg wrote an opinion for the Court holding that a court of appeals may not order a district court on remand to increase a criminal sentence absent a cross-appeal by the Government requesting such relief.¹⁶⁷

Michael Greenlaw was convicted of drug and firearms offenses, including two offenses for carrying a firearm during and in relation to a crime of violence or drug trafficking crime (in violation of 18 U.S.C. § 924(c)).¹⁶⁸ A first conviction under § 924(c) carries a mandatory minimum sentence of five years of imprisonment, and a “second or subsequent” conviction under § 924(c) carries a mandatory minimum sentence of twenty-five years—consecutive to any other term of imprisonment.¹⁶⁹ Over the Government’s objection, the district court imposed a sentence that did not reflect the twenty-five-year mandatory consecutive sentence for the second § 924(c) offense.¹⁷⁰

Greenlaw appealed, arguing that the overall sentence was excessive.¹⁷¹ Although the Government did not cross-appeal, it argued—in response to Greenlaw’s argument that the sentence was too long—that the sentence was actually

166. *Id.* at 210 n.11.

167. 554 U.S. 237, 240 (2008).

168. *See id.* at 240–41.

169. *See id.* at 241 (citing 18 U.S.C. § 924(c)).

170. *See id.*

171. *See id.* at 242.

too short because the district court failed to impose the twenty-five-year mandatory minimum consecutive sentence for the second § 924(c) offense.¹⁷² The Eighth Circuit vacated the sentence and instructed the district court on remand to impose the twenty-five-year mandatory minimum consecutive sentence.¹⁷³ On remand, the district court imposed a sentence of 622 months (more than fifty-one years).¹⁷⁴ In response to Greenlaw’s petition for writ of certiorari, the Government agreed that the court of appeals erred in sua sponte ordering an increase in the sentence.¹⁷⁵ The Supreme Court thus appointed an *amicus curiae* to defend the court of appeals’ judgment.¹⁷⁶

During the oral argument—which focused on whether a federal sentencing statute limited the authority of a court of appeals to instruct a district court to increase a previously-imposed sentence—Justice Ginsburg raised “a larger anterior question”:

[W]e have a system in which the prosecutor can bring charges. The judge may think, my goodness, looking at this set of facts, you could have charged much more. The judge can’t do that, he can’t tell the prosecutor you have to charge “Y” in addition to “X.” The government chooses not to appeal. Now, [by] what right does the court say, I know you didn’t appeal, Government, but [you] should have so we’re going to take care of it for you?¹⁷⁷

Here, Justice Ginsburg cast the critical issue as whether the Court should save the Government from its strategic choice not to cross-appeal. That, she thought, would be a fundamental violation of the adversarial process:

It seems to me that our system rests on a principle of party

172. *See id.*

173. *See id.* at 243.

174. *See id.*

175. *See id.*

176. *See id.*

177. Transcript of Oral Argument at 33–34, *Greenlaw*, 554 U.S. 237 (No. 07-330).

presentation as many systems do not. In many systems, the court does shape the controversy and can intrude issues on its own. But in our adversarial system, we rely on counsel to do that kind of thing. So, my problem with your whole position, without getting down to particular statutory provisions, is what business does the court have to put an issue in the case that counsel chose not to raise?¹⁷⁸

The Supreme Court vacated the Eighth Circuit's judgment, holding that the court of appeals was not authorized to order any increase in Greenlaw's sentence.¹⁷⁹ Under the "cross-appeal rule"—an "unwritten but longstanding rule"—"an appellate court may not alter a judgment to benefit a nonappealing party."¹⁸⁰ This rule is indeed longstanding, dating back at least to 1796,¹⁸¹ and the Court had described the rule as "inveterate and certain."¹⁸² Because the Government elected not to cross-appeal from a sentence that it believed was too short, the court of appeals could not "alter [the] judgment to benefit" the Government.¹⁸³

Writing for the Court, Justice Ginsburg explained that the cross-appeal rule "is both informed by, and illustrative

178. *Id.* at 34.

179. *See Greenlaw*, 554 U.S. at 254-55.

180. *Id.* at 244.

181. *See id.* at 244-45 (citing *McDonough v. Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796) (declining to "take notice of the[] interest" of certain parties who did not cross-appeal from the decision of the lower court)). The Supreme Court has "repeatedly endors[ed]" the cross-appeal rule for "more than two centuries." *El Paso Nat. Gas Co. v. Neztosie*, 526 U.S. 473, 480 (1999).

182. *Greenlaw*, 554 U.S. at 245 (quoting *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937)). In *Morley*, the Supreme Court reversed the judgment of a court of appeals that purported to affirm a district court's judgment on alternative grounds but actually changed the scope of relief in favor of the judgment-winner. *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 190-93 (1937). In describing the cross-appeal rule as "inveterate and certain," Justice Cardozo cited illustrations of the rule dating back to 1830. *Id.* at 191 (citing, among others, *Canter v. Am. Ins. Co.*, 28 U.S. (3 Pet.) 307, 318 (1830)).

183. *Greenlaw*, 554 U.S. at 244.

of, the party presentation principle.”¹⁸⁴ “In our adversary system,” she wrote, “in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”¹⁸⁵ Justice Ginsburg shared Justice Scalia’s view that the adversary system of adjudication assumes that “the parties know what is best for them” and will present the facts and arguments that support their claims.¹⁸⁶

The principle of party presentation reflects not only the view that the parties know best how to advance their legal interests, but also the view that courts—as “neutral arbiter[s]”—should not act as advocates for any particular result.¹⁸⁷ According to Justice Ginsburg, “courts do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties.”¹⁸⁸

184. *Id.*; *see id.* at 252 (stating that the party presentation principle is “served by” the cross-appeal rule); *see also id.* at 254 n.9 (describing the cross-appeal rule as “rooted in the principle of party presentation”).

185. *Id.* at 243.

186. *Id.* at 244 (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)). In a footnote, Justice Ginsburg cited Professor Benjamin Kaplan’s article, “Civil Procedure—Reflections on the Comparison of Systems,” for the proposition that the American system of adjudication “exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge” while the German system “puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal.” *Id.* at 244 n.3 (quoting Kaplan, *supra* note 117, at 431–32). Justice Ginsburg once said that her “love of procedure [was] attributable to Benjamin Kaplan,” who taught her first-year civil procedure course. *Conversation*, *supra* note 3, at 1513. Having coauthored a book on Swedish civil procedure, Justice Ginsburg especially appreciated the differences between the American adversarial system and the more inquisitorial systems of Europe. *See id.* at 1513–14.

187. *Greenlaw*, 554 U.S. at 243.

188. *Id.* at 244 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing en banc)).

E. Burlington Northern & Santa Fe Railway Co. v. United States (2009)

In *Burlington Northern & Santa Fe Railway Co. v. United States*, the Supreme Court upheld a district court's judgment apportioning a share of environmental remediation costs (incurred by state and federal governments) to certain railroads that were partially responsible for soil and groundwater contamination.¹⁸⁹ In the litigation, the railroads took the position that they were not liable for *any* portion of the remediation costs; the governmental parties took the position that the railroads were jointly and severally liable for *all* of the remediation costs.¹⁹⁰ No party proposed a methodology for apportioning costs among the alleged polluters; thus, they "fail[ed] to assist the court in linking the evidence supporting apportionment to the proper allocation of liability."¹⁹¹ The district court ruled that the railroads were liable, along with another alleged polluter, and that apportionment of the costs was appropriate.¹⁹²

The Supreme Court upheld the district court's apportionment calculation.¹⁹³ Although the majority recognized that neither the Government (which argued that liability was not divisible) nor the railroads (which denied liability outright) provided any meaningful assistance to the district court in making an apportionment, the majority nevertheless concluded that the district court's calculation was reasonable.¹⁹⁴

189. See 556 U.S. 599, 619 (2009).

190. See *id.* at 615 (stating that the railroads took an "all-or-nothing approach to liability" while the governmental parties "refus[ed] to acknowledge the potential divisibility of the harm").

191. *Id.* at 616.

192. See *id.* at 606.

193. See *id.* at 619.

194. See *id.* at 615–19.

Justice Ginsburg (alone) dissented.¹⁹⁵ She argued that the district court erred in making any apportionment where “[n]either party offered helpful arguments to apportion liability.”¹⁹⁶ “Given the party presentation principle basic to our procedural system,” she wrote, “it [was] questionable whether the court should have pursued the matter *sua sponte*.”¹⁹⁷ Rather than simply approve the district court’s apportionment—unaided by the parties—Justice Ginsburg would have remanded the case to the district court “to give all parties a fair opportunity to address that court’s endeavor to allocate costs.”¹⁹⁸

F. *Wood v. Milyard* (2012)

In a second opinion involving a court’s raising a defense to a federal habeas petition—*Wood v. Milyard*—Justice Ginsburg emphasized the importance of party presentation while acknowledging a narrow exception to the principle.¹⁹⁹

195. *See id.* at 620–23 (Ginsburg, J., dissenting).

196. *Id.* at 622 (quoting the district court decision, *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, CV-F-92-5068 OWW, 2003 WL 25518047 (E.D. Cal. July 15, 2003), *aff’d in part, rev’d in part sub nom.* *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918 (9th Cir. 2008), *rev’d*, 556 U.S. 599 (2009)).

197. *Id.* (first citing *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008); and then citing *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)). In support of this proposition, Justice Ginsburg added a “*cf.*” cite to Benjamin Kaplan, Arthur T. von Mehren, & Rudolf Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958), which describes the elements of civil procedure in the Federal Republic of Germany. *See Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 623 (Ginsburg, J., dissenting). In questioning whether the district court should have attempted to make an apportionment without assistance from the parties, Justice Ginsburg suggested that doing so—taking upon itself the burden to do the work that the parties should have done—placed the court in a position similar to a German judge, *see id.*, who has an affirmative obligation to “see to it that the parties make full statements regarding all important facts and make all appropriate motions . . . [and] enlarge upon insufficient statements regarding the facts.” Kaplan et al., *supra*, at 1224.

198. *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 623 (Ginsburg, J., dissenting).

199. *See* 566 U.S. 463 (2012).

