RIGHT FOR ANY REASON

Jeffrey M. Anderson†

The chances of winning an appeal in federal court are slim. One reason for that is an array of rules of appellate review that "stack the deck" in favor of the appellee and the lower court's judgment. One such rule of review is "right for any reason," the rule that an appellee may defend a lower court's judgment on any grounds supported by the record—even grounds that the lower court rejected or ignored. The judgment may be right, even if the reasons are wrong. In 1924, the Supreme Court described the rule as "settled"—and felt no need to cite authority to support it—because the Court and other appellate courts had been applying the rule for nearly a century already, and commentators recognized the rule as a common feature of appellate review. This Article explains how "right for any reason" mitigates the strict technicality of writ-of-error analysis and promotes judicial economy by avoiding needless remand and relitigation where the outcome of a case is certain. Useful as this rule of review is in promoting judicial economy, however, it sometimes conflicts with other fundamental aspects of appellate review—including the principle that an appellate court is a court of review, not first view, and the principle of party presentation. To minimize such conflicts (because they cannot be avoided entirely), this Article argues that federal appellate courts should apply "right for any reason" as a discretionary, not a mandatory, rule of review; should not apply the rule when the appellee waived the alternative ground for affirmance; should raise alternative grounds sua sponte only in exceptional circumstances; and ordinarily should not consider alternative grounds that were not raised in the lower court in the first instance. "Right for any reason" is an important tool for an appellate court—and thus an important weapon in the hands of any appellee—but it should not be applied in a manner that undermines other important aspects of appellate review.

† Associate 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.

TABLE OF CONTENTS

INTRODUCTION 1017
I. ORIGINS AND PURPOSES OF APPELLATE REVIEW IN FEDERAL COURTS 1022
A. *The Writ of Error and the Chancery Appeal* 1022
B. *The Purposes of Appellate Review* 1025
II. RIGHT FOR ANY REASON 1027
A. *The "Settled" Rule* 1027
B. *Development of the Rule* 1033
C. *Reasons for the Rule* 1037
1. Judgments, Not Reasons 1038
2. Judicial Economy and Efficiency 1041
III. PERSISTENT QUESTIONS 1043
A. *Mandatory or Discretionary* 1044
B. *Sua Sponte Consideration of Alternative Grounds for Affirmance* 1050
1. Conflict with the Principle of Party Presentation 1051
2. Minimizing the Conflict 1055
a. Waiver Cases 1056
b. Forfeiture Cases 1059
C. *Preservation of Alternative Grounds for Affirmance in the Lower Court* 1061
1. Conflict with the Role of the Appellate Court as a Court of Review, Not First View, and the Goal of Judicial Economy 1068
2. Minimizing the Conflict 1069
CONCLUSION 1072

INTRODUCTION

With one notable exception—the Supreme Court of the United States—the Constitution does not require that the federal judicial system include appellate courts.[1] In the Judiciary Act of 1789, Congress created inferior federal courts, but none of them were purely appellate courts.[2] And in the early years of the Republic, Supreme Court justices "spent more time at trial work than they did in their appellate role," riding circuit and presiding at trials throughout the country.[3] Not until 1891 did Congress create a system of federal appellate courts and bring an end to circuit riding.[4] After more than 130 years, "appellate courts [are] considered essential features of the American judicial scene."[5]

But "for all the appeal of the right to appeal, the rate of reversal of district court judgments is astonishingly low."[6] In calendar year 2021, federal courts of appeals decided more than 48,000 cases.[7] Of the more than 28,000 cases that were terminated on the merits (rather than on procedural grounds), only about 2,300 resulted in reversal of the district court's judgment.[8] That is a reversal rate of only about 8.2%. No doubt that statistic reflects the fact that district courts get a lot right in adjudicating the cases before them. But it also reflects the operation of several features of appellate review, distinct from the merits of the issues presented by appellants.[9] Indeed, several aspects of appellate review

---

1 U.S. CONST. art. III, § 1; *see* ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 11 (1983).

2 *See* MARTINEAU, *supra* note 1, at 11 (explaining that the Judiciary Act created (1) district courts with original jurisdiction only and (2) circuit courts with original and limited appellate jurisdiction).

3 DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 7 (1994).

4 MEADOR & BERNSTEIN, *supra* note 3, at 7–8. In the Evarts Act of 1891, Congress created a new court of appeals for each existing circuit and abolished the appellate jurisdiction of the existing circuit courts. MARTINEAU, *supra* note 1, at 12; *see also* Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 FORDHAM L. REV. 945, 947 (2016).

5 MEADOR & BERNSTEIN, *supra* note 3, at 5; *see also* MARTINEAU, *supra* note 1, at 12 ("The basic appellate court structure of the United States has not changed substantially since 1891.").

6 Lohier, *supra* note 4, at 953.

7 U.S. CTS., TABLE B-5, U.S. COURTS OF APPEALS—DECISIONS IN CASES TERMINATED ON THE MERITS, BY CIRCUIT AND NATURE OF PROCEEDING, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2021 (2021), www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2021/12/31 [https://perma.cc/W8H7-W8VZ].

8 *Id.* The reversal rate in private civil cases is higher than in criminal cases. *See id.*

9 While the party taking an appeal is called an *appellant*, the party seeking appellate review by way of a petition for a writ (including a writ of certiorari in the Supreme Court) is called the *petitioner*. Likewise, while the party defending a judgment on appeal is the *appellee*, the party

undoubtedly "stack the deck" in favor of the appellee and the district court's judgment.[10]

In any appeal, the appellant bears the burden to show the court of appeals that the district court made an error.[11] By rule, the appellant must specify the error in its opening brief and must cite legal authorities and point to specific portions of the record to show how the district court erred.[12] Not only must the appellant thus "preserve" the claimed error in its appellate brief, but it also must have "preserved" the error in the district court by making a timely and specific objection or request for action.[13] Only in rare cases will a court of appeals even consider an issue that the appellant failed to raise in the district court.[14]

---

defending a judgment in a writ proceeding is called the *respondent*. For ease of reference, this Article will describe the parties involved in any appellate proceeding as the *appellant* (the party challenging the judgment) and the *appellee* (the party defending the judgment).

10 As Judge Lohier put it, "[a]ppellants, not appellees, have a steep hill to climb on appeal in order to prevail." Lohier, *supra* note 4, at 953.

11 *See* 5 C.J.S. *Appeal and Error* § 914 (2022) (stating that "[t]he burden of showing error rests on the party alleging it"). Courts sometimes say that there is a presumption in favor of the judgment under review. *See id.* ("[A]n appellate court will ordinarily indulge all reasonable presumptions in favor of the correctness of the order or judgment from which the appeal has been taken. . . . An appellate court presumes that the trial judge knows the law and applies it properly.").

12 FED. R. APP. P. 28(a); *see* 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))).

13 *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.").

14 *See* FED. R. CRIM. P. 52(b) (authorizing a court in a criminal case to correct a "plain error that affects substantial rights" even if it "was not brought to the court's attention"); United States v. Olano, 507 U.S. 725, 732–33 (1993).

But even if the appellant properly preserved a claimed error in both the district court and the court of appeals, the applicable standard of review might significantly affect the appellant's chances of success.[15] If the claimed error relates to a factual finding by the district court, the court of appeals will review the finding only for "clear error."[16] Under that standard, "[i]f the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance."[17] In effect, that standard of review places "a serious thumb on the scale for the [lower] court."[18]

If the claimed error relates to a "judgment call" by the district court—e.g., a case management issue, a discovery issue, admission or exclusion of evidence, the conduct of trial, or a decision to impose sanctions—the court of appeals will review the district court's ruling only for abuse of discretion.[19] Under that standard of review, an appellate court must not substitute its judgment for the district court's but "must defer to the lower court's 'sound judgment,' so long as its decision falls

---

15 *See* MEADOR & BERNSTEIN, *supra* note 3, at 59 (stating that determination of the appropriate standard of review "is a problem of the appropriate depth of review, of how deep-cutting the appellate scrutiny will be, of how much deference, if any, will be given to the trial court's decision"); Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 47 (2000) ("A standard of review indicates to the reviewing court the degree of deference that it is to give to the actions and decisions under review."); J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 L. & CONTEMP. PROBS. 1, 1 (1984) ("Standards of review . . . define the depth or intensity with which trial court rulings of fact, law, and discretion are subjected to review.").

16 FED. R. CIV. P. 52(a)(6); Pierce v. Underwood, 487 U.S. 552, 558 (1988) (stating that "questions of fact" are "reviewable for clear error"); *see* MEADOR & BERNSTEIN, *supra* note 3, at 60–61; Davis, *supra* note 15, at 48; Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 38 (1994).

17 Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2349 (2021); *see* Cooper v. Harris, 137 S. Ct. 1455, 1465 (2017) ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."); Anderson v. City of Bessemer, 470 U.S. 564, 573–74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

18 U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 966 (2018).

19 *See* United States v. Tsarnaev, 142 S. Ct. 1024, 1040 (2022) (evidentiary rulings); United States v. Clarke, 573 U.S. 248, 256 (2014) ("case management, discovery, and trial practice"); Chambers v. NASCO, Inc., 501 U.S. 32, 55–56 (1991) (imposition of sanctions under a court's inherent power); *Pierce*, 487 U.S. at 558 n.1 ("It is especially common for issues involving what can broadly be labeled 'supervision of litigation' . . . to be given abuse-of-discretion review."); MEADOR & BERNSTEIN, *supra* note 3, at 65–68; Davis, *supra* note 15, at 48.

within its 'wide discretion' and is not 'manifestly erroneous.'"[20] The "hallmark" of abuse-of-discretion review, the Supreme Court says, is "deference" to the lower court.[21]

Typically, the appellant has the best chance of success on appeal when it claims that the district court made an error on a pure issue of law. In that case, the court of appeals will review the district court's ruling de novo—giving no deference to the district court, deciding the issue as if for the first time.[22] But even on de novo review, the appellee has a built-in advantage. The appellee almost certainly (but not always) will defend the district court's judgment on its own terms, arguing that the district court properly applied the controlling law to the facts. Then, the appellee almost certainly will argue that even if the district court erred, its ultimate judgment—the bottom-line result of the case—may be affirmed on a ground other than those expressly adopted by the court.[23] In other words, the appellee will say, the judgment was right but for another reason.

Since 1924, the Supreme Court has made clear that an appellee may defend a district court's judgment on any ground supported by the record, even a ground that the district court ignored or expressly rejected.[24] Application of this rule of appellate review—that a judgment should be affirmed if it is "right for any reason"—necessarily broadens the scope of appellate review and increases the likelihood that the court

---

20 *Tsarnaev*, 142 S. Ct. at 1040 (citation omitted) (first quoting United States v. Abel, 469 U.S. 45, 54 (1984); and then quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997)).

21 *Id.* (quoting *Joiner*, 522 U.S. at 143). As one commentator has explained, "[t]he 'abuse of discretion' standard is appropriate when (1) concerns of judicial economy dictate that the trial court be responsible for the decision, or (2) the trial judge is in a better position to make the decision because he or she can observe the parties." Kunsch, *supra* note 16, at 35.

22 *See U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 965 (stating that "an appellate panel reviews . . . a legal conclusion without the slightest deference"); *Pierce*, 487 U.S. at 558 (stating that "questions of law" are "reviewable *de novo*"); MEADOR & BERNSTEIN, *supra* note 3, at 59–60 ("For purely legal questions, no deference at all is accorded to the trial court's ruling."); Davis, *supra* note 15, at 48. The de novo standard applies "when the appellate court is in as good a position as the trial court to judge the evidence." Kunsch, *supra* note 16, at 37.

23 *See* Lohier, *supra* note 4, at 953 ("Among other imbalances favoring appellees (and district court decisions), appellate courts may affirm, but not reverse, for any reason that can be found in the record, even a reason not relied upon by the parties."); Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 283 (2015) ("New arguments in support of the decision below—that is, in support of affirming the district court—are treated differently than novel appellate arguments for reversal. . . . [A]n appellee is generally free to raise any argument in support of affirmance, so long as there's some basis in the record for it and the appellant has had a fair chance to address it.").

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

of appeals will ultimately affirm the judgment of the district court.[25] The rule effectuates a presumption in favor of the judgment-winner, no matter which party that may be. And sometimes, an appellate court may raise an alternative ground for affirmance that the appellee failed to raise in the lower court—contrary to ordinary rules requiring preservation of issues and arguments.[26]

This Article addresses the development and application of "right for any reason" and its relationship with other fundamental features of our system of adjudication. Part I describes the origins and purposes of appellate review in federal courts—the context in which "right for any reason" arose and remains important. The appellate process in America largely reflects the technical writ-of-error procedure received from England, with features of the chancery-appeal procedure that broaden the scope of the review to allow appellate courts to decide more than just whether the lower court made an error in the case. Part II defines "right for any reason," as that rule has been defined by the Supreme Court and federal courts of appeals since 1924, and identifies the reasons justifying affirmance of lower court judgments on alternative grounds. By focusing on judgments rather than reasons, appellate courts can avoid needless remand and relitigation when there is only one proper outcome of the case—thereby promoting judicial economy in trial courts and appellate courts alike. Part III then identifies three recurring questions relating to the application of "right for any reason": (1) whether the rule is mandatory or discretionary, (2) whether an appellate court may or should raise an alternative ground for affirmance sua sponte, and (3) whether an appellate court should consider an alternative ground for affirmance that was not presented to the lower court. Considering the reasons for affirmance on alternative grounds alongside other important aspects of appellate review, this Article argues that appellate courts should apply "right for any reason" as a discretionary, rather than a mandatory, rule of review; should not raise sua sponte alternative grounds for affirmance that the appellee has waived; should raise alternative grounds that were merely forfeited only in exceptional circumstances; and ordinarily should not consider alternative grounds that the appellee failed to preserve in the lower court.

---

25 Kelly B. Cullen, *Right-for-Any-Reason: Clarifying Pennsylvania's Scope-Broadening Doctrine*, 80 U. PITT. L. REV. 509, 511 (2018) (noting that "[r]ight-for-any-reason . . . broadens the scope of appellate review" by allowing the court to consider arguments that the appellant has not raised).

26 *See, e.g.*, United States v. Campbell, 26 F.4th 860, 865 (11th Cir. 2022) (en banc) (affirming the district court's denial of a defendant's motion to suppress based on the good-faith exception to the exclusionary rule, which the en banc court raised sua sponte on rehearing).

I. ORIGINS AND PURPOSES OF APPELLATE REVIEW IN FEDERAL COURTS

A. *The Writ of Error and the Chancery Appeal*

The appellate system in the United States descended from two types of proceedings in English law—the writ of error (for actions at law) and the appeal (for suits in equity).[27] The writ of error was "not a continuation of a case by removing it to another court for review," but "a new proceeding in another court."[28] The plaintiff-in-error (the judgment-loser in the trial court) was required to submit an assignment of errors—akin to a complaint in a trial court—to which the defendant-in-error (the judgment-winner) would respond.[29] On writ of error, the court could consider only errors of law,[30] and only errors that appeared in the record—"the writ of error, the pleadings, the recital of the trial, the verdict, the proceedings after the verdict, and the judgment."[31] If the plaintiff-in-error wished to raise any errors that did not appear in the record (including errors that occurred during the trial), it had to (1) make an exception to each ruling at the time of the ruling and then (2) prepare a bill of exceptions at the conclusion of the trial.[32] Once approved by the trial court, the bill of exceptions would be included in the record.[33] Moreover, "[c]omplicated rules were developed as to how questions, to be availed of on appeal, must be raised in the trial court and as to how these might be waived by failure to present them properly."[34] Only

---

27 *See* MARTINEAU, *supra* note 1, at 4 ("By the beginning of the Eighteenth Century there were two principal procedures for appellate review, writ of error and appeal."); THOMAS W. POWELL, THE LAW OF APPELLATE PROCEEDINGS, IN RELATION TO REVIEW, ERROR, APPEAL, AND OTHER RELIEFS UPON FINAL JUDGMENTS 43 (1872) (stating that the appellate system in the United States was "founded upon" the English system of proceedings in error and appeals).