In response to Patrick Wood's federal habeas corpus petition, the State of Colorado twice told the district court that it did not concede, but would not contest, the timeliness of the petition.²⁰⁰ The district court then rejected Wood's petition on the merits.²⁰¹ On appeal, the Tenth Circuit directed the parties to brief the question whether the petition was timely.²⁰² The court of appeals then affirmed the district court's judgment—solely on the ground that the petition was untimely.²⁰³

At oral argument in the Supreme Court, Justice Ginsburg again focused on the distinction between waiver and forfeiture: “[S]words are crossed over here because [the habeas petitioner] say[s] this is a deliberate waiver and the [State] says no, . . . it's a forfeiture . . . and . . . if it's forfeiture, then the court of appeals has discretion to take it up.”²⁰⁴ In an exchange with the Solicitor General of Colorado, Justice Ginsburg asserted that this was not “failure to raise an argument; this was representing to the court we will not challenge timeliness. . . . That was not negligent oversight in not raising the question. It was an affirmative representation to the court that although we might have done it, we will not challenge timeliness.”²⁰⁵ Not only did the State's affirmative representation constitute a waiver, but “the consequence of that was the district court then had to deal with the case on the merits, had to take up the two exhausted claims and rule on them.”²⁰⁶

Justice Ginsburg further challenged the State's position in terms of the principle of party presentation and the

200. *Id.* at 465.

201. *Id.*

202. *Id.*

203. *Id.*

204. Transcript of Oral Argument at 5, *Wood*, 566 U.S. 463 (2012) (No. 10-9995).

205. *Id.* at 26.

206. *Id.* at 32.

function of appellate review generally:

There is something about the principle of party presentation. The party raises the issue. The court of appeals is the court of review, not first view. . . . Here the State knew very well that it [had] a statute of limitations argument, but it says we're not challenging it.

And then the ordinary thing is that a court of appeals reviews decisions of the district court; [it] doesn't decide questions in the first instance. But here you are saying the attorney can tell [the] district judge: [D]on't decide [the timeliness issue]; go on to the merits. Then the court of appeals, which is supposed to be reviewing what the district court does, instead deals with that question in the first instance. That seems like an odd inversion of the role . . . of the district court and court of appeals.²⁰⁷

Justice Ginsburg repeated this concern for the principle of party presentation in an exchange with the Assistant to the Solicitor General of the United States:

Ms. Arbus Sherry: The fact that the State for whatever reason decided to press other issues shouldn't bind the district court's hands except in the rarest of circumstances.

Justice Ginsburg: Except we have a system where the court doesn't raise issue[s] on its own. The ordinary rule is the party presents it, and when the party says to the court we will not challenge timeliness, it seems to me that's quite a different thing from just having an answer that doesn't raise the defense. It's affirmatively representing to the court that we . . . are not making this an issue.²⁰⁸

The Supreme Court unanimously reversed the Tenth Circuit's judgment, holding that the court of appeals "abused its discretion by resurrecting the limitations issue" that the State had twice forsworn.²⁰⁹ "[A] court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system," Justice Ginsburg wrote.²¹⁰ Rather, a court may raise sua sponte a limitations defense to a habeas petition "[o]nly where the State does not

207. *Id.* at 38–39.

208. *Id.* at 46–47.

209. *Wood*, 566 U.S. at 466.

210. *Id.* at 472.

strategically withhold the limitations defense or choose to relinquish it, and where the petitioner is accorded a fair opportunity to present his position.”²¹¹ Even in those circumstances, the court still must “determine whether the interests of justice would be better served” by considering the limitations defense or deciding the merits of the case.²¹² Courts have “the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative.”²¹³

Here again, the distinction between waiver and forfeiture was critical to Justice Ginsburg’s analysis. While “a waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve.”²¹⁴ “That distinction,” Justice Ginsburg wrote, was “key to [the] decision in *Wood*’s case.”²¹⁵ Whatever discretion a district court or a court of appeals may have to consider a limitations defense that has been forfeited (by mere failure to raise the defense), Justice Ginsburg explained that “[a] court is not at liberty . . . to bypass, override, or excuse a State’s deliberate *waiver* of a limitations defense.”²¹⁶ Here, “the State was well aware of the statute of limitations defense available to it,” but “twice informed the District Court that it” would not challenge the timeliness of the petition.²¹⁷ That was a waiver, not a forfeiture, and thus the court of appeals should not have saved the State from the consequences of its waiver.²¹⁸

211. *Id.* (quoting *Day v. McDonough*, 547 U.S. 198, 211 (2006)).

212. *Id.* (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006)).

213. *Id.* at 473.

214. *Id.* at 470 n.4.

215. *Id.* Justice Ginsburg further explained that although *Granberry* “did not expressly distinguish between forfeited and waived defenses,” *Day* made clear that “a federal court has the authority to resurrect only forfeited defenses.” *Id.* at 471 n.5.

216. *Id.* at 466 (emphasis added).

217. *Id.* at 474.

218. *See id.*

In dicta, Justice Ginsburg explained that even where a court has discretion to raise a timeliness defense sua sponte—departing from the principle of party presentation—the court “should reserve that authority for use in exceptional cases.”²¹⁹ In most cases, there are institutional interests of the judiciary counseling *against* raising the defense. *First*, there is an institutional interest in deciding issues with full assistance of counsel, and if the parties failed to address an issue in the district court, then they probably would not address the issue in their arguments on appeal.²²⁰ *Second*, there is an institutional interest in respecting “the trial court’s processes and time investment” in the case.²²¹ “When a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on that ground,” Justice Ginsburg wrote, “the district court’s labor is discounted and the appellate court acts not as a court of review but as one of first view.”²²²

G. Summary

From her concurring opinion in *Albright* (1994) to her majority opinion in *Wood* (2012), Justice Ginsburg consistently developed a robust principle of party presentation that operates in the Supreme Court, courts of appeals, and district courts. She invoked the principle of party presentation as a “generally applicable” rule for litigation²²³ that is “basic to our procedural system.”²²⁴ In

219. *Id.* at 473.

220. *See id.*

221. *Id.*

222. *Id.* at 474; *see also* *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (stating that the Supreme Court “is a court of final review and not first view” (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part))).

223. *Greenlaw v. United States*, 554 U.S. 237, 248 (2008).

224. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 622 (2009) (Ginsburg, J., dissenting); *see Wood v. Milyard*, 566 U.S. 463, 472 (2012). Thus, “a federal court does not have *carte blanche* to depart from the principle of

determining whether a departure from that rule was warranted, Justice Ginsburg emphasized the distinction between issues that were *waived* by a party's deliberate conduct and issues that were merely *forfeited* by a party's failure to act.²²⁵ In the case of a waiver, a court may not "save" a party from the consequence of its deliberate choice not to raise the issue.²²⁶ In the case of a forfeiture, a court has discretion—but no obligation—to raise the issue *sua sponte*.²²⁷ Even then, a court should depart from the default rule of party presentation only in "exceptional" cases where "special circumstances" exist.²²⁸ And even in those exceptional cases, the court must give the parties an opportunity to be heard on the new issue and ensure that the non-forfeiting party is not prejudiced by the late consideration of the issue.²²⁹ A court's discretion, Justice Ginsburg wrote, is "confined within these limits."²³⁰

party presentation." *Wood*, 566 U.S. at 472. Although Justice Ginsburg recognized limited exceptions to the principle of party presentation, "she [was] clear in articulating and abiding by the general rule." Peter J. Rubin, *Justice Ruth Bader Ginsburg: A Judge's Perspective*, 70 OHIO ST. L.J. 825, 832 (2009).

225. See *Wood*, 566 U.S. at 472–73 (distinguishing a party's "inadvertent error" in failing to raise an issue from a "deliberate decision" not to raise the issue).

226. See *Day v. McDonough*, 547 U.S. 198, 202 (2006) (stating that the Court "would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense"); *id.* at 210 n.11 ("[S]hould a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice."); *Wood*, 566 U.S. at 466 ("A court is not at liberty, we have cautioned, to bypass, override, or excuse a State's deliberate waiver of a limitations defense.").

227. See *Day*, 547 U.S. at 209–10 ("stress[ing] that a district court is not required to doublecheck the State's math" because a court "ha[s] no obligation to assist attorneys representing the State"); *Wood*, 566 U.S. at 473.

228. *Arizona v. California*, 530 U.S. 392, 412 (2000) (acknowledging that "[j]udicial initiative" in raising an issue "might be appropriate in special circumstances"); *Day*, 547 U.S. at 210 (stating that a court must determine whether raising a forfeited issue would serve the interests of justice); *Wood*, 566 U.S. at 473 (stating that appellate courts should exercise their discretion to raise the timeliness of a habeas petition *sua sponte* only in "exceptional cases").

229. See *Day*, 547 U.S. at 210; *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 623 (Ginsburg, J., dissenting); *Wood*, 566 U.S. at 472.

230. *Day*, 547 U.S. at 210 n.11.

If *Hormel* and *Singleton* suggested near-unfettered discretion to consider new issues sua sponte, Justice Ginsburg's decisions created an effective presumption against sua sponte decision-making. Her final opinion addressing the principle of party presentation took the same approach.

IV. JUSTICE GINSBURG'S LAST WORD: *UNITED STATES V. SINENENG-SMITH*

Justice Ginsburg addressed the principle of party presentation for the last time in *United States v. Sineneng-Smith*, issued in May 2020. That case was expected to produce an opinion from the Supreme Court explaining whether a federal criminal statute aimed at persons who encourage or induce immigrants to enter or remain in the United States for the purpose of financial gain was valid under the First Amendment.²³¹ A federal court of appeals had struck down the statute, holding that it was facially overbroad. The oral argument focused entirely on that constitutional question. But Justice Ginsburg's opinion for the (unanimous) Court sidestepped the First Amendment analysis, "completely recast the case in process terms," and instead provided a strong restatement of the principle of party presentation.²³²

231. See Tripp & Metzger, *supra* note 1, at 734 (explaining that the case was "poised to be a test of the competing visions of the statute, as well as a vehicle for resolving some thorny questions of First Amendment doctrine").

232. Tripp & Metzger, *supra* note 1, at 733–34. The *Harvard Law Review* criticized the Court for "punting on the merits issue" and instead deciding the case "on procedural grounds"—arguing that the Court should have "used this opportunity to articulate a definition of solicitation consistent with its First Amendment jurisprudence." *The Supreme Court, 2019 Term—Leading Cases—First Amendment—Freedom of Speech—Criminal Solicitation—United States v. Sineneng-Smith*, 134 HARV. L. REV. 480, 480, 489 (2020).

A. In the District Court

Evelyn Sineneng-Smith owned an immigration consulting firm in California, assisting immigrants seeking green cards through a U.S. Department of Labor program known as “labor certification.”²³³ Even after learning that the labor-certification program expired in April 2001, Sineneng-Smith continued signing retainer agreements with immigrants and telling them that she could help them obtain green cards through labor certification.²³⁴ Sineneng-Smith continued selling her services—and promising to help her clients obtain labor certifications—for the next seven years.²³⁵ Two clients testified that they would have left the United States, rather than remain in the country illegally, but for Sineneng-Smith’s fraud.²³⁶

After Sineneng-Smith pleaded guilty to filing false tax returns, a jury found her guilty of mail fraud and encouraging and inducing an alien to remain the United States for the purpose of financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and § 1324(a)(1)(B)(i). Section 1324(a)(1)(A)(iv) provides that “[a]ny person who . . . encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law . . . shall be punished [as provided in § 1324(a)(1)(B)].”²³⁷ In the district court, Sineneng-Smith argued that her conduct did not fall within the scope of § 1324(a)(1)(A)(iv): she lacked fair notice that her conduct was unlawful; and even if her conduct fell within the scope of the statute, her conduct was protected by the First

233. *United States v. Sineneng-Smith*, 910 F.3d 461, 468 (9th Cir. 2018), *vacated*, 140 S. Ct. 1575 (2020).

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.* at 468, 471 (quoting 8 U.S.C. § 1324(a)(1)(A)(iv)).

Amendment.²³⁸ The district court rejected those arguments and sentenced Sineneng-Smith to eighteen months of imprisonment.²³⁹

B. *In the Court of Appeals*

On appeal to the Ninth Circuit, Sineneng-Smith challenged her § 1324(a)(1)(A)(iv) convictions on the ground that the charged conduct was beyond the scope of the statute; she did not have fair warning that such conduct was unlawful; and her conduct was protected activity under the First Amendment.²⁴⁰ The Government responded to those arguments.²⁴¹ The panel held oral argument in April 2017 and submitted the case for decision.²⁴² Five months later—in September 2017—the panel “determined that [its] decision would be significantly aided by further briefing” and “invit[ed] interested *amici* to file briefs” on three issues that Sineneng-Smith had not raised: (1) whether § 1324(a)(1)(A)(iv) was overbroad under the First Amendment and if so, whether any limiting construction would cure the First Amendment problem; (2) whether the statute was void for vagueness; and (3) whether the statute

238. *See id.*; Notice of Motion and Motion for Judgment of Acquittal on Counts 1–6; Memorandum in Support of Motion for Judgment of Acquittal on Counts 1–6, *United States v. Sineneng-Smith*, No. CR-10-00414-RMW, 2013 WL 6776188 (N.D. Cal. Dec. 23, 2013). The motion for judgment of acquittal repeated arguments that Sineneng-Smith made in a motion to dismiss the relevant counts of the superseding indictment. *See* Notice of Motion and Motion to Dismiss Counts 1–3, 9–10, and the Forfeiture Allegations of the Superseding Indictment, *Sineneng-Smith*, No. CR-10-00414-RMW, 2013 WL 6776188. At no point in the district court did Sineneng-Smith argue that the statute was unconstitutional *on its face*.

239. *See Sineneng-Smith*, 910 F.3d at 468 & n.2.

240. Appellant’s Opening Brief at 9–41, *Sineneng-Smith*, 910 F.3d 461 (No. 15-10614). Although Sineneng-Smith challenged the constitutionality of § 1324(a)(1)(A)(iv) *as applied to her conduct*, she did not challenge the statute *on its face*.

241. Brief for the United States as Appellee at 27–42, *Sineneng-Smith*, 910 F.3d 461 (No. 15-10614).

242. *See Sineneng-Smith*, 910 F.3d at 469.

contains an implicit mens rea element.²⁴³ Three amici were specifically invited to file briefs—the Federal Defender Organizations of the Ninth Circuit, the Immigrant Defense Project, and the National Immigration Project of the National Lawyers Guild.²⁴⁴ The amici were “of course[] not restricted to briefing [the specified issues] and [could] brief such further issues as they, respectively, believe[d] the law and the record call[ed] for.”²⁴⁵ The parties were allowed, but not required, to file supplemental briefs “limited to responding” to the amicus briefs.²⁴⁶

In her supplemental brief, Sineneng-Smith “adopted” the “lengthy and detailed arguments” of the *amici* but did not elaborate on the overbreadth argument.²⁴⁷ For its part, the United States argued that Sineneng-Smith had not presented any facial challenge to the statute; the panel should not consider such a challenge at all, but if the panel were to consider facial overbreadth or vagueness claims, it should do so only under plain-error review.²⁴⁸ At the second oral argument, the United States argued that this case was “just the wrong vehicle in which to consider an overbreadth argument” because the defendant had not presented a facial overbreadth challenge in the district court or on appeal.²⁴⁹ More than that, the defendant’s principal argument—that

243. *See id.* The panel’s Order may be found in the Joint Appendix filed in the Supreme Court. *See* Joint Appendix at 122, *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67).

244. *See* Joint Appendix at 122, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67).

245. *See id.* at 123.

246. *Id.*

247. Appellant’s Supplemental Brief at 1, *Sineneng-Smith*, 910 F.3d 461 (No. 15-10614).

248. *See* Supplemental Brief for the United States as Appellee at 28–31, *Sineneng-Smith*, 910 F.3d 461 (No. 15-10614). As explained below (in Section V.C.2), plain-error review is available in criminal cases where the defendant failed to preserve an issue or argument in the district court. *See* FED. R. CRIM. P. 52(b).

249. Transcript of Oral Argument, *Sineneng-Smith*, 910 F.3d 461 (No. 15-10614), 2018 WL 1426519.

her conduct did not fit within the narrow scope of the statute—was “fundamentally inconsistent” with an overbreadth challenge.²⁵⁰

The panel issued an opinion vacating Sineneng-Smith’s convictions for encouraging or inducing an alien to reside in the United States, on the ground that § 1324(a)(1)(A)(iv) was facially overbroad under the First Amendment and therefore invalid.²⁵¹ The panel explained that Sineneng-Smith had “preserved her overbreadth argument” by asserting a First Amendment claim (not based on overbreadth) in the district court; having asserted that claim, she was “not limited to the precise arguments [she] made below.”²⁵² “Because Sineneng-Smith . . . asserted a First Amendment claim throughout the litigation,” the panel wrote, “her overbreadth challenge”—the issue raised *by the panel* after the first oral argument—was “at most . . . a new argument to support what has been a consistent claim.”²⁵³

C. *In the Supreme Court*

The Government filed a petition for writ of certiorari, arguing that “[t]he Ninth Circuit erred in reaching out to facially invalidate an important federal criminal law.”²⁵⁴ Although the Government complained about the Ninth Circuit’s raising the facial overbreadth issue *sua sponte*, it asked the Supreme Court to review the case to decide only whether the Ninth Circuit erred in holding that

250. *Id.*

251. *Sineneng-Smith*, 910 F.3d at 485. The Ninth Circuit separately affirmed Sineneng-Smith’s convictions for mail fraud. *See United States v. Sineneng-Smith*, 744 F. App’x 498, 499 (9th Cir. 2018) (mem.) (unpublished).

252. *Sineneng-Smith*, 910 F.3d at 469 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

253. *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)).

254. Petition for Writ of Certiorari at 7, *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67).

§ 1324(a)(1)(A)(iv) was facially unconstitutional.²⁵⁵ The Supreme Court granted certiorari.²⁵⁶

In its briefing on the merits, the Government argued that the Ninth Circuit “not only deviated from the normal course of as-applied constitutional adjudication, but also the normal course of party-driven litigation, by inviting argument on—and ultimately invoking—the overbreadth doctrine.”²⁵⁷ Nevertheless, the Government did not make any argument that the Ninth Circuit’s judgment should be reversed for that reason alone. Instead, the Government argued that the Ninth Circuit’s judgment should be reversed because § 1324(a)(1)(A)(iv) was not overbroad.²⁵⁸

After an oral argument that focused entirely on the substantive question whether § 1324(a)(1)(A)(iv) was facially unconstitutional,²⁵⁹ the Supreme Court issued an opinion vacating the Ninth Circuit’s judgment and remanding the case “for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties.”²⁶⁰ Writing for a unanimous Court, Justice Ginsburg explained that in light of the principle of party presentation, the Ninth Circuit’s “radical transformation of [the] case” went “well beyond the pale.”²⁶¹

255. *Id.* at 1. In its Reply in support of the petition for a writ of certiorari, the Government again complained that the Ninth Circuit had “constructed constitutional arguments that [Sineneng-Smith] herself had not advanced.” Reply Brief for the Petitioner at 1, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67). The Government did not make any freestanding argument, however, based on the Ninth Circuit’s raising the overbreadth issue sua sponte.

256. *United States v. Sineneng-Smith*, 140 S. Ct. 36 (2019).

257. Brief for the United States at 37, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67).

258. *See id.* at 15–44.

259. *See* Transcript of Oral Argument, *Sineneng-Smith*, 140 S. Ct. 1575 (No. 19-67).

260. *Sineneng-Smith*, 140 S. Ct. at 1582.

261. *Id.*

“In our adversarial system of adjudication,” Justice Ginsburg wrote, “we follow the principle of party presentation”—“rely[ing] on the parties to frame the issues for decision and assign[ing] to courts the role of neutral arbiter of matters the parties present.”²⁶² This principle reflects the view that “parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”²⁶³ As “essentially passive instruments of government,” courts “do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.”²⁶⁴

The Ninth Circuit’s “takeover of the appeal” violated the principle of party presentation.²⁶⁵ While *Sineneng-Smith* had challenged her § 1324(a)(1)(A)(iv) conviction on the grounds that her conduct did not violate the statute and she had a First Amendment right to engage in that conduct, the panel had another idea—that the statute was facially overbroad and therefore invalid.²⁶⁶ And apparently dissatisfied with the parties’ approach to the case, the panel

262. *Id.* at 1579 (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

263. *Id.* (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)).

264. *Id.* (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing en banc)). One of Justice Ginsburg’s clerks recalled that Justice Ginsburg “had tremendous respect for Judge Arnold, and that passage encapsulated the point in elegant prose much like the Justice’s own writing. When she first read it, the Justice responded with a huge smile, which was the highest compliment.” Tripp & Metzger, *supra* note 1, at 734 n.32.

265. *Sineneng-Smith*, 140 S. Ct. at 1581.