28 ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 47 (1941); *see* MARTINEAU, *supra* note 1, at 4; POWELL, *supra* note 27, at 46–47, 105; John J. Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 3 (1950).

29 *See* MARTINEAU, *supra* note 1, at 4; POUND, *supra* note 28, at 54; POWELL, *supra* note 27, at 105, 280; Parker, *supra* note 28, at 3–4.

30 *See* MARTINEAU, *supra* note 1, at 5, 7; POWELL, *supra* note 27, at 47; Edson R. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 9 (1940) [hereinafter Sunderland, *Appellate Procedure*]; Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 139–40 (1927) [hereinafter Sunderland, *Appellate Review*].

31 MARTINEAU, *supra* note 1, at 4 (citing POUND, *supra* note 28, at 38–39, 47); *see* POWELL, *supra* note 27, at 105; Sunderland, *Appellate Review*, *supra* note 30, at 142.

32 *See* MARTINEAU, *supra* note 1, at 4.

33 *See id.*

34 Parker, *supra* note 28, at 4.

matters previously presented to the trial court could be raised in a writ of error.[35]

"The amazing thing about the common-law proceeding in error," Professor Edson Sunderland explained, "was that it did not operate as a review of the merits of the judgment. . . . The sole question was, Did the judge commit an error? Such error might be great or small . . . but an error was an error and the judgment must fall."[36]

But there was another tradition of review in English courts, the appeal of a chancery court ruling in equity cases.[37] That was a retrial of the whole case—both law and facts—in which the House of Lords "could render any judgment it thought appropriate."[38] Unlike the writ of error, the appeal was "a continuation of the same case," transferred from one court to another for final judgment.[39] Although the scope of review was broader than the error proceeding—the court could review both law and facts—the appeal "fell just short of becoming a true rehearing" because "[n]ew questions could not be considered."[40] While "[i]n a proceeding in error the entire aim of the review was to affirm or deny the existence of the error," in a chancery appeal "that problem became merely preliminary to the really basic question of what the right decree should be."[41] Review in a chancery appeal was "an effort to reach the right decision, to do equity."[42]

---

35 *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1026–27 (1987); Sunderland, *Appellate Review*, *supra* note 30, at 140. New issues could not be considered in an error proceeding because the purpose of the proceeding was to determine whether the trial court committed an error, and a court could not commit an error without deciding an issue that one or both parties presented for decision. *See* Martineau, *supra*.

36 Sunderland, *Appellate Procedure*, *supra* note 30, at 8; *see also* Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 986 (1989); Sunderland, *Appellate Review*, *supra* note 30, at 139–40.

37 *See* MARTINEAU, *supra* note 1, at 5; POWELL, *supra* note 27, at 44 (stating that the appeal was "a common and well known proceeding in the English courts of equity or chancery").

38 MARTINEAU, *supra* note 1, at 5; *see also* Dennerline, *supra* note 36, at 986; Martineau, *supra* note 35, at 1027; Sunderland, *Appellate Procedure*, *supra* note 30, at 9.

39 POWELL, *supra* note 27, at 104.

40 Edson R. Sunderland, *The Proper Function of an Appellate Court*, 5 IND. L.J. 483, 489 (1930) [hereinafter Sunderland, *Proper Function*]; *see also* MARTINEAU, *supra* note 1, at 5; Sunderland, *Appellate Review*, *supra* note 30, at 143.

41 Edson R. Sunderland, *The Scope of Judicial Review*, 27 MICH. L. REV. 416, 420 (1929); *see also* POWELL, *supra* note 27, at 113 ("In appeals . . . the questions on the whole case, its facts and merits, are taken from the inferior to the appellate court, and not merely the question whether errors actually appear in the record.").

42 MEADOR & BERNSTEIN, *supra* note 3, at 58; *see also* Sunderland, *Appellate Review*, *supra* note 30, at 143 ("On a review in equity the question was not as to the commission or non-commission of error, but whether the case had been rightly or wrongly decided on the merits.").

These "two entirely different methods and theories of review"—the writ of error and the appeal—"grew up and flourished side by side" in English law, and they "were bound to influence each other."[43] Lawyers and judges trained in the technical precision of the writ of error were unwilling to give the appeal its full potential to rehear a case.[44] At the same time, lawyers and judges, seeing the capacity of the appeal to reach right results, modified error proceedings to allow narrow relief in cases involving "glaring errors of fact."[45]

Nearly a century ago, Professor Sunderland wrote that "[t]he United States is the unfortunate heir of the dual system of error and appeal."[46] And for better or worse—Sunderland and Roscoe Pound thought worse—the writ of error rather than the appeal was the predominant model.[47] Judges in writ-of-error proceedings "were always examining masonry work with microscopes and condemning it if they found flaws," and "[t]hat tradition [came] down to us."[48] Largely influenced by the writ-of-error experience in England, which was "cumbrous, dilatory, expensive, extremely technical, and tied to the formal record so as often to review anything but the case itself,"[49] early American appellate procedure "became one of the most complicated and troublesome procedures in all the history of jurisprudence."[50] Until the middle of the 20th century, "it was almost unbelievably technical and expensive, full of pitfalls and dangers for the unwary, and needlessly burdensome to litigants, to attorneys and to the courts."[51] Another consequence of the

---

43 Sunderland, *Proper Function*, *supra* note 40, at 488.

44 *Id.* at 488–89.

45 *Id.* at 488.

46 *Id.* at 494.

47 *See* Martineau, *supra* note 35, at 1027–28 ("American appellate procedure followed the writ of error model rather than the appeal in equity, much to the chagrin of Roscoe Pound and Edson Sunderland, the principal academic commentators on the appellate process during the first half of the twentieth century."); MEADOR & BERNSTEIN, *supra* note 3, at 7 (stating that the writ of error "is considered the ancestor of the modern American appeal"); MARTINEAU, *supra* note 1, at 5 (stating that the American colonies in the eighteenth century "began to develop legal systems with appellate review procedure that increasingly resembled the English writ of error"); POUND, *supra* note 28, at 108 (stating that "appellate procedure in this country became set in the mold of procedure on writ of error at common law"); Sunderland, *Appellate Procedure*, *supra* note 30, at 10 (stating that the United States "inherited the proceeding in error").

48 Sunderland, *Appellate Review*, *supra* note 30, at 148.

49 ROSCOE POUND, JURISPRUDENCE 625 (2000).

50 Parker, *supra* note 28, at 3.

51 *Id.*; *id.* at 5 ("The expense of appeal was a real burden under the old practice, and the greater part of it was utterly senseless and explainable only as an anachronism surviving from the days

primacy of the writ-of-error model—"the worst feature of American procedure" in Pound's view—was "the lavish granting of new trials."[52]

Twentieth-century reforms of appellate procedure in the United States were designed "to minimize or eliminate the technical approach of the nineteenth century and to broaden the scope of review beyond that permitted by the writ of error," so that cases might be "decided on their merits rather than on procedural technicalities."[53] Such reforms reflected "an entire change of concept as to the nature of an appeal," from the formal writ-of-error model to the looser, more result-oriented model of the chancery appeal.[54]

Until the formal merger of law and equity under the Federal Rules of Civil Procedure, federal courts in the United States—including the Supreme Court—decided both actions at law and suits in equity.[55] Thus, they were accustomed to both the highly technical, issue-specific form of review typified by the writ of error and the looser, more result-oriented form of review typified by the chancery appeal. The result is case law describing appellate review in terms that reflect *both* the writ-of-error experience *and* the chancery-appeal experience.

B. *The Purposes of Appellate Review*

In his 1872 treatise on appellate procedure, Thomas W. Powell wrote that "the great advantage" of appellate adjudication is that "it guards and protects each particular case from wrongs, errors and injustice" while also "preserv[ing] the uniformity of the law, and render[ing] [the law] a consistent and harmonious whole, in a manner that challenges our admiration."[56] Thus, "[i]n the received tradition, the functions of appellate adjudication are two-fold": (1) "review for correctness" and (2) "institutional review."[57] Error-correction is especially important for the

---

when the only record of the trial consisted in the notes of the trial judge and a narrative statement of the proceedings was the easiest to prepare.").

52 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 746 (1906) (explaining that federal courts of appeals granted new trials in about 29% of cases and state courts of appeals granted new trials in about 40% of cases).

53 MARTINEAU, *supra* note 1, at 8–9; *see also* Martineau, *supra* note 35, at 1028.

54 Parker, *supra* note 28, at 3.

55 Since 1937, there has been only "one form of action" under the Federal Rules of Civil Procedure: "the civil action." FED. R. CIV. P. 2.

56 POWELL, *supra* note 27, at 36.

57 PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 2 (1976) (citing POUND, *supra* note 28); *see also* MEADOR & BERNSTEIN, *supra* note 3, at 3–4; MARTINEAU, *supra* note 1, at 19; Phillips, *supra* note 15, at 2; Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 49 (2010); Chad M. Oldfather, *Universal De Novo Review*, 77 GEO.

parties to the particular case because it "serves to reinforce the dignity, authority, and acceptability of the trial [or other trial-court proceeding], and to control the adverse effects of any personal shortcomings of the basic decision-makers."[58] In the federal system, error-correction "is essentially the obligation of the United States courts of appeals which must be, for most purposes, the ultimate appellate tribunal."[59] At the same time, institutional review is important for the legal system as a whole because it allows appellate courts to "announce, clarify, and harmonize the rules of decision employed" by all courts within the relevant hierarchy[60]—and thus ensure that "justice is administered uniformly" throughout a particular jurisdiction.[61] Indeed, "[a]ppellate courts, through their decisions of cases and the explanations for their decisions, declare, make, and reshape legal doctrine in common-law, statutory, and constitutional fields."[62]

In carrying out those dual functions, appellate courts demonstrate concern for both "the impact of decisions on particular litigants" and "the general principles which govern the affairs of persons other than those who are party to the cases decided."[63] Appellate courts must keep both functions in mind because "[a]n appellate system which is unduly

---

WASH. L. REV. 308, 316 (2009). Roscoe Pound described the functions of appellate review as "correction and prevention"—to "correct unfairnesses and mistakes" in a particular case and to prevent similar unfairnesses and mistakes in future cases. POUND, *supra* note 28, at 3. Some commentators have identified three purposes, including the error-correction and institutional-review purposes described above. *See, e.g.*, Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974) (noting the purposes of appellate review as "correcting erroneous decisions," "maintain[ing] [] consistency among the decisions of those lower courts subordinate to it, so that the law is evenhandedly applied within the system," and "the lawmaking function of creating and amending rules of law"); Parker, *supra* note 28, at 1 ("The function of the reviewing court is: (1) to see that justice is done according to law in the cases that are brought before it, (2) to see that justice is administered uniformly throughout the state, and (3) to give authoritative expression to the developing body of the law.").

58 CARRINGTON, MEADOR & ROSENBERG, *supra* note 57, at 2; *see also* MEADOR & BERNSTEIN, *supra* note 3, at 3–4 ("Reviewing for error is . . . a large and important part of appellate work," which "provide[s] a means of ensuring that the law is interpreted and applied correctly and uniformly."); MARTINEAU, *supra* note 1, at 19 ("Error correction is concerned primarily with the effect of the judicial process in the trial court upon the individual litigant and is intended to protect that person from arbitrariness in the administration of justice.").

59 Kurland, *supra* note 57, at 618.

60 CARRINGTON, MEADOR & ROSENBERG, *supra* note 57, at 2–3.

61 Parker, *supra* note 28, at 1.

62 MEADOR & BERNSTEIN, *supra* note 3, at 4; *see* MARTINEAU, *supra* note 1, at 20 (stating that appellate review "provide[s] an opportunity for the common law to develop" and "enforce[s] the law as declared by both judicial and legislative bodies").

63 CARRINGTON, MEADOR & ROSENBERG, *supra* note 57, at 3.

preoccupied with one of these functions to the neglect of the other, is inadequate to advance the purposes which appellate courts should serve."[64] Of course, it is not always possible to advance both the error-correction function and the institutional-review function at the same time; there are tradeoffs in appellate procedure. For example, insisting on preservation of error in the trial court advances the error-correction function, but it does not advance the institutional-review function because it restrains the appellate court's ability to address legal issues that the parties failed to litigate, whether by strategy or oversight.

Because our appellate system still predominantly reflects the writ-of-error experience, it is "slanted by formal design toward the more constrictive attitude emphasizing the corrective function."[65] Appellate procedure remains technical, with strict rules governing preservation and presentation of issues and arguments. But now and again, that "constrictive attitude" is moderated by chancery-appeal features that allow appellate courts to look beyond discrete errors to the overall outcome of the case and the development of important legal rules. One such feature is the rule that a judgment may be affirmed (though not reversed) for any reason appearing in the record.

II. RIGHT FOR ANY REASON

A. *The "Settled" Rule*

In a line of cases dating back to the 1790s, the Supreme Court has consistently held that the party defending the judgment under review may not seek to enlarge that party's rights (or lessen the other party's rights) under the judgment without filing a cross-appeal or cross-petition.[66] This is known as the cross-appeal rule, which the Court has described as "inveterate and certain."[67] This rule "is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be

64 *Id.*

65 Phillips, *supra* note 15, at 2.

66 *See* Greenlaw v. United States, 554 U.S. 237, 244–45 (2008) ("This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee." (citing McDonough v. Dannery, 3 U.S. (3 Dall.) 188, 198 (1796))).

67 *Id.* at 245 (citing Morley Constr. Co. v. Md. Cas. Co., 300 U.S. 185, 191 (1937)); *see* 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).

litigated and encouraging repose of those that are not."[68] A corollary to this rule is that the appellee *need not cross-appeal* simply to defend the lower court's judgment. The appellee is "always heard in support of the decree"[69] and "in opposition to every assignment of error" presented by the appellant.[70]

The Supreme Court defined the modern cross-appeal rule in *United States v. American Railway Express Co.*, decided in 1924.[71] The American Railway Express Company (American) had a "practical monopoly of the railroad express business" until the Southeastern Express Company (Southeastern) entered that business.[72] When American refused to cooperate with Southeastern in establishing "through routes and joint rates between all points served by them respectively," Southeastern asked the Interstate Commerce Commission (ICC) to do so.[73] The ICC granted Southeastern's request in part, and American filed suit in the United States District Court for the Northern District of Georgia to enjoin enforcement of the ICC order.[74] A three-judge court entered a temporary injunction, holding that the ICC had no power over American, which was a "carrier by railroad."[75] Southeastern and other parties appealed that decision to the Supreme Court, which reversed the judgment of the three-judge court.[76]

In the Supreme Court, American argued that the injunction should be upheld even if the three-judge court was wrong about the "carrier by railroad" limitation on the ICC's route-regulation power.[77] Southeastern replied that American had made the same argument in the lower court and lost, and since it did not take a cross-appeal from the lower court's judgment, it could not advance the argument in this appeal.[78] "The objection [was] unsound," Justice Louis Brandeis wrote for the Court, because the cross-appeal rule did not apply.[79] Under the cross-appeal rule, "a party who does not appeal from a final decree of the trial court cannot

68 El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 481–82 (1999).

69 The William Bagaley, 72 U.S. (5 Wall.) 377, 412 (1866).

70 Town of Mount Pleasant v. Beckwith, 100 U.S. 514, 527 (1879).

71 265 U.S. 425, 435 (1924).