266. *Id.* at 1580. A statute is facially overbroad, in violation of the First Amendment, if a “substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982)); see *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (stating that the “strong medicine” of invalidation due to overbreadth is warranted only where application of the statute to protected speech is “substantial”).

invited three nonparty organizations—representing the interests of criminal defendants and immigrants—to file amicus curiae briefs addressing the overbreadth issue.²⁶⁷ In a second round of oral arguments, the panel gave the invited amici twenty minutes of argument time and Sineneng-Smith’s counsel half that amount.²⁶⁸ “In the panel’s adjudication,” the arguments of defense counsel “fell by the wayside, for they did not mesh with the panel’s overbreadth theory of the case.”²⁶⁹

Although courts are not “hidebound by the precise arguments of counsel,” Justice Ginsburg wrote, they are not authorized to “radical[ly] transform[]” the case that the parties have presented.²⁷⁰ The Court therefore vacated the Ninth Circuit’s judgment and remanded the case “for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties.”²⁷¹

Justice Ginsburg acknowledged that the principle of party presentation “is supple, not ironclad,” and there are “circumstances in which a modest initiating role for a court is appropriate.”²⁷² The Court had departed from the principle of party presentation in certain criminal cases, for example, to protect the rights of *pro se* litigants.²⁷³ Moreover, in an Addendum to her opinion for the Court, Justice Ginsburg identified nearly two dozen cases in the preceding five years (2015–2020) in which the Court itself had called for supplemental briefing or appointed amici curiae (as the Ninth Circuit had done) to address jurisdictional issues, or to clarify issues that parties had raised in lower courts or in

267. *Sineneng-Smith*, 140 S. Ct. at 1580–81.

268. *Id.* at 1581.

269. *Id.*

270. *Id.* at 1581–82.

271. *Id.* at 1582.

272. *Id.* at 1579 (citing *Day v. McDonough*, 547 U.S. 198, 202 (2006)).

273. *See id.*

the Supreme Court, or to defend lower court judgments when the prevailing party declined to do so.²⁷⁴

D. *Summary*

Sineneng-Smith was Justice Ginsburg’s final tribute to our adversarial system and the principle of party presentation. Although the Court was expected to resolve a difficult First Amendment issue in the context of a criminal case, Justice Ginsburg “completely recast the case in process terms and wrote an opinion for a unanimous Supreme Court on the side of the Government and sharply rebuking the Ninth Circuit.”²⁷⁵ “Courts,” she wrote, “are essentially passive instruments of government” that “normally decide only questions presented by the parties.”²⁷⁶ Although there are circumstances in which a court may take a “modest initiating role,” and thus have discretion to raise an issue sua sponte, the “general rule” is that a court should decide the issue(s) that the parties present.²⁷⁷ All this followed from Justice Ginsburg’s opinions from *Albright* to *Wood*.

What was new here was the clear—and forceful—rebuke of a court that “radical[ly] transform[ed]” the case presented by the parties.²⁷⁸ According to Justice Ginsburg, the Ninth

274. *Id.* at 1582–83. If those departures from the principle of party presentation were meant to be normative, then one may wonder how Justice Ginsburg would explain her recasting the case in process terms when the Government barely argued a process violation in its briefs. See Tripp & Metzger, *supra* note 1, at 735 (“The irony of *Sineneng-Smith* is that, after sternly reprimanding the Ninth Circuit for deciding the case on the basis of an argument that no party had raised, the Supreme Court proceeded to turn around and do the same.”). In Justice Ginsburg’s defense, the Government made more mention of the Ninth Circuit’s takeover of the appeal than defense counsel made of facial overbreadth in the lower courts.

275. Tripp & Metzger, *supra* note 1, at 732–33.

276. *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing en banc)).

277. *Id.*

278. See *Sineneng-Smith*, 140 S. Ct. at 1582.

Circuit panel “departed so drastically from the principle of party presentation as to constitute an abuse of discretion.”²⁷⁹ Rather than decide the issues presented by the defendant, the panel injected a new issue into the case and left defense counsel’s arguments “by the wayside.”²⁸⁰ The panel improperly executed a “takeover of the appeal” that made the parties’ presentations irrelevant.²⁸¹ Even if a court has discretion to play a “modest initiating role”²⁸² in “special circumstances,”²⁸³ a court may not hijack a case simply to fit its own legal theory.²⁸⁴ Thus, the Supreme Court vacated the Ninth Circuit’s judgment and remanded “for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel.”²⁸⁵

Sineneng-Smith implicitly reaffirms the *Singleton* approach to sua sponte decision-making, recognizing that a court has *discretion* to consider an issue not presented by the parties.²⁸⁶ But the panel here exercised its discretion to raise a new issue simply because the panel thought it had a better theory of the case; there were no “extraordinary circumstances.”²⁸⁷ And although the panel gave the parties an opportunity to be heard on the new issue, the panel’s order for supplemental briefing and its order setting a second oral argument—where counsel for amici would have twice as much time as defense counsel—demonstrated that the panel was prepared to decide the appeal without regard to the

279. *Id.* at 1578.

280. See *id.* at 1581.

281. See *id.*

282. *Id.* at 1579.

283. *Arizona v. California*, 530 U.S. 392, 412 (2000).

284. See *Sineneng-Smith*, 140 S. Ct. at 1580–82.

285. *Id.* at 1578.

286. See *id.* (holding that the Ninth Circuit’s conduct “constitute[d] an abuse of discretion”).

287. See *id.* at 1581 (stating that the panel ignored counsel’s “differently directed” arguments because “they did not mesh with the panel’s overbreadth theory of the case”).

presentations of defense counsel.²⁸⁸ Raising an issue *sua sponte* without a good reason, ignoring the issues that the parties presented, and relegating the parties to a “secondary role”—that was a “drastic” departure from the principle of party presentation, which the Court would not allow.²⁸⁹

V. DISCRETION WITHIN LIMITS

The Supreme Court’s opinions in the past several decades, including Justice Ginsburg’s opinions, describe a robust principle of party presentation from which a court may depart in extraordinary circumstances where the interests of the judicial branch at least balance the interests of the parties in controlling the litigation. Courts considering whether to raise a “new” issue that was not presented by the parties (in the district court or in the court of appeals) should consider those opinions in three broad categories of cases: (1) “must” cases, where a court has an *affirmative obligation* to raise the new issue, (2) “may not” cases, where a court is *forbidden* to raise the new issue, and (3) “may” cases, where a court has *discretion* to raise the new issue.²⁹⁰

288. *See id.* at 1580–81.

289. *See id.* at 1578. The panel’s decision on remand shows how important its departure from the principle of party presentation was. Disregarding the facial overbreadth issue (as required by the Supreme Court), the panel easily rejected all of Sineneng-Smith’s arguments—statutory and First Amendment arguments alike—and affirmed her convictions. *See United States v. Sineneng-Smith*, 982 F.3d 766, 773–77 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 117 (2021).

290. At oral argument in *Day*, Justice Ginsburg said that a case involving a court’s raising an issue *sua sponte* “could be a ‘must,’ it [could] be ‘may not,’ or it could be ‘may.’” Transcript of Oral Argument at 12, *Day v. McDonough*, 547 U.S. 198 (No. 04-1324). That is a useful way to describe the continuum of cases in which the principle of party presentation applies, and so the remaining analysis will follow Justice Ginsburg’s lead.

A. “*Must*” Cases

The category of “must” cases—cases in which a court has an affirmative obligation to raise and decide an issue that the parties have not presented—seems to be limited to cases involving some question about the court’s authority to decide the case. Notwithstanding the principle of party presentation, a judge must examine issues relating to its *subject-matter jurisdiction* over the case.²⁹¹

“[P]roperly comprehended,” subject-matter jurisdiction refers to “a tribunal’s ‘power to hear a case,’” and a federal court has power to hear only the kinds of cases specified by the Constitution and federal statutes.²⁹² Once a court determines that it lacks subject-matter jurisdiction, it “cannot proceed at all” with respect to the merits of the case and its “only function” is to “announc[e] the fact” that jurisdiction is lacking “and dismiss[] the cause.”²⁹³ Thus, a court has no authority to pass on the merits of a dispute—even to “pronounce upon the meaning or the constitutionality of a state or federal law”—if there is no basis for the court’s jurisdiction.²⁹⁴ To do so “is, by very definition, for a court to act *ultra vires*.”²⁹⁵

Because a court cannot enter a valid judgment absent subject-matter jurisdiction, objections to a court’s subject-matter jurisdiction are “unique in our adversarial system” in

291. See Martineau, *supra* note 57, at 1045 (“The most universally recognized exception to the general rule [against considering new issues on appeal] is subject matter jurisdiction.”).

292. *Union Pac. R.R. Co v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (Ginsburg, J.) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)); see *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (stating that subject-matter jurisdiction is “the courts’ statutory or constitutional *power* to adjudicate the case”).

293. *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

294. *Id.* at 101.

295. *Id.* at 102.

that they “can be raised at any time.”²⁹⁶ While federal courts “do not usually raise claims or arguments on their own,” they “have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.”²⁹⁷ A party may challenge subject-matter jurisdiction for the first time even “at the highest appellate instance”—in the Supreme Court.²⁹⁸ And a party may raise an objection to a court’s subject-matter jurisdiction even if that party previously *conceded* that the court had jurisdiction over the action.²⁹⁹ That is because “a court’s subject-matter jurisdiction cannot be expanded to account for the parties’ litigation conduct.”³⁰⁰

Thus, the Federal Rules of Civil Procedure provide that “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”³⁰¹ And that is so whether or not the parties notice the defect and bring it to the court’s attention. “In contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them *on their own initiative*.”³⁰²

296. *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013) (Ginsburg, J.); *see Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (Ginsburg, J.); *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (Ginsburg, J.); *Union Pac. R.R.*, 558 U.S. at 81.

297. *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

298. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (Ginsburg, J.).

299. *See Auburn Reg’l Med. Ctr.*, 568 U.S. at 153.

300. *Kontrick*, 540 U.S. at 456; *see Davis*, 139 S. Ct. at 1849 (stating that “courts must consider [challenges to subject-matter jurisdiction] *sua sponte*”); *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (“When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.”).

301. FED. R. CIV. P. 12(h)(3) (emphasis added); *see Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (“This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.” (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900))).

302. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017)

The rule that courts must raise jurisdictional issues *sua sponte* is clear, but it comes with certain costs. As Justice Ginsburg observed in *Auburn Regional Medical Center*, “[t]ardy jurisdictional objections can . . . result in a waste of adjudicatory resources and can disturbingly disarm litigants.”³⁰³ The waste of resources is apparent when parties and the court—and perhaps a jury and an appellate court—litigate and adjudicate the merits of a case all the way to judgment, only to learn at the last stage of litigation that there never was federal jurisdiction in the first place.³⁰⁴ Waste of resources, however, pales in comparison to the institutional harm resulting from *ultra vires* adjudication. A court’s taking action against a party when the court lacks constitutional or statutory power to decide the case is an unlawful exercise of power, which must be remedied as soon as the court (or a reviewing court) notices the error.