72 *Id.* at 428.

73 *Id.*

74 *Id.* at 429–30.

75 *Id.* at 430.

76 *Id.* at 430, 438.

77 *Id.* at 434–35.

78 *Id.* at 435.

79 *Id.*

be heard in opposition thereto," and thus "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."[80]

But it was "likewise settled," the 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*."[81] In other words, an appellee may disagree with the reasoning that led to the judgment in its favor—and say so—without taking a cross-appeal to challenge the judgment. Because American did not attack the lower court's injunction but "merely assert[ed] additional grounds why the decree should be affirmed," the Court considered American's alternative arguments for affirmance.[82]

This is the rule known as "right for any reason": even without taking a cross-appeal, an appellee may challenge the *reasoning* of the lower court, asking the appellate court to affirm the judgment below on any ground supported by the record, whether or not the lower court accepted or even addressed that ground in its ruling.[83] Under this rule, an appellee is entitled to argue a ground that it presented but the lower court *ignored* (because it relied on a different ground).[84] And the appellee is entitled to argue a ground that it presented but the lower court *rejected*.[85] Thus,

---

80 *Id.*

81 *Id.* (emphasis added).

82 *Id.* at 435–36. In the end, the Court rejected American's alternative arguments and reversed the judgment of the three-judge court. *Id.* at 436–38.

83 *See* Jennings v. Stephens, 574 U.S. 271, 276 (2015); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 80 (2009); El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999); Schweiker v. Hogan, 457 U.S. 569, 585 n.24 (1982); Blum v. Bacon, 457 U.S. 132, 137 n.5 (1982); Bondholders Comm., Marlborough Inv. Co. v. Comm'r, 315 U.S. 189, 192 n.2 (1942); Le Tulle v. Scofield, 308 U.S. 415, 421–22 (1940); Morley Constr. Co. v. Md. Cas. Co., 300 U.S. 185, 191 (1937); *Am. Ry. Express Co.*, 265 U.S. at 435.

84 *See* Thigpen v. Roberts, 468 U.S. 27, 29–30 (1984) (affirming the court of appeals judgment on due process grounds, even though the court of appeals relied only on double jeopardy).

85 *See* Swarb v. Lennox, 405 U.S. 191, 202–03 (1972) (White, J., concurring) ("[D]espite the fact that appellee-intervenors did not cross-appeal, they were free to support that part of the judgment in their favor on grounds that were presented and rejected by the District Court in arriving at an adverse judgment on other aspects of the case."); Stelos Co. v. Hosiery Motor-Mend Corp., 295 U.S. 237, 238–39 (1935) ("In support of the judgment, the defendants might have urged the point as to invalidity, decided against them in the Circuit Court of Appeals, without applying for a cross-writ of certiorari."); Langnes v. Green, 282 U.S. 531, 539 (1931) (stating that "the right or duty of this court to consider . . . additional grounds [for affirmance] will [not] be affected by their rejection in the court below").

courts sometimes say that a judgment may be affirmed if it is right for the *wrong* reason.[86]

The Court in *American Railway Express* did not cite any authority for the proposition that a lower court's decision may be affirmed if it is right for any reason appearing in the record. Nevertheless, "right for any reason" was indeed a "settled" rule of appellate review by 1924.[87] In several cases brought to the Court on writs of error, the Court made clear that it could (and would) affirm a lower court's judgment if any ground supported it.

Almost a century before *American Railway Express*, Chief Justice John Marshall wrote in *Williams v. Norris* that "[i]f the judgment should be correct, although the reasoning, by which the mind of the Judge was conducted to it, should be deemed unsound, that judgment would certainly be affirmed in the superior Court."[88] That is an early statement of "right for any reason"—but it was only dicta, because the question before the Court was simply whether an opinion of one state supreme court justice was properly part of the record in a writ-of-error proceeding.[89] (It wasn't.[90]) The Supreme Court actually applied "right for any reason" in *Collier v. Stanbrough*, affirming a state supreme court's judgment on an alternative ground.[91] The state supreme court had held that an out-of-state judgment creditor could not execute on a federal-court judgment against an in-state insolvent estate, leaving nothing to distribute to other creditors.[92] The Supreme Court, however, "deem[ed] it proper to forbear touching the delicate question on which the [state supreme court] founded its judgment" and instead decided the case on a different ground—namely, that the debt had not been appraised before execution.[93] The Court wrote:

---

86 *See, e.g.*, J.E. Riley Inv. Co. v. Comm'r, 311 U.S. 55, 59 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action." (citing Helvering v. Gowran, 302 U.S. 238, 245–46 (1937))); *Helvering*, 302 U.S. at 245 (stating that a correct judgment "must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason"); United States v. Holt State Bank, 270 U.S. 49, 56 (1926) ("But notwithstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable.").

87 *Am. Ry. Express Co.*, 265 U.S. at 435.

88 25 U.S. (12 Wheat.) 117, 120 (1827).

89 *Id.* at 118.

90 *Id.* at 118–21.

91 47 U.S. (6 How.) 14, 20–22 (1848).

92 *Id.* at 21.

93 *Id.*

> The judgment of the State court pronounced the seizure and sale on the federal execution void; this judgment we are called on to revise, and *if we find that it was proper, for the reasons given by the court below, or on other grounds manifestly appearing of record*, and equally calling into exercise the jurisdiction of this court, *it is our duty to affirm it*; and we are of opinion that the judgment of the State court was proper, on another ground.[94]

Then in 1899, the Court in *United States v. One Distillery* applied a similar rule in reviewing a federal court judgment dismissing an information seeking a decree that certain real and personal property that had been seized by a revenue collector was forfeited to the United States.[95] The Government argued that dismissal was improper because the property owner's response to the information failed to present a valid defense.[96] But the Court stated the rule that "if . . . the judgment of the district court dismissing the information was right *upon any ground disclosed upon the record*, the judgment of the circuit court affirming the judgment of the district court should not be held to have been erroneous."[97] In 1919, the Court in *Yazoo & Mississippi Valley Railroad v. Mullins* stated that "the assignment by the lower court of an erroneous reason for a right decision" was not sufficient to reverse a judgment.[98] And in 1921—just three years before *American Railway Express*—the Court in *Frey & Son v. Cudahy Packing Co.* stated that it "must affirm the final judgment" of the court of appeals "[i]f any of [the appellee's arguments were] well taken."[99]

Thus, from at least 1821 to 1921, the Supreme Court recognized, and sometimes applied, the rule that a lower court's judgment could be "right for any reason." And federal courts of appeals also applied "right for any reason," affirming district court judgments on alternative grounds, for at least twenty-five years before *American Railway Express*.[100]

---

94 *Id.* (emphasis added); *see also* Erwin v. Lowry, 48 U.S. (7 How.) 172, 179–80 (1849) ("If [the marshal's sale were] void on any one ground, it would be altogether useless to reverse the judgment because an error had been committed on some other ground; as, on the cause being remanded, the State court would pronounce the deed void a second time on the true ground.").

95 174 U.S. 149 (1899).

96 *Id.* at 151.

97 *Id.* (emphasis added).

98 249 U.S. 531, 532–33 (1919).

99 256 U.S. 208, 210 (1921).

100 *See, e.g.*, Fourth Nat'l Bank of Macon v. Willingham, 213 F. 219, 221 (5th Cir. 1914) ("We are not concerned with the reasons given for making [the decree], . . . for if the order is itself correct, it is not to be disturbed, although the reasons for it or the grounds on which it is based are not such as meet approval."); Dean v. Davis, 212 F. 88, 89 (4th Cir. 1914) ("This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound, even though

Although this Article focuses on federal appellate courts, state supreme courts likewise applied "right for any reason" for decades before *American Railway Express*.[101] In 1853, the Alabama Supreme Court observed that it was the "settled rule" to consider a lower court's judgment "without regard to the reasons"—because "if the court has arrived at a correct result, although the reasons assigned for it may be deemed insufficient, the constant practice is to affirm."[102] That same year, the Supreme Court of Virginia wrote that it was the "settled rule that how erroneous soever may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons."[103] In an 1897 decision, the California Supreme Court explained that:

> No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.[104]

---

the District Judge may have rejected that reason and rested his decree on some other ground." (citing Erwin v. Lowry, 48 U.S. (7 How.) 172 (1849))); United States v. Lehigh Valley R.R., 204 F. 705, 707 (3d Cir. 1913) ("Of course the question before us on this writ is the correctness of the judgment, and if it may properly be supported upon any ground we should affirm it."); John Naylon & Co. v. Christiansen Harness Mfg., 158 F. 290, 293 (6th Cir. 1908) ("[I]f we found that, upon any ground established in the case, the decree of the lower court was correct, though a wrong reason was given for it, it would be our duty to affirm the decree." (citing Merchs.' Nat'l Bank v. Cole, 149 F. 708 (6th Cir. 1907))); *cf.* Converse v. Stewart, 197 F. 152, 154 (2d Cir. 1912) (stating that the state supreme court "would not reverse [the judgment of the intermediate appellate court] if there was any ground on which it could affirm," even a ground "other than those discussed in the court below"); United States *ex rel.* Scott v. McAleese, 93 F. 656, 657 (3d Cir. 1899) (stating that if the lower court's judgment was correct, "our duty is to affirm it").

101 *See, e.g.*, People *ex rel.* Kissinger v. Burrell, 139 N.E. 865, 866 (Ill. 1923); Jorgenson v. Stirling, 209 P. 271, 273 (Idaho 1922); Randall v. Peerless Motor Car Co., 99 N.E. 221, 231 (Mass. 1912); Gooler v. Eidness, 121 N.W. 83, 84–85 (N.D. 1909); Scattergood v. Johns, 46 P. 935, 936 (Kan. 1896); *In re* Kingsley's Est., 29 P. 244, 244 (Cal. 1892) (per curiam); Atwood v. Partree, 14 A. 85, 86 (Conn. 1887); Dolan v. Burlington, C.R. & N. Ry. Co., 105 N.W. 834, 835 (Iowa 1906); Nat'l Park Bank v. Whitmore, 10 N.E. 524, 525 (N.Y. 1887); Macon & Augusta R.R. v. Vason, 57 Ga. 314, 315 (1876); Chabot v. Tucker, 39 Cal. 434, 435–36 (1870); Ohio & Miss. R.R. v. Schultz, 31 Ind. 150, 151 (1869).

102 Cave v. Webb, 22 Ala. 583, 586 (1853); *see also* Dawson v. Turner, 5 Stew. & P. 195, 197 (Ala. 1834) (affirming a lower court decision on alternative grounds, explaining that "[w]hen the result of the decision is correct, the grounds or reasons given for it are generally immaterial").

103 Schultz v. Schultz, 51 Va. (10 Gratt.) 358, 384 (1853).

104 Davey v. S. Pac. Co., 48 P. 117, 117 (Cal. 1897) (en banc).

In 1908, the Missouri Supreme Court described "right for any reason" as a "sensible" rule of appellate review whereby "if the right thing be done (though a wrong reason be given for doing it), the thing itself may stand."[105] By following that rule, appellate courts might "get practical and just results in the administration of law."[106]

Consistent with these federal and state appellate court decisions, commentators recognized "right for any reason" as an important rule of appellate review before *American Railway Express* was decided in 1924. In his 1872 treatise on appellate procedure, Thomas W. Powell wrote that a judgment "will be affirmed, if right, though rendered upon false or incorrect reasoning."[107] Thus, "the reason upon which the judgment was rendered is not considered in sustaining it, for the question then is, is the judgment right as developed by the pleadings and facts of the case, as they appear in the record?"[108] And *Corpus Juris* (published in 1916) summarized "right for any reason" this way:

> Where a judgment or order is correct, it will not be reversed on appeal because the trial court has based its decision on insufficient or erroneous reasons or grounds, or has stated no reasons therefor. . . . The ground on which the court below proceeded . . . is not a subject of inquiry in the appellate court. It is the ruling itself and not the reason therefor with which the reviewing court is concerned.[109]

Presumably no citation was necessary in *American Railway Express* because "right for any reason" had been applied routinely in the Supreme Court, federal courts of appeals, and state supreme courts for decades already.

B. *Development of the Rule*

Since *American Railway Express*, the Court has expressed the "right for any reason" rule of review in different ways. Although the Court consistently has said that an appellee may urge in defense of a judgment "any matter appearing in the record,"[110] the Court also has said that an

---

105 Green v. Terminal R.R. of St. Louis, 109 S.W. 715, 718 (Mo. 1908).

106 *Id.*

107 POWELL, *supra* note 27, at 54.

108 *Id.*

109 4 C.J.S. *Appeal and Error* § 2557 (1916) (footnote omitted) (citing cases from forty-two states and the District of Columbia).

110 Jennings v. Stephens, 574 U.S. 271, 276 (2015); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 80 (2009); El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999); Schweiker v. Hogan, 457 U.S. 569, 585 n.24 (1982); Blum

appellee is free to defend a judgment upon "any legal ground which will support it,"[111] upon "any ground that finds support in the record,"[112] upon "any grounds which would lend support to the judgment below,"[113] and upon "any ground that the law and the record permit."[114] Whatever the language of the rule, the Court has consistently demonstrated a willingness to consider alternative grounds for affirmance that the lower court rejected or ignored.

Langnes v. Green illustrates the application of "right for any reason" to affirm a judgment on grounds that the lower court expressly rejected.[115] Winfield A. Green was injured while working on the fishing vessel *Aloha*, which was owned by Axel Langnes.[116] Green filed a personal-injury suit in Washington state court, and Langnes filed an action in the Western District of Washington seeking a judgment that under a federal statute, Langnes's liability was limited to the extent of his interest in the vessel.[117] The district court enjoined further proceedings in the state court, conducted a bench trial, and then entered a judgment in favor of Langnes.[118] Green appealed the judgment to the Ninth Circuit, which reversed and remanded the case to the district court.[119]

In the court of appeals, Green made two arguments: (1) that Langnes should have made any request for a limitation of liability in state court rather than federal court, and (2) that because the owner of the vessel (Langnes) had knowledge of the injury, the federal statute did not

---

v. Bacon, 457 U.S. 132, 137 n.5 (1982); Bondholders Comm., Marlborough Inv. Co. v. Comm'r, 315 U.S. 189, 192 n.2 (1942); Le Tulle v. Scofield, 308 U.S. 415, 421 (1940); Morley Constr. Co. v. Md. Cas. Co., 300 U.S. 185, 191 (1937); Langnes v. Green, 282 U.S. 531, 539 (1931).

111 Ryerson v. United States, 312 U.S. 405, 408 (1941) (citing *Le Tulle*, 308 U.S. at 421–22).

112 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 n.7 (1984); Jaffke v. Dunham, 352 U.S. 280, 281 (1957) (per curiam); *see also* Bennett v. Spear, 520 U.S. 154, 166 (1997) ("any ground supported by the record").

113 United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977); *see also* United States v. Arthur Young & Co., 465 U.S. 805, 814 n.12 (1984) ("any ground in support of the judgment").

114 Thigpen v. Roberts, 468 U.S. 27, 30 (1984); *see* Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982); United States v. N.Y. Tel. Co., 434 U.S. 159, 166 n.8 (1977); *see also* Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018) ("any ground supported by the law and the record"); Dahda v. United States, 138 S. Ct. 1491, 1498 (2018) ("any ground permitted by the law and the record"); Murr v. Wisconsin, 137 S. Ct. 1933, 1949 (2017) (same).

115 282 U.S. at 538–39.

116 *Id.* at 532–33.

117 *Id.* at 533, 539–40.

118 *Id.* at 533–34.

119 *Id.* at 534.

apply.[120] The Ninth Circuit rejected the first argument but accepted the second.[121] Green thus won the appeal, and Langnes sought review in the Supreme Court. There, Green defended the Ninth Circuit's judgment "upon the ground upon which it was based, and, in addition, continue[d] to urge the rejected ground"—that Langnes should have sought any limitation of liability in the state court rather than a federal court.[122] Langnes complained that because Green had not cross-petitioned for certiorari, he could not argue a ground for affirmance that the court of appeals had rejected.[123] But the Supreme Court said that Green's right to argue *both* grounds for affirmance was "beyond successful challenge" because *American Railway Express* made clear that an appellee may seek affirmance of a lower court's judgment on any ground appearing in the record.[124] Green argued the ground rejected by the Ninth Circuit "not to overthrow the decree, but to sustain it"—as was his right.[125]

Thigpen v. Roberts illustrates the application of "right for any reason" to affirm a judgment on an alternative ground that the lower court simply did not address.[126] Barry Joe Roberts caused a traffic accident that resulted in the death of another person.[127] He was convicted of reckless driving and other state law misdemeanors, and while his appeal from those convictions—under state law, a trial de novo—was pending, a grand jury indicted him for manslaughter.[128] A jury later convicted Roberts of manslaughter, and the trial court sentenced him to twenty years in prison.[129] Roberts then filed a petition for writ of habeas corpus in federal district court.[130] The district court granted habeas relief on two grounds: (1) that the manslaughter prosecution violated the Double Jeopardy Clause (because proof of manslaughter required proof of all the elements of reckless driving); and (2) that substitution of a felony charge covering the conduct for which Roberts had previously been convicted of misdemeanors violated due process.[131] The court of appeals affirmed the

120 *Id.*

121 *Id.*

122 *Id.* at 538.

123 *Id.* at 535, 538.

124 *Id.* at 538–39.

125 *Id.* at 538; *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 330 (1936) (following *Langnes* and considering alternative grounds for affirmance that the lower court expressly rejected); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 559–60 (1931).

126 468 U.S. 27, 29–30 (1984).

127 *Id.* at 28.

128 *Id.* at 28–29.

129 *Id.* at 29.

130 *Id.*

131 *Id.*

district court's judgment, relying solely on the double jeopardy argument.[132]

The Supreme Court affirmed the judgment of the court of appeals, but not on double jeopardy grounds.[133] The Court began its analysis by invoking "right for any reason": "[a]lthough the court below . . . addressed only the double jeopardy issue, we may affirm on any ground that the law and the record permit and that will not expand the relief granted below."[134] The Court then explained that under *Blackledge v. Perry*, a prosecutor's obtaining a felony indictment after the defendant exercised a statutory right to a trial de novo on less serious charges relating to the same conduct carried "a presumption of unconstitutional vindictiveness" in violation of due process.[135] Because Roberts's case was "plainly controlled by *Blackledge v. Perry*," the Court "affirm[ed] on the basis of that decision without reaching the double jeopardy issue."[136] The judgment was right, based on a ground that the court of appeals ignored.

Repeatedly since *American Railway Express* (decided in 1924), the Supreme Court has applied some form of "right for any reason" in civil and criminal cases alike.[137] Federal courts of appeals likewise routinely

---

132 *Id.*

133 *Id.* at 30–33.

134 *Id.* at 29–30.

135 *Id.* at 30 (citing Blackledge v. Perry, 417 U.S. 21, 27–28 (1974)).

136 *Id.*

137 *See, e.g.*, Dahda v. United States, 138 S. Ct. 1491, 1498 (2018); Murr v. Wisconsin, 137 S. Ct. 1933, 1949 (2017); Jennings v. Stephens, 574 U.S. 271, 276 (2015); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 80 (2009); Greenlaw v. United States, 554 U.S. 237, 250 n.5 (2008); El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999); Bennett v. Spear, 520 U.S. 154, 166–67 (1997); United States v. Arthur Young & Co., 465 U.S. 805, 814 n.12 (1984); Blum v. Bacon, 457 U.S. 132, 137 n.5 (1982); United States v. N.Y. Tel. Co., 434 U.S. 159, 166 n.8 (1977); Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970); Jaffke v. Dunham, 352 U.S. 280, 281 (1957) (per curiam); Walling v. Gen. Indus. Co., 330 U.S. 545, 547 (1947); Le Tulle v. Scofield, 308 U.S. 415, 419, 421 (1940); Helvering v. Gowran, 302 U.S. 238, 245–46 (1937).

apply "right for any reason."[138] And appellate courts in the states have applied the same or similar rules.[139]

C. *Reasons for the Rule*

"Right for any reason" seems to be one of those chancery-appeal features that mitigates the strict technicality of the writ-of-error model. This rule allows an appellate court to shift its focus from the specific claimed error(s) to the bottom-line result of the case as a whole and *affirm* a judgment notwithstanding actual error. Even if the trial court erred in the way that the appellant claims, and even if the appellant gave the trial court an opportunity to avoid the error by making a timely objection, the appellant obtains no relief because the appellate court can see that the case was decided correctly, notwithstanding the error. Analyzing alternative grounds for affirmance is akin to reviewing the entire case, whereby the appellate court may consider grounds on which there was no ruling in the lower court.

So what is this chancery-appeal feature doing in a system of appellate review that generally reflects the writ-of-error model? Commentators and appellate courts have identified two important justifications for affirming judgments based on any reason appearing in the record: (1) appellate courts review judgments, not reasons or opinions, and (2) affirmance promotes judicial economy and efficiency when the lower court could reach the same result on alternative grounds.

---

138 *See, e.g.*, United States v. Thomas, 32 F.4th 1073, 1077 (11th Cir. 2022); United States v. Perez, 30 F.4th 369, 374 (4th Cir. 2022); Moreno v. UtiliQuest, LLC, 29 F.4th 567, 577–78 (9th Cir. 2022); Olson v. Major League Baseball, 29 F.4th 59, 84 (2d Cir. 2022); United States v. Black, 25 F.4th 766, 777 (10th Cir. 2022); Cross v. Fox, 23 F.4th 797, 802 (8th Cir. 2022); Beasley v. Howard, 14 F.4th 226, 231 (3d Cir. 2021); Rutila v. U.S. Dep't of Transp., 12 F.4th 509, 511 n.3 (5th Cir. 2021); Meza v. Renaud, 9 F.4th 930, 933 (D.C. Cir. 2021); Yan v. ReWalk Robotics Ltd., 973 F.3d 22, 39 (1st Cir. 2020); United States v. Gilbert, 952 F.3d 759, 762 (6th Cir. 2020); Yeatts v. Zimmer Biomet Holdings, Inc., 940 F.3d 354, 359 (7th Cir. 2019); Wyandot Nation of Kan. v. United States, 858 F.3d 1392, 1397 (Fed. Cir. 2017).

139 *See* 5 C.J.S. *Appeal and Error* § 838 & nn.3–7 (2022) (citing cases); 5 Am. Jur. 2d *Appellate Review* § 718 & nn.3–5 (2022) (citing cases); *see, e.g.*, Wells v. Commonwealth, 512 S.W.3d 720, 721–22 (Ky. 2017); Yanmar Co. v. Slater, 386 S.W.3d 439, 448 (Ark. 2012); Banks v. Commonwealth, 701 S.E.2d 437, 440 (Va. 2010); Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 796 (Ala. 2007); Robertson v. State, 829 So. 2d 901, 906–07 (Fla. 2002); Outdoor Media Dimensions Inc. v. State, 20 P.3d 180, 195–96 (Or. 2001); City of Phoenix v. Geyler, 697 P.2d 1073, 1080 (Ariz. 1985) (en banc); Newmire v. Maxwell, 161 N.W.2d 74, 80 (Iowa 1968). "Right for any reason" has also been applied in Canada "for over a century." Paul Michell, *Right for the Wrong Reason*, 39 ADVOC. Q. 129, 129 (2011).

1. Judgments, Not Reasons

First, "right for any reason" reflects the longstanding principle of appellate review that appellate courts review judgments, not reasons or opinions.[140] Federal courts are empowered to decide cases and controversies, and the outcome of a case is a judgment. "As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies."[141]

As the Court explained as early as 1821, "[t]he question before an appellate [c]ourt is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed."[142] And then in 1827, the Court in *Williams v. Norris* explained that the opinion of a court, "which states merely the course of reasoning which conducted the [c]ourt to its judgment, may explain the views and motives of the [c]ourt, but does not form a part of its judgment."[143] About a century later, the Court in *Rogers v. Hill* explained that "[t]he court's decision of a case is its judgment thereon," while the court's opinion is merely "a statement of reasons on which the judgment rests."[144]

This distinction between a court's judgment and the reasons or grounds for the judgment—and "the primacy of [the] judgment[]"[145]—is critical to the task of appellate review. Writing for the Court in *Williams*, Chief Justice Marshall explained that "[i]f the judgment should be correct, although the reasoning, by which the mind of the [j]udge was conducted to it, should be deemed unsound, that judgment would certainly be affirmed in the superior Court."[146] Following *Williams*, the

---

140 Cullen, *supra* note 25, at 509–10 ("The theory that appellate courts review the trial court's order, not the reasons or analysis behind the order, underlies right-for-any-reason."); Thomas G. Saylor, *Right for Any Reason: An Unsettled Doctrine at the Supreme Court Level and an Anecdotal Experience with Former Chief Justice Cappy*, 47 DUQ. L. REV. 489, 490 (2009); *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party*, 51 HARV. L. REV. 1058, 1067 (1938) [hereinafter *Review of Errors*].

141 Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–27 (1999).

142 McClung v. Silliman, 19 U.S. 598, 603 (1821).

143 25 U.S. (12 Wheat.) 117, 118 (1827).

144 289 U.S. 582, 587 (1933).

145 Hartnett, *supra* note 141, at 130–31.

146 *Williams*, 25 U.S. (12 Wheat.) at 120; *see also* Schultz v. Schultz, 51 Va. 358, 384 (1853) ("[I]t is the settled rule that how erroneous soever may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons.").

Court in *Davis v. Packard* refused to consider an opinion of a state court judge that was not part of the record, stating that "[t]he question before this court is, whether the judgment was correct, not the ground on which that judgment was given."[147] More recently, the Court has made clear that it "reviews judgments, not statements in opinions."[148] The party that prevailed in the lower court "seeks to enforce not a [lower] court's reasoning, but the court's judgment."[149]

State courts likewise say that they review judgments, not reasons.[150] For example, the Supreme Court of Georgia in 1879 explained that reviewing courts should focus on results, not reasons, because the "human mind is so constituted that in many instances it *finds the truth* when wholly unable to *find the way* that leads to it."[151] Considering the role of appellate review, the court there recalled Oliver Goldsmith's 1774 poem *Retaliation*:

> The pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honor, yet fearing to roam, The coachman was tipsy, the chariot drove home.[152]

---

147 Davis v. Packard, 31 U.S. (6 Pet.) 41, 48 (1832).

148 Black v. Cutter Lab'ys, 351 U.S. 292, 297 (1956); California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam); *see also* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984); Herb v. Pitcairn, 324 U.S. 117, 126 (1945); *Review of Errors*, *supra* note 140, at 1060.

149 Jennings v. Stephens, 574 U.S. 271, 277 (2015) (emphasis omitted); *see Review of Errors*, *supra* note 140, at 1060 ("The appellee, though urging a theory rejected by the lower court, is not attacking the judgment as such. Instead, he accepts the judgment as rendered, and argues in support of it."). For the same reason, "[s]omeone who seeks an alteration in the language of the opinion but not the judgment may not appeal." United States v. Accra Pac, Inc., 173 F.3d 630, 632 (7th Cir. 1999); *see In re* Interlogic Outsourcing, Inc., No. 21-8021, 2022 WL 1210049, at *2 (6th Cir. BAP Apr. 22, 2022); Ward v. Santa Fe Indep. Sch. Dist., 393 F.3d 599, 604 (5th Cir. 2004); Robert L. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 HARV. L. REV. 763, 774 (1974) ("The sound principle underlying the [cross-appeal rule] is that appeals are to be taken from portions of a court's *order* which a litigant seeks to change, not from parts of an *opinion* with which the litigant disagrees." (emphasis added)).

150 *See, e.g.*, State v. Weber, 168 N.E.3d 468, 480 (Ohio 2020) ("We review judgments, not reasons." (citing State v. Lozier, 803 N.E.2d 770, 775 (Ohio 2004))); Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1200 (Pa. 2009) (describing the focus of appellate review as "the judgment or order before the appellate court, rather than any particular reasoning or rationale employed by the lower tribunal" (citing Hader v. Coplay Cement Mfg., 189 A.2d 271, 274–75 (Pa. 1963))); People v. DeBerry, 868 N.E.2d 382, 383 (Ill. App. Ct. 2007) ("[W]e review the trial court's judgment and not the reasons given for that judgment."); Greater New Orleans Expressway Comm'n v. Olivier, 860 So. 2d 22, 24 (La. 2003) ("A judgment and reasons for judgment are two separate and distinct documents. Appeals are taken from the judgment, not the written reasons for judgment." (citation omitted)); Massey v. U.S. Steel Corp., 86 So. 2d 375, 377 (Ala. 1955) ("Our review is of the judgment rendered in favor of the defendant, not of the reasons given by the trial court for rendering that judgment.").

151 Lee v. Porter, 63 Ga. 345, 346 (1879).

152 *Id.* (citing Oliver Goldsmith, *Retaliation* (1774)).

The analogy of a trial judge to a "tipsy coachman" might have been uncharitable, but the point was clear:

> [M]any steps in the reasoning of the court below might be defective, and still its ultimate conclusion be correct. It not infrequently happens that a judgment is affirmed upon a theory of the case which did not occur to the court that rendered it, or which did occur and was expressly repudiated.[153]

This "tipsy coachman" rule—another name for "right for the wrong reason"—is still applied in appellate courts in Florida.[154]

Because an appellate court reviews a lower court's judgment—the bottom-line result in the case—rather than its reasons or opinions, the question for the appellate court is not whether the lower court *said* the right thing but whether it *did* the right thing.