B. “*May Not*” Cases

The category of “may not” cases—in which a court has *no discretion* to raise or consider an issue not presented by the parties—appears to be limited to cases where a party has taken clearly inconsistent positions in the litigation. This “may not” category includes cases involving waivers, invited errors, and the cross-appeal rule.

(Ginsburg, J.) (emphasis added); see *Henderson*, 562 U.S. at 434. Issues relating to standing, mootness, and ripeness—often described as jurisdictional issues—must be raised *sua sponte*, without regard to the parties’ presentation of such issues. See *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 230–31 (1990) (standing); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (mootness); *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (ripeness).

303. *Auburn Reg’l Med. Ctr.*, 568 U.S. at 153; see *Davis*, 139 S. Ct. at 1849.

304. See *Henderson*, 562 U.S. at 434–35 (recognizing that “a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction,” and “if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted”).

1. Waivers

In *Day* and *Wood*, Justice Ginsburg emphasized the distinction between waivers and forfeitures and made clear that courts do not have discretion to consider *sua sponte* an issue that a party previously *waived*.³⁰⁵ An issue or argument is waived when it is “knowingly and intelligently relinquished,” not merely left unaddressed.³⁰⁶ The line between waiver and forfeiture may be difficult to identify in certain circumstances. But because a waiver reflects a party’s deliberate, intentional litigation choice, disregarding a waiver undermines party control of litigation while involving the court in what appears to be advocacy—“saving” a party from its (in the court’s view) ill-considered choice. Thus, as Justice Ginsburg explained in *Wood*, “a federal court has the authority to resurrect only *forfeited* defenses,” not waived defenses.³⁰⁷

305. See *Day v. McDonough*, 547 U.S. 198, 202 (2006) (stating that a court would abuse its discretion by “overrid[ing] a State’s deliberate waiver of a limitations defense”); *Wood v. Milyard*, 566 U.S. 463, 466 (2012) (stating that a court “is not at liberty . . . to bypass, override, or excuse a State’s deliberate waiver of a limitations defense”).

306. *Wood*, 566 U.S. at 470 n.4; *Hamer*, 138 S. Ct. at 22 n.1 (“The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. ‘Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.’” (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”).

307. *Wood*, 566 U.S. at 471 n.5. In a recent *en banc* decision, the Eleventh Circuit examined the distinction between waivers and forfeitures to determine whether the court should decide an issue that the government (in a criminal case) failed to raise on appeal. *United States v. Campbell*, 26 F.4th 860 (11th Cir. 2022) (en banc). Discussing *Sineneng-Smith*, *Wood*, and *Day*, the majority explained that because “[w]aiver directly implicates the power of the parties to control the course of the litigation,” a court “must respect [the] decision” of a party that “affirmatively and intentionally relinquishes an issue.” *Id.* at 872. By contrast, a court “ha[s] the ability to ‘resurrect’ forfeited issues *sua sponte* in ‘extraordinary circumstances.’” *Id.* (quoting *Wood*, 566 U.S. at 471 n.5). The critical issue in *Campbell* was whether the government’s failure to raise an issue (the good-faith exception to the exclusionary rule) on appeal constituted a waiver or a forfeiture. *Id.* at 865. Although the majority and the dissent disagreed on that point, there was no disagreement that the principle of party presentation is central to

2. Invited Errors

Appellate courts will not consider issues or arguments relating to alleged errors that were invited by the party claiming error.³⁰⁸ The appellant's asking the court of appeals to hold the district court in error for granting a request made by the appellant below is simply unfair to the district court.³⁰⁹ So strong is this rule against consideration of invited errors that a court of appeals may decline to consider an invited error even if the appellee fails to argue invited error; in other words, while a court may not raise an invited error (favoring the appellant) *sua sponte*, the court may raise the invited-error doctrine *sua sponte*.³¹⁰

adversarial system and requires different treatment for waivers and forfeitures. *Compare id.* at 872 (“This waiver/forfeiture distinction matters due to the party presentation principle.”), *with id.* at 899 (Jordan and Newsom, JJ., dissenting) (stating that “the party-presentation principle is part and parcel of the adversarial system”) and *id.* at 901 (stating that “a court . . . shouldn’t countermand a litigant’s conscious choice about how best to frame its case”).

308. *See* *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (stating that “a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed”); *Minneapolis & St. Louis R.R. Co. v. Winters*, 242 U.S. 353, 356 (1917) (stating that the defendant “cannot complain of a course to which it assented below”); *McGillin v. Bennett*, 132 U.S. 445, 452–53 (1889) (holding that the defendant could not object to admission of evidence that he offered over the plaintiff’s objection); *United States v. City of Memphis*, 97 U.S. 284, 292 (1878) (“The action of the court was in this particular exactly what he asked. . . . [H]e cannot now be permitted to complain in this court of an order made in the inferior court at his instance.”); *United States v. Brown*, 934 F.3d 1278, 1301 (11th Cir. 2019) (“It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.” (quoting *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006))); *United States v. Ginyard*, 215 F.3d 83, 88 (D.C. Cir. 2000) (“If a defendant invites error by the district court, he is ‘barred from complaining about it on appeal.’” (quoting *United States v. Harrison*, 103 F.3d 986, 992 (D.C. Cir. 1997))).

309. *See* *United States v. Perrault*, 995 F.3d 748, 772 (10th Cir. 2021) (explaining that the invited-error doctrine is “rooted in reliance interests” and “prevents a party who induces an erroneous ruling from being able to have it set aside on appeal” (citation omitted)), *cert. denied*, 142 S. Ct. 472 (2021); *Pensacola Motor Sales Inc. v. E. Shore Toyota, LLC*, 684 F.3d 1211, 1231 (11th Cir. 2012) (“A party that invites an error cannot complain when its invitation is accepted.”).

310. *See* *Brown*, 934 F.3d at 1301; *United States v. Mancera-Perez*, 505 F.3d 1054, 1057 & n.3 (10th Cir. 2007); *Harden v. United States*, 688 F.2d 1025, 1032 n.7 (5th Cir. 1982).

3. The Cross-Appeal Rule

As Justice Ginsburg explained in *Greenlaw*, absent a cross-appeal, a court of appeals has *no discretion* to grant a judgment-winner greater relief than that party obtained in the district court.³¹¹ The judgment-winner in the district court has the option to cross-appeal and seek greater relief; the decision not to cross-appeal presumably reflects that party’s willingness (and deliberate choice) to accept the district court’s judgment on its own terms. Raising a new issue—which may result in greater relief to the judgment-winner than the district court’s judgment provides—would actually disregard *both* the party’s litigation choice (not to challenge the judgment) *and* the finality of the district court’s judgment. Even if a court of appeals believes that the appellee should have received greater relief from the district court, that belief alone cannot overcome the principle of party presentation coupled with the judiciary’s interest in preserving the finality of judgments.

In cases involving waiver, invited error, and the cross-appeal rule, a court cannot raise a new issue *sua sponte* without overriding a party’s knowing, deliberate choice and disrespecting the district court’s work.

311. See *Greenlaw v. United States*, 554 U.S. 237, 244–45 (2007); *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924) (“[A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.”); *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937) (describing the cross-appeal rule as “inveterate and certain”); *United States v. Kaluza*, 780 F.3d 647, 656 (5th Cir. 2015) (declining to consider an appellee’s argument based on the cross-appeal rule); *Jackson v. Humphrey*, 776 F.3d 1232, 1239–40 (11th Cir. 2015) (same).

C. “May” Cases

The category of “may” cases—in which courts have discretion (but no obligation) to raise new issues that the parties have not presented—includes various circumstances where the parties’ interests in controlling the litigation may be balanced or outweighed by institutional interests of the judiciary. Considering *Wood v. Milyard* and other recent decisions, one court of appeals has identified “cabined and rare exceptions to both the party presentation principle and the rules governing forfeiture of affirmative defenses.”³¹² Those exceptional contexts “share a common, defining feature”—namely, that the circumstances “squarely implicate the institutional interests of the judiciary.”³¹³ Thus, “federal courts may depart from the party presentation principle . . . only in distinct and narrow circumstances in which the judiciary’s own interests are implicated.”³¹⁴

The critical question, then, is what kinds of interests may justify a departure from the principle of party presentation in cases where the court has discretion to raise a new issue.

1. The Interest in Deciding All Issues that Are Antecedent To—or Fairly Included Within—the Issues that the Parties Have Presented

Perhaps the first question a court should ask is whether the new issue should be decided *in order to decide* the issues that have been presented by the parties. If consideration of the new issue is necessary to a fair determination of the issues that undoubtedly were presented by the parties, then the interest of the judiciary in providing a fair adjudication of the parties’ dispute may justify raising the issue *sua sponte*. In that situation, the court might say that the new

312. *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1109–10 (D.C. Cir. 2019).

313. *Id.* at 1110.

314. *Id.* at 1112.

issue is not really “new” at all; it is encompassed within the issue that was presented, just not expressed separately.

The Supreme Court has held that it may be appropriate to consider a new issue that is “antecedent” to, or “fairly included” within, an issue that actually was presented by the parties.³¹⁵ Indeed, Supreme Court Rule 14.1(a) expressly provides that the question presented in any petition for a writ of certiorari will be deemed to “comprise every subsidiary question fairly included therein,” and the Court will consider all such questions.³¹⁶ A question is not “subsidiary” to, or “fairly included” within, another question if it is merely “related” or “complementary.”³¹⁷ Where the new issue “exist[s] side by side” with the issue that was presented, and where “neither encompass[es] the other,” the new issue cannot be said to be “fairly included” within the issue that was presented.³¹⁸ This approach—considering all questions that are “subsidiary” to the question presented—reflects the Court’s interest in making a fair and accurate determination of the issues that clearly were presented by the parties.

For example, in *Kamen v. Kemper Financial Services, Inc.*, the Court reversed the judgment of the court of appeals fashioning a uniform federal rule to fill a gap in federal securities law, based on an argument that the petitioner did

315. See *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Caspari v. Bohlen*, 510 U.S. 383, 388–89 (1994) (concluding that a *Teague* non-retroactivity issue was “a subsidiary question fairly included in the question presented,” namely, whether the Double Jeopardy Clause applies to successive noncapital sentence enhancement proceedings).