In focusing on what the court did (its judgment) rather than what the court said (its reasoning), an appellate court may ensure a correct resolution of the particular case. The court also may avoid rendering an advisory opinion.[155] As the Supreme Court has explained, federal courts have "no power to issue advisory opinions" or to "decide questions that cannot affect the rights of litigants in the case before them."[156] In *Herb v. Pitcairn*, decided in 1945, the Court directed the parties to ask the state supreme court to clarify whether its decision—the decision under review—rested on state law or federal law grounds.[157] In doing so, the Court explained, "[w]e are not permitted to render an advisory opinion, and if the same *judgment* would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing

---

153 *Id.*; s*ee also* Cave v. Webb, 22 Ala. 583, 586 (1853) (stating that if the lower court "arrived at the true point of destination," it would be "useless to go back, and travel the ground over, because the court failed to reach it by the direct road").

154 H. Michael Muñiz, *Tipping the Ole Tipsy Coachman over in His Grave—An Inequity of Appellate Review*, 81 FLA. BAR J. 33, 33 (2007); *see* Michell, *supra* note 139, at 132 (explaining that the rule is "sometimes irreverently referred to as the 'tipsy coachman' doctrine, the notion being that the court below, like a drunk driver, may sometimes reach the right destination by the wrong route"). The Supreme Court of Florida formally adopted the "tipsy coachman" analogy in 1963. *See* Carraway v. Armour & Co., 156 So. 2d 494, 496 (Fla. 1963) (citing *Lee*, 63 Ga. at 346); Smith v. Croom, 7 Fla. 180, 195 (1857) ("This court will always gladly avail itself of the light which may be furnished by the reasoning of the court below, but when it comes to decide, it has to do only with the conclusions as they are embodied in the judgment or decree—the logic of the [j]udge is beyond its control.").

155 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) ("[F]ederal courts do not issue advisory opinions."); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990); Hartnett, *supra* note 141, at 131.

156 North Carolina v. Rice, 404 U.S. 244, 246 (1971).

157 324 U.S. 117, 125–28 (1945).

more than an advisory opinion."[158] If the state supreme court would reach the same bottom-line decision even if the Court corrected its interpretation of the federal statute—if the outcome of further proceedings on remand would be the same—then the Court's interpretation of the federal statute would not affect the outcome of the case and would be merely advisory.[159]

"Right for any reason" focuses the appellate court on the judgment of the lower court rather than its analysis, ensuring that a "right" resolution of the dispute between the litigants will be affirmed.

2. Judicial Economy and Efficiency

Second, "right for any reason" enables appellate courts to promote judicial economy and efficiency by affirming a judgment (rather than remanding the case) when, although the lower court has erred in some respect, the ultimate outcome is certain.[160] Where there could be only one result on remand, sending the case back for another hearing or trial (to correct a discrete error) would only waste the time and resources of the parties and the lower court. Just as an appellate court may reverse and render judgment in favor of the appellant when "the record permits only one resolution,"[161] so an appellate court may affirm a lower court's judgment—in other words, render judgment in favor of the appellee—when the proper outcome of further proceedings on remand is certain. As the Supreme Court has explained in other contexts, judicial economy is served by "preventing needless litigation."[162]

---

158 *Id.* at 126 (emphasis added).

159 As Professor Hartnett has explained, "[w]hile a federal court may, and regularly does, enter a judgment without delivering an opinion, it may not deliver an opinion without entering a judgment. This is the key to the firmly-rooted principle that a federal court cannot issue an advisory opinion." Hartnett, *supra* note 141, at 145 (footnote omitted).

160 *See* Cullen, *supra* note 25, at 511–12 (stating that "[r]ight-for-any-reason is . . . a doctrine of judicial economy"); Saylor, *supra* note 140, at 491–92 (explaining that an appellate court may affirm a correct judgment, notwithstanding the lower court's erroneous reasoning, to "obviate the inefficiency, burden, and expense associated with a retrial"); Michell, *supra* note 139, at 135 ("[T]he key rationales for the right-for-the-wrong-reason doctrine are efficiency and economy.").

161 Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982) ("[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.").

162 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); *see* Perkins v. Matthews, 400 U.S. 379, 386–87 (1971) (declining to remand for district court analysis "in the interest of judicial economy" where "[t]he record [was] adequate to enable [the Supreme Court] to decide" an issue). In this way, right for any reason is similar to the independent and adequate state grounds doctrine, whereby the Supreme Court declines to exercise jurisdiction over appeals from state supreme courts where resolution of the federal law issue would not be sufficient to resolve the case. *See* Murdock

Not only does affirmance on alternative grounds promote judicial economy in the particular case by avoiding waste of resources where the outcome is certain, but it also promotes judicial economy on a larger scale by reducing the number of successful appeals and therefore reducing congestion of court dockets. Fewer successful appeals should mean fewer appeals generally, which helps maintain a manageable caseload in the courts of appeals.[163] And fewer remands should mean more efficient docket management in the district courts.

In this respect, "right for any reason" serves a function similar to the function of another rule of appellate review—the harmless error rule. Former California Chief Justice Roger Traynor reminded us that "[t]here was a time in the law, extending into [the 20th] century, when no error was lightly forgiven. In that somber age of technicality[,] the slightest error in a trial could spoil the judgment. The narrow bounds of propriety were entirely surrounded by booby traps."[164] But now Congress has directed the Supreme Court and the courts of appeals to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."[165] Likewise, Rule 61 of the Federal Rules of Civil Procedure provides that "[a]t every stage of [a civil] proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."[166] And Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[167] The Supreme Court has held that (with limited exceptions) an error or defect "affects substantial rights" only where it results in "actual prejudice"—i.e., where it has a "substantial and

---

v. City of Memphis, 87 U.S. 590, 635 (1874) (stating that the Court will not reverse a judgment of a state court, even if that court erred in resolving a federal law issue, if the judgment may be sustained on a state law ground "to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant").

163 *See* Lohier, *supra* note 4, at 953 ("[I]f losing litigants believed they had, say, a 30 percent or higher chance of prevailing on appeal, the automatic *right to appeal* would, for the courts, be tantamount to an *actual appeal* in virtually every case. It is for this practical reason that our precedents and procedures so strongly . . . favor affirmance."); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 761–62 (1982) ("[T]here is a limit on the capacity of the judicial system to entertain appeals and afford retrials. In addition to the obvious burden of a retrial, the retrial itself is likely to produce new grounds for appeal; the alleged errors simply will be different. Too perfectionist an attitude with respect to many sorts of claims of trial error involves the prospect of an infinite regress." (footnote omitted)).

164 ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 3 (1970).

165 28 U.S.C. § 2111.

166 FED. R. CIV. P. 61.

167 FED. R. CIV. P. 52(a).

injurious effect or influence" on the outcome of the proceedings.[168] Thus, a federal appellate court may not reverse a district court judgment simply upon finding some error in legal reasoning; rather, the court must ask whether the error actually mattered to the result, and if it did not, affirm the judgment. After all, the Supreme Court has said that a party is "entitle[d] . . . to a fair trial, not a perfect one."[169] Such harmless-error analysis (in various contexts) "conserve[s] judicial resources" by avoiding further proceedings on remand where the lower court's judgment was correct notwithstanding some error in reasoning.[170]

Like the harmless-error rule, "right for any reason" allows the appellate court to think about any trial court error in the context of the entire case—and to affirm a judgment (rather than remand for further proceedings) where the result is right even if the court did something wrong along the way. Affirming on alternative grounds thus avoids needless relitigation in the trial court (and possibly another appeal), promoting the objective of judicial economy in both the trial court and the appellate court.

III. PERSISTENT QUESTIONS

In cases decided since *American Railway Express*, there appear to be at least three persistent questions relating to application of "right for any reason": (1) whether the rule is mandatory or discretionary, (2) whether an appellate court may raise an alternative ground for affirmance sua sponte, and (3) whether an appellate court may affirm a judgment based on an alternative ground that the appellee failed to preserve in the lower court. Each of these questions implicates an important aspect of appellate

168 United States v. Lane, 474 U.S. 438, 449 (1986) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 776 (1946)).

169 Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); *see* United States v. Hasting, 461 U.S. 499, 508–09 (1983); Lutwak v. United States, 344 U.S. 604, 619 (1953).

170 TRAYNOR, *supra* note 164, at 81; *see id.* at 14 (arguing that the objective of harmless-error rules was "to conserve not merely public funds, but the judicial process itself for legitimate disputes by guarding against needless reversals and new trials that would clog already burdened trial-court calendars"). Federal courts of appeals likewise have recognized the judicial-economy purpose of harmless-error analysis. *See, e.g.*, United States v. Montgomery, 969 F.3d 582, 583 (6th Cir. 2020) ("The purpose of our harmless-error analysis is to avoid the efficiency cost of resentencing in cases where we are absolutely certain that the district court would have announced the same sentence had it not erred."); United States v. Rodriguez Cortes, 949 F.2d 532, 543 (1st Cir. 1991) ("In a case of clearly harmless error it would be a waste of judicial resources to require a new trial where the result is likely to be the same."); Mays v. Bowen, 837 F.2d 1362, 1364 (5th Cir. 1988) ("The major policy underlying the harmless error rule is to preserve judgments and avoid waste of time."); Johnstone v. Kelly, 808 F.2d 214, 217 (2d Cir. 1986) ("Since a conviction will be upheld only if the result would almost certainly have been the same had the error not occurred, the doctrine promotes judicial economy without sacrificing fairness.").

review that should be considered alongside the justifications for "right for any reason."

A. *Mandatory or Discretionary*

The first question that an appellate court or litigant might ask in considering "right for any reason" is whether the court *must*, or just *may*, affirm a judgment on alternative grounds. In other words, is "right for any reason" a mandatory rule of appellate review, or merely a discretionary tool to be used in appropriate circumstances? The Supreme Court's cases suggest a subtle change of attitude on that question. While the basic rule—defining *the appellee's right* to raise an alternative ground for affirmance—has remained fairly constant, *the appellate court's duty* seems to have changed over time.

Early cases said that an appellate court "must affirm" or had a "duty to affirm" a lower court's decision if it was correct—suggesting that "right for any reason" was a *mandatory* rule of appellate review.[171] As Chief Justice Marshall explained in *Williams v. Norris*, "[i]f the judgment should be correct, although the reasoning, by which the mind of the Judge was conducted to it, should be deemed unsound, *that judgment would certainly be affirmed*" by the appellate court.[172] Justice John Marshall Harlan, writing for the Court in *Ex parte Royall*, likewise addressed the question of whether a lower court's refusal to issue a writ of habeas corpus could be "sustained upon any other ground than the one" given by that court—because "[i]f it [could] be, the judgment [would] not be reversed because an insufficient reason may have been assigned."[173] Those cases suggest that an appellate court should consider an alternative ground for affirmance as a matter of course. *American Railway Express* illustrates the point: upon determining that the appellee "merely assert[ed] additional grounds why the decree should be affirmed," the Court stated, "[t]hese grounds will be examined."[174]

Consistent with the Supreme Court's approach, federal courts of appeals frequently described their applications of "right for any reason"

---

171 *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 88 (1943); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921); J.E. Riley Inv. Co. v. Comm'r, 311 U.S. 55, 59 (1940); Helvering v. Gowran, 302 U.S. 238, 245 (1937); United States v. Holt State Bank, 270 U.S. 49, 56 (1926); Ridings v. Johnson, 128 U.S. 212, 218 (1888); Collier v. Stanbrough, 47 U.S. (6 How.) 14, 21 (1848).

172 25 U.S. (12 Wheat.) 117, 120 (1827) (emphasis added).

173 117 U.S. 241, 250 (1886).

174 265 U.S. 425, 436 (1924).

in mandatory terms—both before and after *American Railway Express*.[175] The Fifth Circuit expressed this point when it said (in 1914), "if the order is itself correct, *it is not to be disturbed*, although the reasons for it or the grounds on which it is based are not such as meet approval."[176]

More recent cases, however, indicate a less automatic approach to the rule. Even where the alternative ground for affirmance was raised in the lower court and fully briefed and argued in the appellate court, the Supreme Court has said that it may "decline to entertain" the alternative ground.[177] In other words, the Court has "*discretion* to affirm on any ground supported by the law and the record that will not expand the relief granted below."[178] Sometimes the Court exercises its discretion to consider the alternative ground.[179] Other times the Court declines to

---

175 *See, e.g.*, Sapp v. Renfroe, 511 F.2d 172, 175 n.2 (5th Cir. 1975) ("[A]n appellate court must affirm a correct judgment of the district court even when that decision is based on an inappropriate ground or a wrong reason." (citing *Helvering*, 302 U.S. at 245)); Olson v. United States, 175 F.2d 510, 512 (8th Cir. 1949) ("Notwithstanding such error it is our duty to affirm the judgment, if correct, regardless of the reason given by the trial court for its entry." (citing Walling v. Friend, 156 F.2d 429 (8th Cir. 1946))); Lemm v. N. Cal. Nat'l Bank, 93 F.2d 709, 710 (9th Cir. 1937) ("In the absence of the grounds upon which the order rests, we are required to affirm it if it may be sustained upon any ground." (citing United States v. One Distillery, 174 U.S. 149 (1899))); Cap. Apartment Corp. v. Vassos, 65 F.2d 482, 483 (D.C. Cir. 1933) ("And, where a trial court renders no reason for its decision, if the record reveals a ground on which the judgment can properly rest, it is the duty of the appellate court to affirm the judgment." (citing Pa. R.R. v. Wabash, St. Louis & Pac. Ry. Co., 157 U.S. 225 (1895))); Park Lane Dresses, Inc. v. Houghton & Dutton Co., 54 F.2d 33, 37 (1st Cir. 1931) ("[W]here, even though the grounds for the decision of the court below are insufficient, sufficient grounds on which the decision might have been based are actually disclosed on the record, a correct decision will not be disturbed." (citing Dean v. Davis, 212 F. 88 (4th Cir. 1914))); Lewis-Hall Iron Works v. Blair, 23 F.2d 972, 974–75 (D.C. Cir. 1928) ("[W]here a judgment or order is correct, it will not be reversed on appeal because the trial court has based its decision on insufficient or erroneous reasons or grounds, or has stated no reason therefor."); *Dean*, 212 F. at 89 ("This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound, even though the District Judge may have rejected that reason and rested his decree on some other ground." (citing Erwin v. Lowry, 48 U.S. (7 How.) 172 (1849))); John Naylon & Co. v. Christiansen Harness Mfg., 158 F. 290, 293 (6th Cir. 1908) ("[I]f we found that, upon any ground established in the case, the decree of the lower court was correct, though a wrong reason was given for it, it would be our duty to affirm the decree." (citing Merchs.' Nat'l Bank v. Cole, 149 F. 708 (6th Cir. 1907))); United States *ex rel.* Scott v. McAleese, 93 F. 656, 657 (3d Cir. 1899) ("We have before us merely [the lower court's] judgment, and, if for any reason we find the judgment to be correct, our duty is to affirm it.").

176 Fourth Nat'l Bank v. Willingham, 213 F. 219, 221 (5th Cir. 1914) (emphasis added).

177 United States v. Tinklenberg, 563 U.S. 647, 661 (2011) (quoting United States v. Nobles, 422 U.S. 225, 241 n.16 (1975)).

178 Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018) (emphasis added) (citing Thigpen v. Roberts, 468 U.S. 27, 30 (1984)) (declining to consider an alternative ground for affirmance); *see* United States v. N.Y. Tel. Co., 434 U.S. 159, 166 n.8 (1977) ("[W]e have discretion to consider [alternative grounds for affirmance].").