316. SUP. CT. R. 14.1(a).

317. See *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (declining to consider a regulatory-taking issue where the question presented related only to a physical-taking issue); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31–32 (1993) (holding that a question concerning the propriety of third-party intervention in the court of appeals was not “fairly included” in the question whether a court of appeals should vacate a district court judgment at the parties’ request in connection with a settlement on appeal).

318. *Yee*, 503 U.S. at 537.

not raise in the court of appeals until her reply brief.³¹⁹ The petitioner, a shareholder in an investment company, brought a derivative action against the company's investment adviser, claiming a violation of the Investment Company Act of 1940, which prohibits materially misleading proxy statements.³²⁰ The district court dismissed the action on the ground that the petitioner-shareholder failed to make a pre-complaint demand on her company's board of directors, and the Seventh Circuit affirmed.³²¹ Relying on the American Law Institute's Principles of Corporate Governance, the Seventh Circuit created a federal common law rule requiring a pre-complaint demand.³²²

In the Supreme Court, the petitioner-shareholder argued that the court of appeals erred in fashioning a federal common law rule that did not incorporate state law. The investment adviser argued that the Court should not consider that argument, however, because the petitioner-shareholder "failed to advert to state law until her reply brief in the proceedings below."³²³ Although a court of appeals ordinarily does not consider an argument made for the first time in a reply brief, the Supreme Court concluded that the state-law argument was properly presented because the shareholder-petitioner "effectively invoked federal common law as the basis of her right to forgo demand as futile," and the court of appeals therefore had to identify "the proper source of [any] federal common law [rule]."³²⁴ The question for the Supreme Court was "whether the Court of Appeals drew its universal-demand rule from an improper source when it disregarded state law relating to the futility

319. *See* 500 U.S. 90, 99–100 (1991).

320. *See id.* at 93–94.

321. *See id.* at 94.

322. *See id.* at 94–95.

323. *Id.* at 99.

324. *Id.* (emphasis omitted).

exception.”³²⁵ Once the petitioner presented the issue whether she was required to make a demand as a matter of federal common law, she effectively presented the subsidiary issue whether the correct federal common law rule should incorporate state law. In other words, the source-of-law issue was *antecedent* to the ultimate issue whether the petitioner was required to make a pre-complaint demand.

Similarly, the Court in *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.* approved an appellate court’s raising and deciding an issue relating to the validity of a statutory provision—whether that provision had been repealed—even though no party had questioned the validity of the provision.³²⁶ Trade organizations representing insurance agents challenged a decision of the Comptroller of the Currency allowing an Oregon bank to sell insurance through its branches, pursuant to authority granted by § 92 of the National Bank Act.³²⁷ Although the trade organizations did not argue—in the district court or the court of appeals—that § 92 of the National Bank Act had been repealed, the court of appeals directed the parties to address that issue and then held that the trade organizations were entitled to a judgment because § 92 had been repealed in 1918 and was no longer a federal statute.³²⁸

The Supreme Court (unanimously) reversed, holding that any apparent repeal of § 92 was merely a scrivener’s error and the statute remained in force.³²⁹ At the outset, the Court concluded that the court of appeals had not abused its discretion in raising the repeal issue *sua sponte*.³³⁰ There was “a real case and controversy” between the parties concerning the lawfulness of the Comptroller’s decision,

325. *Id.* at 100.

326. 508 U.S. 439, 447–48 (1993).

327. *See id.* at 443–44.

328. *See id.* at 444–45.

329. *Id.* at 462.

330. *Id.* at 446–47.

which was based on § 92.³³¹ To decide that question, the court of appeals was permitted to “‘identify and apply the proper construction of governing law,’ even where the proper construction is that a law does not govern because it is not in force.”³³² If the court of appeals were not authorized to make that determination, then “litigants, by agreeing on the legal issue presented, [could] extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory.”³³³ Because the trade organizations had unquestionably put the issue of the Comptroller’s interpretation of § 92 before the court of appeals, the court of appeals was authorized to make a threshold determination whether the statute was actually still a federal law; in other words, the court of appeals could identify and decide the “antecedent” question whether the statute had been repealed.³³⁴

Finally, the Court in *Lebron v. National Railroad Passenger Corp.* clarified the circumstances in which it would consider a new issue as included within the question presented.³³⁵ Michael Lebron sued Amtrak for violating his First Amendment rights when it refused to display a political advertisement that he had created for Pennsylvania Station

331. *Id.* at 446.

332. *Id.* (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)).

333. *Id.* at 447. Because Article III gives federal courts power to adjudicate only “cases” or “controversies,” the Supreme Court has held that it will not render “advisory” opinions on abstract questions of law. *Carney v. Adams*, 141 S. Ct. 493, 498 (2020); see *Hall v. Beals*, 396 U.S. 45, 48 (1969).

334. *U.S. Nat’l Bank of Or.*, 508 U.S. at 447 (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). The Court explained that “[t]he omission of section 92 from the United States Code, . . . along with the codifiers’ indication that the provision had been repealed, created honest doubt about whether section 92 existed as law,” and the court of appeals was not required to “render judgment on the basis of a rule of law whose nonexistence [was] apparent on the face of things, simply because the parties agree upon it.” *Id.* (quoting *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment)).

335. 513 U.S. 374, 379–83 (1995).

in New York City.³³⁶ In both the district court and the court of appeals, Lebron argued that Amtrak was subject to First Amendment limitations because it was a private entity that was closely connected with the federal government; Lebron never argued that Amtrak was a federal government entity itself.³³⁷ In the Supreme Court, however, Lebron argued (in the alternative) that Amtrak was “not a private entity but Government itself.”³³⁸

Over Amtrak’s objection, the Court considered the new argument.³³⁹ The Court concluded that the new argument was “fairly embraced” within the question presented—which asked whether the court of appeals erred in holding that Amtrak’s conduct “was not state action” under the circumstances of the case.³⁴⁰ The question whether Amtrak was a private entity (connected with federal government entities) or a government entity was “prior to the clearly presented question and dependent upon many of the same factual inquiries.”³⁴¹ That made the case more like *U.S. National Bank of Oregon* and less like *Yee*.³⁴²

Kamen, *U.S. National Bank of Oregon*, and *Lebron* show that the Supreme Court is willing to consider new issues where doing so is necessary to make a fair resolution of the issues that the parties actually presented. Likewise, a court of appeals or a district court in a “may” case would be on the strongest ground in raising an issue sua sponte if it could explain how the new issue was antecedent to, or fairly included within, an issue that a party clearly had presented. In that situation, the court could say that it was only answering a question that must be answered to resolve the

336. *See id.* at 376–77.

337. *See id.* at 378.

338. *Id.*

339. *See id.* at 379–83.

340. *Id.* at 380 & n.1.

341. *Id.* at 382.

342. *See id.* at 382–83.

issue before it.

Recall that the Ninth Circuit panel in *Sineneng-Smith* asserted that the facial overbreadth issue was not really new at all—because defense counsel had raised a First Amendment issue in the district court and on appeal.³⁴³ Citing *Yee*, the panel asserted that once defense counsel presented a First Amendment claim, she was entitled to rely on any argument in support of that claim.³⁴⁴ But this was not a *Yee* case. As Justice Ginsburg explained, defense counsel made three specific claims—a non-constitutional claim that the defendant’s conduct did not fall within the scope of the statute; a constitutional claim that the statute, as applied to her conduct, was vague; and a constitutional claim that the statute could not apply to her because her alleged conduct was protected First Amendment activity.³⁴⁵ Defense counsel never argued that the statute was unconstitutional *on its face*.³⁴⁶ Under the panel’s view of *Yee*, invocation of the First Amendment or “free speech” *in any way* would allow consideration of *any and all* First Amendment or “free speech” kinds of arguments. The Supreme Court has rejected such an expansive view of a “claim” for purposes of *Yee*.³⁴⁷ The facial overbreadth issue might have been related or complementary to the as-applied statutory and First Amendment issues that *Sineneng-Smith* actually presented, but facial overbreadth was not antecedent to, or fairly included within, those issues.

343. See *United States v. Sineneng-Smith*, 910 F.3d 461, 469 (9th Cir. 2018), *vacated*, 140 S. Ct. 1575 (2020).

344. See *id.*

345. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579–80 (2020).

346. See *id.* at 1580 (“Nowhere did [Sineneng-Smith] so much as hint that the statute is infirm, not because her own conduct is protected, but because it trenches on the First Amendment sheltered expression of others.”).

347. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (“If ‘statutory preemption’ were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had ‘consistently argued’ that a challenged regulation was unconstitutional.”).

2. The Interest in Avoiding Plainly Erroneous Judgments in Criminal Cases

The Supreme Court has recognized that the principle of party presentation may be overcome by institutional interests in the context of a criminal case involving a “plain error.” For more than a century, the Supreme Court has considered itself “at liberty to correct” a “plain error . . . in a matter . . . absolutely vital to defendants” in a criminal case, even where the error was “not properly raised” by the defendants in a lower court.³⁴⁸ Under Rule 52(b) of the Federal Rules of Criminal Procedure, a court of appeals may correct a “plain error that affects substantial rights . . . even though it was not brought to the [trial] court’s attention.”³⁴⁹ In other words, even if defense counsel fails to object to a district court ruling or action in the district court, a court of appeals may (but is not required to) consider a challenge to that ruling or action on appeal from the judgment.

Rule 52(b) applies to errors that were not objected to and thus *forfeited*.³⁵⁰ As the Supreme Court explained in *United States v. Olano*, “forfeiture is the failure to make the timely assertion of a right”—distinguished from waiver, which is the “intentional relinquishment or abandonment of a known right.”³⁵¹ Rule 52(b) gives a court of appeals “a limited power

348. *Wiborg v. United States*, 163 U.S. 632, 658 (1896); see *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (stating that “[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings”).

349. See FED. R. CRIM. P. 52(b).

350. See *Puckett v. United States*, 556 U.S. 129, 134 (2009) (“If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited.”).