179 *See, e.g.*, Dahda v. United States, 138 S. Ct. 1491, 1498 (2018); *Tinklenberg*, 563 U.S. at 661; Bennett v. Spear, 520 U.S. 154, 167 (1997); *N.Y. Tel. Co.*, 434 U.S. at 166 n.8.

consider the alternative ground, for various case-specific reasons.[180] Consistent with the Supreme Court's approach, federal courts of appeals now typically describe "right for any reason" as a discretionary rule of appellate review.[181] Nevertheless, courts of appeals sometimes suggest that they are applying "right for any reason" in a mandatory manner.[182] And courts sometimes employ *both* mandatory *and* discretionary language to describe the rule—in the same opinion.[183]

---

180 *Lundgren*, 138 S. Ct. at 1654 (stating that "restraint [was] the best use of discretion" where the proffered "alternative ground for affirmance did not emerge until late in [the] case," when an amicus brief first argued that ground); MeadWestvaco Corp. *ex rel.* Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 31 (2008) (declining to consider an alternative ground for affirmance and stating that "[t]he case for restraint [was] particularly compelling" where "the question may impact the law of other jurisdictions" that were not "on notice that the constitutionality of [their] tax scheme[s] [were] at issue"); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38–40 (1989) (declining to consider an alternative ground for affirmance that was not presented to the lower courts and raised "difficult questions" relating to foreign sovereign immunity and jury trial rights); *cf.* Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) (stating that "it may be appropriate to remand the case rather than deal with the merits" of an alternative ground for affirmance "[w]hen attention has been focused on other issues, or when the [lower court] has expressed no views" on that ground).

181 *See, e.g.*, Rutila v. U.S. Dep't of Transp., 12 F.4th 509, 511 n.3 (5th Cir. 2021); Lemmon v. Snap, Inc., 995 F.3d 1085, 1095 (9th Cir. 2021); Yan v. ReWalk Robotics Ltd., 973 F.3d 22, 39 (1st Cir. 2020); *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 112 (D.C. Cir. 2020); *In re* Asbestos Prods. Liab. Litig. (No. VI), 873 F.3d 232, 240 (3d Cir. 2017); United States v. Nelson, 868 F.3d 885, 891 (10th Cir. 2017); United States v. Vinson, 805 F.3d 120, 122 n.1 (4th Cir. 2015); CILP Assocs. v. PriceWaterhouse Coopers LLP, 735 F.3d 114, 127 (2d Cir. 2013); Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1306 n.15 (11th Cir. 2010); Hydril Co. v. Grant Prideco LP, 474 F.3d 1344, 1351 (Fed. Cir. 2007).

182 *See, e.g.*, Velasquez v. Utah, 857 F. App'x 971, 975 n.5 (10th Cir. 2021) ("[W]e must affirm the district court's judgment 'if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.'" (quoting Richison v. Ernest Grp., 634 F.3d 1123, 1130 (10th Cir. 2011))); CSX Transp., Inc. v. City of Garden City, 325 F.3d 1236, 1244 (11th Cir. 2003) (stating that the court "must . . . consider" alternative grounds for affirmance); Doody v. Ameriquest Mortg. Co., 242 F.3d 286, 289 (5th Cir. 2001) ("We are required . . . to affirm the district court's judgment if it was correct, even if for a reason not articulated."); Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1273 (10th Cir. 2000) ("[W]e must address any alternative ground for affirmance that appellees have properly preserved below and raised on appeal and for which there is a sufficient record."); Boger v. Wayne County, 950 F.2d 316, 322 (6th Cir. 1991) ("[W]e are required to affirm the district court if its judgment was correct for some other reason . . . ." (citing Faughender v. City of North Olmsted, 927 F.2d 909, 913 (6th Cir. 1991))).

183 *See, e.g.*, Alan v. Paxson Commc'ns Corp., 239 F. App'x 475, 479 n.3 (11th Cir. 2007) (stating that the court "may affirm the judgment below on any adequate ground" (and citing a case supporting that proposition) while also citing a case for the proposition that the court "must affirm" a judgment that is correct); Collado v. United Parcel Serv., Co., 419 F.3d 1143, 1151–52 (11th Cir. 2005) (citing cases for the proposition that the court "must affirm" and "may affirm" a district court's judgment on alternative grounds); Arnold v. Ghee, 12 F. App'x 313, 315 (6th Cir. 2001)

A discretionary approach, rather than a mandatory approach, reflects a recognition that there are circumstances in which the justifications for "right for any reason"—focusing on the judgment rather than the opinion and promoting judicial economy—are in tension with each other.

Understanding "right for any reason" as a mandatory rule makes sense in light of the "judgment, not reasons" focus of appellate review. If the purpose of appellate review is primarily to determine whether the lower court's *judgment* was *correct*, then a reviewing court should consider alternative grounds for affirmance as a matter of course and affirm a judgment that is right for any reason supported by the record. In other words, the court should review "the entire case" and determine the appropriate result—as in a chancery appeal. The court should not decline to consider alternative grounds for affirmance because doing so necessarily increases the chances that a correct judgment will be set aside—leading to further (wasteful) litigation of a case that had already been resolved correctly. In other words, applying "right for any reason" in a mandatory fashion—affirming a lower court's judgment *whenever* the court of appeals sees a ground for affirmance in the record—ensures that appellate review does not revert to highly technical writ-of-error review that produces needless remands and retrials.

At the same time, mandatory application of "right for any reason" might require appellate courts to depart from their traditional function as "court[s] of review, not [courts] of first view," which typically do not consider issues that were not addressed in a lower court.[184] Indeed, it is not the "usual practice" of appellate courts "to adjudicate either legal or predicate factual questions in the first instance."[185] The nature of appellate review—considering discrete issues based on a paper record—puts appellate judges at a relative disadvantage (compared with trial court judges) in deciding fact-intensive issues.[186] And even when deciding pure

(same). The Tenth Circuit in *Velasquez* stated that it "must affirm" a judgment if the result is correct, quoting a case that said the court "may affirm" on alternative grounds. *Velasquez*, 857 F. App'x at 975 n.5 (quoting Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1130 (10th Cir. 2011)).

184 Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005); *see* Belaustegui v. Int'l Longshore & Warehouse Union, 36 F.4th 919, 930 (9th Cir. 2022); Charlton-Perkins v. Univ. of Cincinnati, 35 F.4th 1053, 1064 (6th Cir. 2022); Landry's, Inc. v. Ins. Co. of Pa., 4 F.4th 366, 372 n.4 (5th Cir. 2021); Capitol Servs. Mgmt. v. Vesta Corp., 933 F.3d 784, 789 (D.C. Cir. 2019); United States v. Houston, 792 F.3d 663, 669 (6th Cir. 2015). "As its name implies, a court of review does not, except in a limited number of cases, hear a case *de novo*." Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part I*, 7 WIS. L. REV. 91, 91 (1932).

185 CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 435 (2016).

186 *See* Friendly, *supra* note 163, at 31 (stating that "[t]he trial court's direct contact with the witnesses places it in a superior position to perform [the] task" of determining the facts of the case);

issues of law (on de novo review), an appellate court may prefer to have the advice of the lower court on novel or complex legal issues rather than addressing them in the first instance.[187]

Moreover, to the extent that appellate courts depart from their reviewing function, and assume a "first view" function, they risk undermining the objective of "right for any reason" to promote judicial economy. The appellate-review function best promotes judicial economy when (1) appellate review is focused on discrete legal (not factual) issues within the "wheelhouse" of appellate judges' competence;[188] (2) appellate review is focused on issues that have already been fully developed in the trial court; and (3) the result of the appeal fully and finally disposes of the case. "Right for any reason" generates a full and final disposition of the case, but it may be more or less wasteful of judicial resources depending on the nature of the alternative grounds for affirmance. If one of the principal justifications for "right for any reason" is that it promotes judicial economy, then a court should not invoke that rule in circumstances where economy might not be achieved—for example, where ruling on the alternative grounds would require the court to make significant factual determinations or address complex issues for the first time.

Discretionary application of "right for any reason" helps ensure that the rule will work where it makes the most sense for it to work—that is, where the appellate court can determine that the judgment was right

---

Cooper v. Harris, 137 S. Ct. 1455, 1474 (2017) (stating that an appellate court gives "singular deference to a trial court's judgments about the credibility of witnesses" because "the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record" (quoting Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985))); Phillips v. Crown Cent. Petroleum Corp., 602 F.2d 616, 636 (4th Cir. 1979) (Widener, J., concurring in part and dissenting in part) ("It is the opportunity to hear the witness testify and observe his manner and demeanor on the stand which places the district court in a better position to judge credibility than that of an appellate court which must rely on a cold paper record.").

187 *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 39–40 (1989) (declining to consider an alternative ground for affirmance that presented a "novel" argument that spawned additional "difficult questions"); *In re* Asbestos Prods. Liab. Litig. (No. VI), 873 F.3d 232, 240–41 (3d Cir. 2017) (declining to consider an alternative ground for affirmance where the court was "without the benefit of the District Court's well-regarded expertise" relating to the issue); Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1306 n.15 (11th Cir. 2010) (stating that a court of appeals "may exercise [its] discretion to decline to [consider an alternative ground for affirmance] when appellate review would benefit from reasoned deliberation by the district court").

188 United States v. Eaden, 37 F.4th 1307, 1314–15 (7th Cir. 2022) (stating that "legal errors are in [the] wheelhouse" of the court of appeals); United States v. Campbell, 26 F.4th 860, 879 (11th Cir. 2022) (en banc) (stating that a ground for affirmance that presented a "pure question of law" was "well within [the] wheelhouse [of] an appellate court").

without having to do the kind of work that a trial court ordinarily is better suited to do. Thus, in exercising discretion to consider (or not consider) an alternative ground for affirmance, an appellate court should consider (1) whether the alternative ground presents a pure issue of law,[189] (2) whether the facts material to the alternative ground were fully developed in the lower court,[190] (3) whether the legal issue is novel or unusually complex,[191] and (4) whether the issue has been fully briefed and argued by the parties.[192] Those considerations bear directly on whether the appellate court can decide the alternative ground in the ordinary course of its review function and thus maximize the opportunity to achieve judicial economy.

The best candidate for consideration is an alternative ground that presents a pure issue of law, that was fully briefed and argued in the trial court and on appeal, and that may be decided on the basis of undisputed facts.[193] Even if the trial court did not address the issue, the appellate court could do so without straying far from its traditional review function.

---

189 *See, e.g.*, United States v. Sanchez, 13 F.4th 1063, 1071 n.4 (10th Cir. 2021) (considering "whether, in light of . . . the uncontested facts, [the court's] decision would involve only questions of law"); Yan v. ReWalk Robotics Ltd., 973 F.3d 22, 39 (1st Cir. 2020) (exercising discretion to consider an alternative ground for affirmance that presented "issues of law"); United States v. Vinson, 805 F.3d 120, 122 & n.1 (4th Cir. 2015) (exercising discretion to consider an alternative ground for affirmance that "involve[d] a pure question of law"); CILP Assocs. v. PriceWaterhouse Coopers LLP, 735 F.3d 114, 127 (2d Cir. 2013) (declining to consider an alternative ground for affirmance that was "highly fact-intensive and [would] depend on an evaluation of expert witness reports and deposition testimony"); Fireman's Fund Ins. v. United States, 909 F.2d 495, 499 (Fed. Cir. 1990) (exercising discretion to consider an alternative ground for affirmance that was "purely legal and fairly straightforward").

190 *See, e.g.*, *Sanchez*, 13 F.4th at 1071 n.4 (considering "whether the parties have had a fair opportunity to develop the factual record" (quoting Harvey v. United States, 685 F.3d 939, 950 n.5 (10th Cir. 2012))); Hydril Co. v. Grant Prideco LP, 474 F.3d 1344, 1351 (Fed. Cir. 2007) (declining to consider alternative grounds for affirmance that "may require . . . augmentation of [the factual] record"); *Fireman's Fund*, 909 F.2d at 499 (exercising discretion to consider an alternative ground for affirmance where "the appellate record on [that ground was] complete").

191 *See, e.g.*, *Hydril Co.*, 474 F.3d at 1351 (declining to consider alternative grounds for affirmance that "involve[d] complex and difficult questions"); *Fireman's Fund*, 909 F.2d at 499 (exercising discretion to consider an alternative ground for affirmance that was "purely legal and fairly straightforward").

192 *See, e.g.*, *Sanchez*, 13 F.4th at 1071 n.4 ("[T]he court considers 'whether the ground was fully briefed and argued here and below . . . .'" (quoting *Harvey*, 685 F.3d at 950 n.5)); *Yan*, 973 F.3d at 39 (exercising discretion to consider an alternative ground that the parties had "extensively briefed" in the appeal); *Vinson*, 805 F.3d at 122 & n.1 (exercising discretion to consider an alternative ground for affirmance that was "closely related to the arguments made by the government" in its appeal briefs, where the government had an opportunity to address the new issue).

193 *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 166–67 (1997) (considering alternative grounds for affirmance that "were raised below" and were "fully briefed and argued" in the Supreme Court); Blum v. Bacon, 457 U.S. 132, 137 n.5 (1982) (considering an alternative ground for affirmance

B. *Sua Sponte Consideration of Alternative Grounds for Affirmance*

A second question attending application of "right for any reason" is whether a court should consider an alternative ground for affirmance that the appellee has not raised in the appeal. In other words, should an appellate court raise alternative grounds for affirmance sua sponte?

In a few cases, the Supreme Court has raised alternative grounds for affirmance sua sponte. For example, in *Collier v. Stanbrough*, discussed above, the defendants argued that property taken from them to satisfy a federal court judgment should be returned because (1) execution of an out-of-state federal judgment was not proper, and (2) the property had not been appraised.[194] The trial court ruled in favor of the defendants, and the state supreme court affirmed that judgment—solely on the ground that the execution was not proper.[195] The Supreme Court affirmed the state supreme court's judgment, but not on that ground.[196] Instead, the Court held that the sale of the defendants' property was void because the property had not been appraised, as required by state law.[197] That argument was not presented to the Court because "no one appear[ed] for the defendant in error."[198] Thus, the Court raised that alternative ground for affirmance sua sponte based on its review of the record from the trial court because it was the Court's "duty" to affirm the state supreme court's judgment if it was "proper, for the reasons given by the court below, or on other grounds manifestly appearing of record."[199]

Similarly, the Court in *Ridings v. Johnson* considered a ground for affirmance that the appellee did not present in the appeal.[200] The Circuit Court for the Eastern District of Louisiana dismissed a bill in equity (for lack of jurisdiction) without opinion, the plaintiff took an appeal to the Supreme Court, and the defendants-appellees did not appear to defend

---

that presented an issue of statutory interpretation that "was raised and decided in both the District Court and the Court of Appeals"); United States v. N.Y. Tel. Co., 434 U.S. 159, 166 & n.8, 169 (1977) (considering alternative grounds for affirmance that "were considered by both the District Court and the Court of appeals and fully argued" in the Supreme Court and that presented pure questions of law concerning a district court's authority to order a nonparty to assist law enforcement in executing a search warrant).

194 47 U.S. (6 How.) 14, 20 (1848).

195 *Id.* at 20–21.

196 *Id.* at 21–22.

197 *Id.* at 22.

198 *Id.* at 21.