351. 507 U.S. 725, 733 (1993) (second excerpt quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (holding that the presence in the jury room of alternates who did not participate in deliberations was not a reversible error under Rule 52(b)).

to correct errors that were forfeited.”³⁵²

But not just any otherwise-forfeited error will justify this departure from the principle of party presentation. For a court of appeals to disturb the district court’s judgment, the error must be “plain”—which means “clear” or “obvious” under current law (at a minimum).³⁵³ And then the plain error must “affect substantial rights”—which means that it “must have affected the outcome of the district court proceedings.”³⁵⁴ In other words, the error must have been prejudicial. And then, finally, the plain error must “seriously affect[] the fairness, integrity or public reputation of judicial proceedings.”³⁵⁵ If those conditions are satisfied, the court of appeals has *discretion* to correct the otherwise-forfeited error; while the court “has authority to order correction, [it] is not required to do so.”³⁵⁶

The Supreme Court has been careful to emphasize the limitations on plain-error review, which is a departure from the principle of party presentation. Those limitations (1) “serve[] to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them” and (2) “prevent[] a litigant from sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.”³⁵⁷ The plain-error review authorized by Rule 52(b) thus strikes a “careful balance . . . between judicial efficiency and the redress of injustice.”³⁵⁸ At the same time, it seeks to

352. *Id.* at 731; *see id.* at 732 (stating that “the authority created by Rule 52(b) is circumscribed”); *Puckett*, 556 U.S. at 134 (“If an error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed.”).

353. *Olano*, 507 U.S. at 734.

354. *Id.*

355. *Id.* at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). While conviction of an actually innocent person satisfies this standard, actual innocence is not required. *See id.* at 736–37.

356. *Id.* at 735; *see Puckett*, 556 U.S. at 135.

357. *Puckett*, 556 U.S. at 134.

358. *Id.* at 135.

promote the “integrity” and “public reputation” of the adjudicative process.³⁵⁹

3. The Interest in Avoiding Needless Conflicts with State Courts

Although there is only a limited analog to Rule 52(b) in the Federal Rules of Civil Procedure³⁶⁰—such that plain error-review generally is not available in civil cases³⁶¹—the Supreme Court has recognized a court’s authority in certain civil cases to raise and consider new issues that were not presented by the parties.³⁶² In several cases, courts have raised new issues to avoid needless conflicts with state courts.

359. *Olano*, 507 U.S. at 736.

360. See FED. R. CIV. P. 51(d)(2) (providing that a court “may consider a plain error in the [jury] instructions that has not been preserved . . . if the error affects substantial rights”).

361. Other than Rule 51(d)(2), “[t]here is no Federal Rule of Civil Procedure explicitly authorizing plain error review in civil litigation.” *SEC v. Yang*, 795 F.3d 674, 679 (7th Cir. 2015). Some circuits apply plain-error review to non-instructional issues in civil cases anyway. See *Transverse, L.L.C. v. Iowa Wireless Servs., L.L.C.*, 992 F.3d 336, 347 & n.46 (5th Cir. 2021); *Higgs v. Costa Crociere S.P.A. Co.*, 969 F.3d 1295, 1307–08 (11th Cir. 2020); *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011); *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 561 (8th Cir. 2008). Such review may be stricter in civil cases than in criminal cases. See *Henry*, 969 F.3d at 786 (stating that plain-error review in civil cases is “severely constricted” (quoting *Yang*, 795 F.3d at 679)); *Sindi v. El-Moslimany*, 896 F.3d 1, 20 (1st Cir. 2018) (stating that “reversals for plain error are ‘hen’s-teeth-rare’ in civil cases”); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (“[W]e require a greater showing of error than in criminal appeals.”), *abrogated on other grounds by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

362. See *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977) (“[T]his Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they ‘seriously affect the fairness, integrity or public reputation of judicial proceedings.’” (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936))); *N.Y. Cent. R.R. Co. v. Johnson*, 279 U.S. 310, 318–19 (1929) (“The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error.” (citations omitted)).

As explained above, Justice Ginsburg's opinion in *Day* expressly approves a district court's raising the timeliness of a habeas petition sua sponte, when the defendant mistakenly fails to raise the issue.³⁶³ *Day* relied on *Granberry v. Greer*, which held that a district court has discretion to raise sua sponte a habeas petitioner's failure to exhaust state-law remedies.³⁶⁴ In *Granberry*, the Court explained that even if the State fails to assert a meritorious non-exhaustion defense, the court "should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim."³⁶⁵ And the Court in *Caspari v. Bohlen* held that a district court considering a habeas petition has discretion to raise a non-retroactivity defense that the State fails to present.³⁶⁶ These decisions reflect the Court's recognition of important institutional interests in the habeas context—interests in federal-state comity and finality that may balance and outweigh the parties' interest in controlling litigation.

Outside the context of habeas cases, the Court has stated that the interests of comity and federalism also may warrant a court's raising abstention issues sua sponte.³⁶⁷ "Federal courts abstain out of deference to the paramount interests of

363. *Day v. McDonough*, 547 U.S. 198, 202 (2006).

364. 481 U.S. 129, 133–35 (1987).

365. *Id.* at 134.

366. 510 U.S. 383, 389 (1994).

367. *See Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976). Federal courts of appeals have consistently taken that approach. *See, e.g., Citizens for Free Speech, LLC v. Cnty. of Alameda*, 953 F.3d 655, 658 (9th Cir. 2020); *Hill v. Snyder*, 878 F.3d 193, 206 n.3 (6th Cir. 2017); *Jiménez v. Rodríguez-Pagan*, 597 F.3d 18, 27 n.4 (1st Cir. 2010); *Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734, 737 n.1 (5th Cir. 1999); *Int'l Coll. of Surgeons v. City of Chi.*, 153 F.3d 356, 360 (7th Cir. 1998); *Morrow v. Winslow*, 94 F.3d 1386, 1390–91 & n.3 (10th Cir. 1996); *O'Neill v. City of Phi.*, 32 F.3d 785, 786 n.1 (3d Cir. 1994); *Robinson v. City of Omaha*, 866 F.2d 1042, 1043 (8th Cir. 1989).

another sovereign,”³⁶⁸ and thus there may be a significant interest of the judiciary in avoiding needless conflict with state courts that may balance or outweigh the parties’ interest in controlling the litigation.

4. The Interest in Respecting the Finality of Judgments

The principle of party presentation also yields to the general rule that while an appellate court may *reverse* a lower court’s judgment only on grounds asserted by the appellant (or petitioner), the court may *affirm* a lower court’s judgment on any ground supported by the record.³⁶⁹ Almost a century ago, the Supreme Court explained that an appellee “may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.”³⁷⁰ In other words, a reviewing court may uphold a lower court’s judgment for any reason “appearing in the record”—even if that reason was presented by a party but *ignored* by the lower court; even if that reason was presented by a party and squarely *rejected* by the lower court; and even if that reason was *never presented* by any party.³⁷¹

368. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996); *see New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367–68 (1989) (explaining that the Court had extended the doctrine of *Younger* abstention to certain civil proceedings because of the Court’s “concern for comity and federalism”); *Int’l Coll. of Surgeons*, 153 F.3d at 361 (explaining that *Pullman* abstention seeks not to protect the rights of any party but to “promot[e] a harmonious federal system by avoiding a collision between the federal courts and state . . . legislatures,” and *Burford* abstention “is not concerned with the rights of the parties in the case at hand but rather is inspired by concerns of federalism” (first excerpt quoting *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983))).

369. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *United States v. One Distillery*, 174 U.S. 149, 151 (1899).

370. *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924).

371. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (“The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.”). This “right for any reason” rule does not apply where the judgment

This rule reflects the importance of the finality of judgments, placing a thumb on the scale in favor of affirmance—and thus in favor of the district court’s resolution of the case. Appellate courts review judgments, not opinions or reasons,³⁷² and so they are free to affirm lower courts’ judgments that are right for the wrong reason.³⁷³

Although the appellate court may seem to abandon its customary role as a “passive” adjudicator in this circumstance, it does so in the interest of preserving the *status quo* and upholding the correct judgment (though not the reasons) of another adjudicator. As the Supreme Court explained in *SEC v. Chenery Corp.*, “[i]t would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.”³⁷⁴ In other words, American law acknowledges that the institutional interest in protecting the finality of judgments outweighs the parties’ interest in controlling litigation and framing the issues that they wish a court would decide.

Some courts of appeals have held that they may raise an alternative ground for affirmance sua sponte—where the appellee fails to present that ground in its brief—so long as the ground was presented to the district court (and was not

depends upon a determination of fact. *See* *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Guevara v. Republic of Peru*, 468 F.3d 1289, 1305–06 (11th Cir. 2006).

372. *See* *Jennings v. Stephens*, 574 U.S. 271, 277 (2015); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 457 (6th Cir. 2021); *United States v. Rivera*, 613 F.3d 1046, 1051 (11th Cir. 2010).

373. *See* *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (“In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”); *Silberman v. Mia. Dade Transit*, 927 F.3d 1123, 1137 (11th Cir. 2019) (“We can affirm where the district court reaches the correct result but for the wrong reasons.”).

374. *Chenery Corp.*, 318 U.S. at 88.

waived) and the appellant had an opportunity to address it.³⁷⁵ As then-Judge Neil Gorsuch explained, an appellate court’s “preference for affirmance no doubt follows from the deference [it] owe[s] to the district courts and the judgments they reach, many times only after years of involved and expensive proceedings.”³⁷⁶ Reversal always entails some “cost and risk,” and so appellate courts “are ready to affirm whenever the record allows it”—whether or not the appellee presents the best argument on appeal.³⁷⁷

5. The Interest in Avoiding Waste of Judicial Resources

A court may consider the interest of the judiciary in avoiding waste of judicial resources. For example, the Supreme Court in *Arizona v. California* explained that a forfeited preclusion defense may be raised sua sponte “in special circumstances”—where the court is on notice that it previously decided the issue presented—because preclusion doctrine promotes an institutional interest in avoiding waste of judicial resources as well as the defendant’s interest in avoiding duplicative litigation.³⁷⁸ The Court in *Arizona*

375. See *Fields v. City of Chi.*, 981 F.3d 534, 557 n.4 (7th Cir. 2020) (“We have held that we can affirm a district court even on grounds not raised at all by the appellee, as long as the argument was presented to the district court and the appellant had an opportunity to respond to the argument there such that the appellee did not waive it in that court.”); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (stating that a court of appeals may affirm “on any basis supported by the record, even if it requires ruling on arguments not . . . even presented to [the court] on appeal”). *But see Ivey v. Audrain Cnty.*, 968 F.3d 845, 850–51 (8th Cir. 2020) (“Though we may affirm a district court’s decision on any ground that the record supports, we usually do so when a party advances that alternative ground, not when we raise the matter sua sponte without giving the appellant a chance to respond.” (citation omitted)).