199 *Id.*

200 128 U.S. 212, 213–18 (1888).

the judgment.[201] Although the Court lamented the "most unsatisfactory manner" in which the case came to it—especially difficult because the case involved the "exceptional" and "unfamiliar" civil law of Louisiana—the Court determined that the bill had been dismissed because the circuit court believed that a proceeding to annul a sale and compel the buyer to return the property was properly an action at law rather than a suit in equity.[202] The circuit court was wrong about that; the plaintiff's claim was properly presented in a bill in equity and should not have been dismissed for lack of jurisdiction.[203] Nevertheless, the Court explained that "if [it could] see that there [was] any other ground on which [the bill] ought to be dismissed, for example, want of equity on the merits, [the Court] must affirm the decree."[204] Even in the absence of any argument by the appellees in defense of the judgment, the Court in *Ridings* believed that it was obliged to affirm if it could see "any other ground" supporting the lower court's judgment—and thus obliged to investigate arguments that the appellees themselves did not present.[205]

At least in cases where the appellee does not appear to defend the judgment below, the Court has been willing to raise alternative grounds sua sponte to affirm the judgment. But some courts of appeals have affirmed district court judgments on grounds that they raised sua sponte even when the appellee did appear. For example, the en banc Eleventh Circuit affirmed a district court's denial of a motion to suppress based on the good-faith exception to the warrant requirement even though the Government did not argue that exception as a ground for affirmance before the panel.[206] Likewise, the Fifth and Eighth Circuits have affirmed district court judgments based on res judicata arguments that the appellees never raised.[207]

1. Conflict with the Principle of Party Presentation

Where the court raises an alternative ground for affirmance sua sponte, application of "right for any reason" risks creating a conflict with

---

201 *Id.* at 213.

202 *Id.* at 213, 215.

203 *Id.* at 216–17.

204 *Id.* at 218. The Court explained that it was obliged to review "the whole case" because it was deciding an equity suit. *Id.* In effect, the Court was applying "right for any reason"—deciding whether the judgment (dismissal) was right even if the reason (lack of jurisdiction) was wrong.

205 *Id.*

206 United States v. Campbell, 26 F.4th 860, 870 n.5, 887–88 (11th Cir. 2022) (en banc).

207 *See* Russell v. SunAmerica Sec., Inc., 962 F.2d 1169, 1172 (5th Cir. 1992); Bechtold v. City of Rosemount, 104 F.3d 1062, 1068–69 (8th Cir. 1997).

the principle of party presentation—which is a "central tenet" of our adversarial system of adjudication.[208]

The principle of party presentation "generally requires a court to refrain from deciding issues that the parties in a lawsuit did not choose to present."[209] This principle is crucial to an adversarial system of adjudication, which emphasizes party control of litigation and the judge's impartial evaluation of the parties' arguments.[210] In an adversarial system—distinguished from an inquisitorial system—the parties are active litigants, identifying and developing facts and legal arguments for evaluation by a passive, neutral judge.[211] 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."[212] Sua sponte decision making undermines the principle of party presentation insofar as the judge actively raises and decides issues that the parties—by neglect or strategy—have not presented.[213]

Over the past eighty years, the Supreme Court has become more protective of the principle of party presentation—and thus less tolerant of sua sponte decision making by federal courts. In *Hormel v. Helvering*, the Supreme Court explained that courts could depart from the principle of party presentation, and raise issues sua sponte, "as justice may

---

208 Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 495 (2009).

209 *See* Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 BUFF. L. REV. 1029, 1033 (2022); Frost, *supra* note 208, at 455 (describing "the norm in favor of 'party presentation'" as "the conventional view that the parties to litigation, and not the judge, are responsible for raising the legal questions that will ultimately be resolved by the court"); Robert W. Millar, *The Formative Principles of Civil Procedure—I*, 18 U. ILL. L. REV. 1, 9 (1923) (describing 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").

210 *See* Frost, *supra* note 208, at 495; 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.").

211 *See* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 2 (2014) ("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."); 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); Sward, *supra* note 210, at 302; Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983).

212 Landsman, *supra* note 211, at 714.

213 *See* Anderson, *supra* note 209, at 1045–50.

require."[214] And then in *Singleton v. Wulff*, the Court wrote 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."[215] Thus, by the late 1970s, courts generally had discretion to raise new issues sua sponte, with few clear limits on the exercise of discretion.[216] In recent decades, however, the Supreme Court has emphasized the importance of the principle of party presentation, placing limits on federal courts' exercise of discretion.[217] "[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system,"[218] but may do so—by raising an issue sua sponte—only in "special circumstances"[219] and "exceptional cases."[220] Even in such cases, courts are merely "permitted, but not obliged," to raise the new issue.[221] And their discretion is now "confined within these limits."[222] In 2020, the Court in *United States v. Sineneng-Smith* reaffirmed the principle that 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."[223] While that rule is "supple, not ironclad,"[224] a court's judgment may be reversed if it "radical[ly] transform[s]" the case presented by the parties.[225] After *Sineneng-Smith*, "it is inappropriate for a court to raise an issue *sua sponte* in most situations."[226]

---

214 312 U.S. 552, 559 (1941). In 1958, Professor Allan Vestal observed that "[w]hen consideration of a matter sua sponte will result in affirmance, and consequently, in the eyes of the appellate court, strengthen respect for the judicial system, the courts are more willing to consider the matter." Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 510 (1958).

215 428 U.S. 106, 121 (1976).

216 As the Supreme Court later explained, *Singleton* "stopped short of stating a general principle to contain appellate courts' discretion" in deciding whether to consider new issues not presented by the parties. Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 (2008).

217 *See* Anderson, *supra* note 209, at 1059–87.

218 Wood v. Milyard, 566 U.S. 463, 472 (2012).

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

220 *Wood*, 566 U.S. at 473.

221 Day v. McDonough, 547 U.S. 198, 209 (2006).

222 *Id.* at 210 n.11.

223 140 S. Ct. 1575, 1579 (2020) (alteration in original) (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring)).

224 *Id.* at 1579.

225 *Id.* at 1581–82.

226 United States v. Campbell, 26 F.4th 860, 872 (11th Cir. 2022) (en banc). The Supreme Court's cases suggest that a court has discretion to raise an issue sua sponte where specific institutional interests of the judiciary balance or outweigh the interest in party control of litigation. *See* Anderson, *supra* note 209, at 1094–1109.

This principle of party presentation is reflected in the rules requiring parties to specifically identify the issues and arguments that they wish the court to decide. Rule 28(a) of the Federal Rules of Appellate Procedure requires the appellant to provide in its principal brief "a statement of the issues presented for review," as well as an argument containing "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies" and "for each issue, a concise statement of the applicable standard of review."[227] Likewise, Rule 28(b) requires the appellee to provide the same information in its brief (except that it need not state the issues presented for review or the standards of review if it is satisfied with the appellant's statement).[228] Failure to adequately present an issue or argument to the court of appeals in the opening brief may result in the court's refusal to consider the issue or argument.[229]

Federal courts of appeals routinely apply these issue-presentation rules against *appellants*, who bear the burden to show error requiring reversal; a court of appeals typically will not reverse a district court's judgment based on an argument that the appellant failed to raise in its principal brief.[230] It is not clear, however, whether the same rule should apply to an *appellee* that fails to raise all possible alternative grounds for

---

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

228 *Id.* at 28(b).

229 *See, e.g.*, 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))); NLRB v. RELCO Locomotives, Inc., 734 F.3d 764, 795 (8th Cir. 2013) ("We will generally not consider an argument that was not made in a party's opening briefs . . . .").

230 *See* 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."); LaCourse v. PAE Worldwide Inc., 980 F.3d 1350, 1360 (11th Cir. 2020) ("We have repeatedly held that an appellant abandons an argument on appeal when she fails to 'specifically and clearly identif[y]' it or 'plainly and prominently' raise it in her opening brief." (alteration in original) (quoting Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004))); Scott v. First S. Nat'l Bank, 936 F.3d 509, 522 (6th Cir. 2019) ("In this Circuit, an appellant forfeits an argument that he fails to raise in his opening brief."); 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))); Jenkins v. Winter, 540 F.3d 742, 751 (8th Cir. 2008) ("This court does not consider issues raised for the first time on appeal in a reply brief 'unless the appellant gives some reason for failing to raise and brief the issue in his opening brief.'" (quoting Neb Plastics, Inc. v. Holland Colors Ams., Inc., 408 F.3d 410, 421 n.5 (8th Cir. 2005))).

affirmance in its principal brief. Some courts simply apply the same rule and refuse to consider alternative grounds that the appellee has not presented in the appeal.[231] Other courts, however, do not apply a strict waiver rule against appellees.[232] The First Circuit, for example, has reasoned that "[t]he differing roles of appellees and appellants in framing the issues and in presenting arguments justifies differing waiver rules"[233]—such that it might be appropriate for the court to consider a ground for affirmance that the appellee failed to identify on appeal.

2. Minimizing the Conflict

To avoid conflict with the principle of party presentation, an appellate court should not consider an alternative ground for affirmance that the appellee waived in the lower court or on appeal. If the appellee merely forfeited the alternative ground (by failing to raise it in its principal brief), then the court should exercise its discretion to consider (or decline to consider) the new ground sua sponte. The court should consider the justifications for "right for any reason" as well as the proper function of an appellate court in determining whether to consider the alternative ground. And the court should take steps to minimize the unfairness of raising a new issue for the first time on appeal.

---

231 *See, e.g.*, Ivey v. Audrain County, 968 F.3d 845, 850–51 (8th Cir. 2020) ("declin[ing] to reconfigure and reframe" an appellee's case by raising an alternative ground for affirmance sua sponte); United States v. Dreyer, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) ("Generally, an appellee waives any argument it fails to raise in its answering brief."); Gensler v. Strabala, 764 F.3d 735, 739 (7th Cir. 2014) (declining to affirm a district court's Rule 12(b)(6) dismissal on the ground that the allegations in the complaint failed to satisfy Rule 9(b) because the appellee did not make any Rule 9(b) argument in its appellate brief); Hamilton v. Southland Christian Sch., 680 F.3d 1316, 1318–19 (11th Cir. 2012) ("Because [the appellee] did not raise any issue or make any argument in its brief about the ministerial exception, we will not decide whether that exception might apply."); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1207 (10th Cir. 2007) (stating that the court "cannot affirm summary judgment" based on an argument that the appellees did not make in their appellate brief).

232 *See, e.g.*, Eichorn v. AT&T Corp., 484 F.3d 644, 657–58 (3d Cir. 2007) (stating that appellees "were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds"); Indep. Park Apartments v. United States, 449 F.3d 1235, 1240 (Fed. Cir. 2006) ("As appellee, the government was not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds."); Kessler v. Nat'l Enters., Inc., 203 F.3d 1058, 1059 (8th Cir. 2000) ("[A]ppellate courts should not enforce the [waiver] rule punitively against appellees . . . ."); Schering Corp. v. Ill. Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996) ("We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver.").

233 Ms. S. v. Reg'l Sch. Unit 72, 916 F.3d 41, 49 (1st Cir. 2019).

a. Waiver Cases

At the outset, an appellate court should not raise an alternative ground for affirmance sua sponte if the appellee actually *waived* that argument in the lower court or on appeal. In *Day v. McDonough* and *Wood v. Milyard*, the Supreme Court 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*.[234] An issue or argument is waived when it is "knowingly and intelligently relinquished," not merely left unaddressed.[235] The line between waiver and forfeiture may be difficult to identify in certain circumstances. But because a waiver reflects a party's "deliberate decision,"[236] 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 the Court explained in *Wood*, "a federal court has the authority to resurrect only *forfeited* defenses," not waived defenses.[237] If an appellee affirmatively disclaimed or conceded a potential ground for affirmance at any point in the litigation, the appellate court should not raise that ground sua sponte—even though the judgment may be correct.[238]

The Eleventh Circuit's en banc decision in *United States v. Campbell* illustrates this point.[239] A federal grand jury indicted Erickson Campbell for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).[240] Campbell moved to suppress the gun that was found during a search of his car, arguing that the officer did not have reasonable suspicion to believe that Campbell had committed a traffic violation; even if there was reasonable suspicion, the officer "prolonged the stop by

234 *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) ("A court is not at liberty . . . to bypass, override, or excuse a State's deliberate waiver of a limitations defense.").

235 *Wood*, 566 U.S. at 470 n.4; *see* Hamer v. Neighborhood Hous. Servs. Of Chi., 138 S. Ct. 13, 17 n.1 (2017) ("The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. '[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the "intentional relinquishment or abandonment of a known right."'" (alteration in original) (quoting United States v. Olano, 507 U.S. 725, 733 (1993))).

236 *Wood*, 566 U.S. at 473.

237 *Id.* at 471 n.5 (emphasis added).

238 *See, e.g.*, Amadeo v. Zant, 486 U.S. 214, 228 n.6 (1988) (refusing to consider the appellee's argument that even if the appellant could show cause, he could not show prejudice, because the appellee "conceded this point in both courts below").

239 26 F.4th 860 (11th Cir. 2022) (en banc).

240 *Id.* at 866.

asking questions unrelated to the purpose of the stop," and if the stop was unlawful, then any consent that he gave to the search was tainted.[241] After an evidentiary hearing, the district court asked the parties for supplemental briefing relating to Campbell's argument concerning the officer prolonging the stop and the good-faith exception to the exclusionary rule.[242] The court eventually denied Campbell's motion to suppress, concluding that the officer had reasonable suspicion to justify the stop; the officer did not unreasonably prolong the stop by asking unrelated questions; and because the seizure was reasonable, the court did not have to decide whether Campbell's consent was tainted or whether the officer acted in good faith.[243]

Campbell then entered a conditional guilty plea and appealed the denial of his motion to suppress.[244] In defense of the district court's ruling, the Government argued that the district court's analysis was correct, but the Government (like the district court) did not address the good-faith exception.[245] A panel of the Eleventh Circuit affirmed the district court's denial of the motion to suppress, based on the good-faith exception.[246] The court later granted Campbell's petition for rehearing en banc and directed the parties to address the question of whether the court could affirm the district court's ruling based on the good-faith exception when the Government failed to present that ground for affirmance in its principal brief.[247] The parties addressed that issue, as well as the merits of the good-faith exception.[248]

In a 7-5 decision, the en banc court held that (1) the court could affirm the district court's ruling on a ground that it raised sua sponte, and (2) suppression was not warranted because the officer acted in good-faith reliance on appellate precedent.[249] "Under the party presentation principle," the court began, "it is inappropriate for a court to raise an issue *sua sponte* in most situations."[250] But that is not an "ironclad" rule, and a court has discretion, in "extraordinary circumstances," to consider an

241 *Id.* at 866–67.

242 *Id.* at 869. Under the good-faith exception to the exclusionary rule, evidence seized in violation of the Fourth Amendment should not be suppressed if the officer acted in "reasonable reliance on binding precedent" because the exclusionary rule "should not be applied to deter objectively reasonable law enforcement activity." Davis v. United States, 564 U.S. 229, 241 (2011) (quoting United States v. Leon, 468 U.S. 897, 919 (1984)).

243 *Campbell*, 26 F.4th at 869–70.

244 *Id.* at 870.

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.*

249 *Id.* at 888.