376. *Richison*, 634 F.3d at 1130.

377. *Id.*

378. 530 U.S. 392, 412 (2000); see *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (stating that “res judicata and collateral estoppel . . . conserve judicial resources,” among other things); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (stating that the doctrine of collateral estoppel has the purpose of “promoting judicial economy by preventing needless litigation”); *Comm’r v. Sunnen*, 333 U.S. 591, 597 (1948) (stating that the doctrine of *res judicata* “rests upon considerations of economy of judicial time and public policy favoring the

elected not to consider the preclusion defense sua sponte (in an original action) because the relevant issue had had not been previously decided—which meant that there was no risk of wasting judicial resources.³⁷⁹

Preclusion is not the only defense that a court may raise sua sponte to avoid waste of judicial resources. Under a federal statute, a district court may dismiss an *in forma pauperis* action sua sponte if the court determines that the action is frivolous, “fails to state a claim on which relief may be granted,” or seeks monetary relief from a defendant who is immune from claims for such relief.³⁸⁰ This statute is designed to “discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions.”³⁸¹ Similarly, several courts of appeals have held that a district court may dismiss a complaint sua sponte for failure to state a claim upon which relief can be granted.³⁸² In that

establishment of certainty in legal relations”).

379. *Arizona*, 530 U.S. at 412. In contrast, the Fourth Circuit in *Clodfelter v. Republic of Sudan* held that a district court properly raised a preclusion defense sua sponte because there were “special circumstances” warranting a departure from the principle of party presentations. 720 F.3d 199, 208–10 (4th Cir. 2013) (holding that “reciprocal foreign litigation interests of the United States and a concern for judicial efficiency support[ed] the district court’s sua sponte consideration of *res judicata*,” where the district court had “expended significant judicial resources” over a decade adjudicating the first action, such that consideration of *res judicata* might avoid waste of resources).

380. See 28 U.S.C. § 1915(e)(2)(B)(i)–(iii).

381. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). The Court in *Neitzke* held that the previous version of the statute did not allow sua sponte dismissal for failure to state a claim. *Id.* at 331. The current version of the statute expressly authorizes sua sponte dismissal on that ground. See 28 U.S.C. § 1915(e)(2)(B)(ii).

382. See *Anokwuru v. City of Hou.*, 990 F.3d 956, 967 (5th Cir. 2021); *Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282, 290–91 (4th Cir. 2021); *Reed v. Lieurance*, 863 F.3d 1196, 1207 (9th Cir. 2017); *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015); *Smithrud v. City of St. Paul*, 746 F.3d 391, 395 (8th Cir. 2014); *Chute v. Walker*, 281 F.3d 314, 319 (1st Cir. 2002); 5B ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1357 (3d ed. 2022) (“Even if a party does not make a formal motion under Rule 12(b)(6), the district judge on his or her own initiative may note the

circumstance, where the plaintiff has no possibility of recovery, dismissal would avoid needless waste of judicial (and party) resources.

D. Reasoned Discretion

For decades commentators have agreed that there are no clear rules guiding courts considering whether to raise new issues sua sponte.³⁸³ The *Hormel* standard—allowing courts to raise new issues “as justice may require”³⁸⁴—did not confine courts’ discretion in any meaningful way, resulting in a patchwork of exceptions that were not consistently applied. In recent decades, commentators have proposed rule-like approaches to bring order to the apparent chaos.³⁸⁵ The Supreme Court, however, has not adopted a rule-like approach to this question and has not created any multi-pronged test. Instead, the Court has articulated a strong

inadequacy of the complaint and dismiss it for failure to state a claim . . .”). Sua sponte dismissals may be appropriate only “as long as the procedure employed is fair”—which typically means that the plaintiff must have notice of the court’s intention to dismiss the action and an opportunity to respond. *Anokwuru*, 990 F.3d at 967 (quoting *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014)); see *Robertson*, 989 F.3d at 291; *Reed*, 863 F.3d at 1207; *Surtain*, 789 F.3d at 1248; *Chute*, 281 F.3d at 319; *Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991) (per curiam); MILLER ET AL., *supra*, § 1357.

383. See, e.g., *Dodson*, *supra* note 13, at 11–12 (describing the rule against considering new issues as merely a “presumption, pockmarked by exceptions”); *Frost*, *supra* note 6, at 463 (observing that federal appellate courts have acted “with little rhyme or reason” in raising new merits issues); *Miller*, *supra* note 13, at 1256 (stating that federal courts have “failed to follow any consistent practice about sua sponte holdings”).

384. *Hormel v. Helvering*, 312 U.S. 552, 559 (1941).

385. See, e.g., *Weigand*, *supra* note 123, at 290–93 (proposing an eight-question “construct” for determining whether to raise a new issue); *Steinman*, *supra* note 14, at 1612–16 (proposing an initial six-point analysis followed by consideration of at least thirteen other questions); *Dennerline*, *supra* note 71, at 1010–12 (proposing a “model rule” allowing sua sponte decision-making where the new issue was not waived, no further factual development would be necessary, and raising the issue would not prejudice any party or there was no opportunity to raise the issue before); *Martineau*, *supra* note 57, at 1059–61 (proposing that courts raise new issues sua sponte only when such issues could provide bases for relief under Fed. R. Civ. P. 60(b)).

principle of party presentation and identified certain considerations that may inform a court's exercise of discretion. Under current doctrine, the question whether to raise a new issue sua sponte is still a question committed to the court's discretion. But now there are considerations that "confine[]" a court's discretion.³⁸⁶

Specifically, where a court has discretion (but no obligation) to raise a new issue sua sponte, a court should balance the parties' interest in controlling the litigation with institutional interests of the judiciary. Such interests include resolving all issues subsidiary to the issues presented by the parties, avoiding plainly erroneous judgments in criminal cases, avoiding needless conflicts with state courts, respecting the finality of judgments, and avoiding waste of judicial resources.

Not only should a court conduct a balancing of party and judicial-branch interests, but it should also explain its reasons for raising a new issue sua sponte. From *Singleton* to *Sineneng-Smith*, the Supreme Court has made clear that the decision whether to raise a new issue sua sponte is reviewable only for abuse of discretion,³⁸⁷ which may be found where a court failed to consider judicially recognized factors constraining the court's discretion or applied an incorrect legal standard.³⁸⁸ As explained above, the Supreme

386. *Day v. McDonough*, 547 U.S. 198, 210 n.11 (2006).

387. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020).

388. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983) (explaining that a court's discretion "must be exercised under the relevant [legal] standards"); *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 939 (9th Cir. 2018) (stating that abuse of discretion may occur where a court "fail[s] to consider the relevant factors . . . and articulate why" it reached a specific result (quoting *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003))); *Sciarretta v. Lincoln Nat'l Life Ins.*, 778 F.3d 1205, 1212 (11th Cir. 2015) (stating that abuse of discretion occurs where a court "applies an incorrect legal standard" or "applies the law in an unreasonable or incorrect manner" (quoting *FTC v. AbbVie Prods. LLC*, 713 F.3d 54, 61 (11th Cir. 2013))); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627 (6th Cir. 2014) (explaining that abuse of discretion occurs where a court "applies the wrong legal standard [or] misapplies the correct legal standard when reaching a conclusion" (quoting *Young v. Nationwide Mut. Ins.*

Court's decisions addressing the principle of party presentation expressly limit the exercise of discretion in this context. To facilitate meaningful appellate review of the decision to raise a new issue *sua sponte*—specifically, to make a record of the balancing of party and judicial-branch interests—the court should say so when it is raising a new issue, and explain the reasons for that decision.

To avoid the Ninth Circuit's error in *Sineneng-Smith*—and the unanimous rebuke it provoked—a court considering whether to raise a new issue *sua sponte* should (1) determine whether the case is a “must” case, a “may not” case, or a “may” case; (2) if the case is a “may” case, identify the “special circumstances” that make the case “exceptional,” such that a departure from the principle of party presentation may be warranted; and (3) if the court wishes to raise the new issue, give the parties an opportunity to address the new issue before making a ruling. In all this, the court must keep its focus on the case that the parties have presented; the court may not ignore the issues that the parties have raised, nor displace the parties (and their counsel) from the central roles they occupy in an adversarial system.

CONCLUSION

“Justice Ginsburg’s jurisprudence [was] animated by recognition that the judge’s role is that of adjudicator in a system that is fundamentally an adversarial one.”³⁸⁹ For Justice Ginsburg, the public perception of fair proceedings in an adversarial system—which depends on the public perception of a passive, neutral decision-maker—was of paramount importance. Her consistent invocation of the principle of party presentation suggests her understanding of Professor Fuller’s concern that “if the grounds for the decision [of a case] fall completely outside the framework of the [parties’] argument, making all that was discussed or

Co., 693 F.3d 532, 536 (6th Cir. 2012))).

389. Rubin, *supra* note 224, at 831.

proved at the hearing irrelevant[,] then the adjudicative process has become a sham” that will not command the respect of the parties or the public.³⁹⁰

To avoid the danger of judicial overreach (illustrated by *Sineneng-Smith*), courts should consider the development of the principle of party presentation over the past century, and especially in Justice Ginsburg’s opinions during the past three decades. Where there is a question concerning the court’s power to adjudicate the case, the judiciary’s interest in avoiding *ultra vires* action always outweighs the parties’ interests in controlling the litigation; thus, a court always must determine its own subject matter jurisdiction with or without assistance from the parties. Where a party has affirmatively disclaimed an issue or argument—where there is a waiver, not merely a forfeiture—or where a party has invited specific court action, a reviewing court may not save the party from its choice. But where the court has discretion to raise an issue that the parties have not raised, the court must determine whether “special circumstances” make an “extraordinary case” calling for sua sponte decision-making. More specifically, the court should consider the balance of institutional interests of the judiciary against the parties’ interests in controlling the litigation. By explaining the reasons for any decision to raise an issue sua sponte, and detailing the “special” or “extraordinary” circumstances involved, a court may show that it is exercising reasoned discretion within bounds—not simply engaging in ad hoc adjudication to reach a preferred result.

“The lesson for judges”—drawn from Justice Ginsburg’s consistent application of the principle of party presentation—“is that, once satisfied that there is jurisdiction, courts in our system should in general decide the cases as they are presented to them. They are to adjudicate.”³⁹¹ They are not to advocate. Absent “special

390. Fuller, *supra* note 36, at 388.

391. Rubin, *supra* note 224, at 831.

circumstances” in an “extraordinary case,” judges should respect the principle of party presentation and decline to raise new issues sua sponte.