250 *Id.* at 872.

issue sua sponte where the issue was not waived by a party but merely forfeited.[251] The court then concluded that the Government's failure to address the good-faith exception in its principal brief was a forfeiture, not a waiver, such that the court could consider that ground for affirmance sua sponte.[252] "Although we are usually reluctant to address matters the parties have not argued on appeal," the court concluded, "this reluctance is discretionary, not mandatory. . . . As the Government did not waive the good-faith exception, we choose to raise the exception *sua sponte* due to the strong policy considerations underlying the exclusionary rule and the circumstances of this case."[253] The relevant circumstances included the fact that there were "no material factual disputes" relating to the good-faith exception, such that the alternative ground for affirmance presented a "pure question of law" that was "well within" the court's appellate "wheelhouse."[254] The court acknowledged, however, that "it would have been wise for the panel" to ask the parties for supplemental briefing on the good-faith exception before deciding the case on that ground.[255]

Where the majority saw a mere forfeiture, the dissent saw a waiver—and thus a violation of the principle of party presentation.[256] According to the dissent's reading of the record, the Government did not mistakenly or inadvertently fail to mention the good-faith exception in its brief but "consciously, intentionally, and deliberately *waived* its position that the good-faith exception justified admission of the evidence seized from Campbell's car."[257] In the face of such a waiver, the court of appeals had no discretion to raise and decide the good-faith issue sua sponte.[258] Doing so "contravene[d] foundational commitments of our adversarial system and its constituent party-presentation principle . . . and fail[ed] to meaningfully limit the circumstances in which appellate courts can engage in what commentators have called 'judicial issue creation.'"[259]

Importantly, both the majority and the dissent agreed that in the wake of *Day*, *Wood*, and (most recently) *Sineneng-Smith*—all of which

---

251 *Id.* (first quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020); and then quoting Wood v. Milyard, 566 U.S. 463, 471 (2012)).

252 *Id.* at 873–80.

253 *Id.* at 887–88.

254 *Id.* at 879.

255 *Id.* at 875 n.10.

256 *Id.* at 893 (Newsom & Jordan, JJ., dissenting).

257 *Id.* at 902. The dissent pointed to the Government's responses to questions at the en banc argument as evidence that the Government did not fail to raise the good-faith argument unwittingly or inadvertently. *Id.* at 903–04.

258 *Id.* at 908.

259 *Id.* at 893.

emphasized the principle of party presentation—the court could not raise and decide the good-faith issue sua sponte if (1) the issue was waived or (2) the issue was merely forfeited, but there were no extraordinary circumstances.

b. Forfeiture Cases

If the appellee has not waived the alternative ground for affirmance, but merely forfeited it (by failing to address the ground in its principal brief), then the court must decide whether to raise that alternative ground sua sponte. Although it might be tempting to apply the same simple rule to both sides in an appeal—raise the argument or lose it—the better approach is not to require the appellee to raise every possible ground for affirmance in its principal brief. Winning in the trial court makes a difference: Because the appellate court reviews a judgment, and the judgment is presumed to be proper, the appellant carries a burden in the appeal that the appellee does not. The appellee simply defends the judgment, not the reasoning of the lower court. While the appellee has the *right* (and a strong incentive) to defend the judgment on alternative grounds, it has no *duty* to do so.[260] The appellee should consider the strength of the lower court's reasons, and if it has some concern that those reasons might not be sufficient to satisfy the court of appeals, then it should supply alternatives. But the appellee is not required to show that the judgment was right, and so it should not be required to identify every conceivable ground for affirmance in its brief.

Rather than apply a blanket rule against considering an alternative ground for affirmance that was not raised in the appellee's brief, the appellate court should exercise its *discretion* to consider (or decline to consider) the new ground. In exercising its discretion, the appellate court should recognize that considering an alternative ground that the appellee has not raised creates a conflict with the principle of party presentation. To mitigate that conflict, an appellate court raising an alternative ground sua sponte should either (1) consider only an alternative ground that was addressed by the parties in the lower court (whether or not the lower court ruled on that ground) or (2) order supplemental briefing from the parties in the appeal to address the new issue raised by the court. Either way, the court may ensure that the parties have had at least one opportunity to address the issue that may be decisive.[261]

---

260 *See* Schering Corp. v. Ill. Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996) ("The urging of alternative grounds for affirmance is a privilege rather than a duty.").

261 Commentators have expressed concern that deciding issues sua sponte deprives the parties of an opportunity to be heard on potentially dispositive issues. *See* Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The "Gorilla Rule" Revisited*, 17 J. APP.

The Seventh Circuit took that approach in *Thayer v. Chiczewski*, exercising its discretion to consider a qualified immunity argument as a ground to affirm the district court's judgment even though the State had not argued qualified immunity in its brief.[262] The court stated that although the issue was not raised on appeal, the court could "affirm on any ground supported in the record, *so long as that ground was adequately addressed in the district court and the [appellant] had an opportunity to contest the issue*."[263] Likewise, the Eleventh Circuit in *Campbell* noted that "it would have been wise for the panel" to request supplemental briefing on the alternative ground for affirmance raised by the court sua sponte.[264]

One last question here: If the appellee is not required to raise all possible grounds for affirmance in its principal brief, must the appellant anticipate an alternative ground for affirmance in its initial brief? In other words, is it part of the appellant's burden to *negate* all possible alternative grounds for affirmance? If "right for any reason" were a mandatory rule of review, the answer might be yes—or at least that the appellant faces a significant risk if it fails to address a ground that the court identifies. But if the court applies "right for any reason" in a discretionary manner, and may exercise its discretion not to consider an alternative ground that the appellee raises in its brief, then it is hard to explain why the appellant should be required to address an alternative ground preemptively. The appellant does not know which grounds other than those relied on by the lower court will be relevant to the appellate court's decision. Rather, once the appellee raises an alternative ground for affirmance, the appellant should respond to that argument in its reply brief so that the court may have the benefit of both parties' views on that ground.[265]

PRAC. & PROCESS 113, 132 (2016); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1297 (2002). One commentator has argued that "[a]s a limitation to the exercise of [the] power [to raise a new issue sua sponte], the [appellate] court should give its reasons for engaging in such activity" and "the parties should be given a hearing." Note, *Appellate-Court Sua Sponte Activity: Remaking Disputes and the Rule of Non-Intervention*, 40 S. CAL. L. REV. 352, 370–71 (1967).

262 705 F.3d 237, 247 (7th Cir. 2012).

263 *Id.* (emphasis added) (quoting Peretz v. Sims, 662 F.3d 478, 480 (7th Cir. 2011)).

264 *Campbell*, 26 F.4th at 875 n.10.

265 *See* FED. R. APP. P. 28(c) (authorizing an appellant to "file a brief in reply to the appellee's brief"); United States v. Brown, 348 F.3d 1200, 1213 (10th Cir. 2003) (rejecting an argument that the appellant was required to anticipate an alternative ground for affirmance and stating that "[w]hen an appellee raises in its answer brief an alternative ground for affirmance, the appellant is entitled to respond in its reply brief"). Indeed, some courts of appeals have warned that an appellant who fails to address an alternative ground for affirmance in its reply brief gives up a valuable opportunity to meet the appellee's argument—and cannot assume that the court will disregard the

C. *Preservation of Alternative Grounds for Affirmance in the Lower Court*

A third question relating to "right for any reason" is whether an appellate court should consider an alternative ground for affirmance that the appellee did not "preserve" in the lower court. Whether an appellate court understands "right for any reason" to be a mandatory or a discretionary rule of review, the rule requires that any alternative ground for affirmance be supported by the record presented to the appellate court—that is, the record created in the lower court. *American Railway Express* made clear that an appellee is entitled to defend a favorable judgment on any ground "appearing in the record."[266] But neither *American Railway Express* nor any subsequent Supreme Court decision explains precisely what it takes for an alternative ground for affirmance to "appear in the record." The Court sometimes has said that an appellee may rely on any ground that is "supported by the law and the record."[267] That formulation suggests that the alternative ground for affirmance must be *both* (1) supported by applicable law *and* (2) supported by the factual record developed in the case. Perhaps a more difficult question is whether an alternative ground also must "appear in the record" in the sense that it was actually *presented to the lower court*. In other words, does application of "right for any reason" depend upon the appellee's having "preserved" the alternative ground in the lower court—or may the appellate court consider an alternative ground that was raised for the first time in the appeal?

The Supreme Court on several occasions has considered alternative grounds for affirmance that were not presented in the district court or the court of appeals, suggesting that there is no preservation requirement for alternative grounds. *Helvering v. Gowran* is one example from the 1930s.[268] A taxpayer, H.C. Gowran, received $53,371.50 when the Hamilton Manufacturing Company acquired his preferred stock, and he treated that sum as capital gain for tax purposes.[269] The Commissioner of Internal Revenue took the position, however, that the sum was a stock

alternative ground. *See, e.g.*, Hasan v. AIG Prop. Cas. Co., 935 F.3d 1092, 1099 (10th Cir. 2019); Hardy v. City Optical Inc., 39 F.3d 765, 771 (7th Cir. 1994); *In re* Incident Aboard D/B Ocean King, 758 F.2d 1063, 1071 n.9 (5th Cir. 1985).

266 265 U.S. 425, 435 (1924).

267 Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018); *see* Dahda v. United States, 138 S. Ct. 1491, 1498 (2018); Murr v. Wisconsin, 137 S. Ct. 1933, 1949 (2017); *see also* Thigpen v. Roberts, 468 U.S. 27, 30 (1984) (stating that an appellee may urge "any ground that the law and the record permit"); Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982) (same); United States v. N.Y. Tel. Co., 434 U.S. 159, 166 n.8 (1977) (same).

268 302 U.S. 238, 245–47 (1937).

269 *Id.* at 239–40.

dividend redeemed that should have been treated as taxable income.[270] Gowran took the matter to the Board of Tax Appeals, which first accepted Gowran's position but later ruled in favor of the Commissioner.[271] Gowran then challenged that ruling in the Seventh Circuit Court of Appeals.[272] In defense of the Board's ruling, the Commissioner argued that (1) the payment was a taxable stock dividend, and (2) even if the payment was not a dividend, Gowran still owed the amount ordered by the Board because when the stock was sold, its cost was zero and thus the entire payment price constituted income.[273] The Seventh Circuit rejected both arguments and held in favor of Gowran.[274] The Commissioner sought review in the Supreme Court, repeating the arguments that he made in the court of appeals.[275] The Supreme Court rejected the dividend argument but accepted the zero-cost argument.[276]

Gowran urged the Court not to consider the Commissioner's zero-cost argument "because that theory raised an issue not pleaded, tried, argued, or otherwise referred to in the proceedings before the Board."[277] The Court, however, accepted the new zero-cost argument, explaining that the Commissioner was entitled to make the new argument to the court of appeals in defense of the Board's ruling. Citing *American Railway Express*, the Court explained that "if the decision below [was] correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."[278] Thus, the "ultimate question" before the court of appeals was simply whether the Board erred in accepting the Commissioner's position that additional taxes were due.[279] "If the Commissioner was right in his determination," the Court continued, "the Board properly affirmed it, even if the reasons which he had assigned were wrong. And, likewise, if the Commissioner's determination was right, the Board's affirmance of it should have been sustained by the Court of Appeals, even if the Board gave a wrong reason for its action."[280] Accordingly, the Commissioner "was entitled to urge in the Court of

---

270 *Id.* at 240.

271 *Id.*

272 *Id.*

273 *Id.*

274 *Id.* at 240–41.

275 *Id.* at 241, 243.

276 *Id.* at 241–45.

277 *Id.* at 245.

278 *Id.*

279 *Id.* at 246.

280 *Id.* (footnote omitted).

Appeals that on the undisputed facts the Board's decision was correct because of the 'basis of zero' theory"—even though the Commissioner did not present that theory to the Board.[281]

Another example is *Schweiker v. Hogan*, in which a class of self-supporting disabled persons challenged the constitutionality of a federal statute concerning Medicaid benefits.[282] The district court there granted a partial summary judgment in favor of the class, and the Secretary of Health and Human Services took an immediate appeal to the Supreme Court.[283] The class representative defended the district court's judgment on both constitutional and statutory-interpretation grounds, even though the class had not presented the statutory-interpretation argument in the district court.[284] Nevertheless, the Court considered that argument as an alternative ground for affirmance of the judgment.[285] More than that, the Court considered that (unpreserved) argument *first*, to avoid having to address the (preserved) constitutional argument.[286]

More recently, in *Greenlaw v. United States*, the Court considered an alternative ground for affirmance proffered for the first time by an amicus curiae appointed to defend the judgment.[287] 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)).[288] A first conviction under Section 924(c) carries a mandatory minimum sentence of five years of imprisonment, and a "second or subsequent" conviction under Section 924(c) carries a mandatory minimum sentence of twenty-five years—consecutive to any other term of imprisonment imposed on the defendant.[289] Over the Government's objection, the district court

---

281 *Id.* In two other tax cases, the Supreme Court affirmed judgments of the Ninth Circuit based on alternative grounds for affirmance that the Commissioner had not raised in the Board of Tax Appeals or the Ninth Circuit. *See* Bondholders Comm., Marlborough Inv. Co. v. Comm'r, 315 U.S. 189, 191–94, 192 n.2 (1942); J.E. Riley Inv. Co. v. Comm'r, 311 U.S. 55, 59 (1940).

282 457 U.S. 569, 583 (1982).

283 *Id.* at 584.

284 *Id.* at 584–85.

285 *Id.* at 585 & n.24.

286 *Id.* at 585 ("Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue." (quoting Blum v. Bacon, 457 U.S. 132, 137 (1982))); *see also* W.G. Fairfield Co. v. Occupational Safety & Health Rev. Comm'n, 285 F.3d 499, 503–04 (6th Cir. 2002) (considering an unpreserved statutory argument as an alternative ground for affirmance (citing *Schweiker*, 457 U.S. at 585 n.24)); Ford-Evans v. United Space All. LLC, 329 F. App'x 519, 523–24 (5th Cir. 2009) (per curiam) (same).

287 554 U.S. 237, 249–50 (2008).

288 *Id.* at 240–41.

289 *Id.* at 241 (citing 18 U.S.C. § 924(c)).

imposed a sentence that did not reflect the twenty-five-year mandatory consecutive sentence for the second Section 924(c) offense.[290]

Greenlaw appealed, arguing that the overall sentence was excessive.[291] 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 *too short* because the district court failed to impose the twenty-five-year mandatory minimum consecutive sentence for the second Section 924(c) offense.[292] The Eighth Circuit vacated the sentence and instructed the district court on remand to impose the twenty-five-year mandatory minimum consecutive sentence.[293] On remand, the district court imposed a sentence of 622 months.[294] 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.[295] The Supreme Court thus appointed an amicus curiae to defend the court of appeals' judgment.[296] The amicus argued, among other things, that the court of appeals was required by a federal statute (18 U.S.C. § 3742) to vacate the judgment and remand for resentencing upon finding any error in the original sentence.[297] "This novel construction" of the statute had not been presented to either the district court or the court of appeals.[298] Nevertheless, the Court considered the argument because "[a]n appellee or respondent may defend the judgment below *on a ground not earlier aired*."[299] That was perhaps the most sweeping affirmative statement allowing consideration of alternative grounds for affirmance that were not presented to any lower court.

Gowran, *Schweiker*, and *Greenlaw* suggest that the Supreme Court does not always require an appellee to "preserve" an alternative ground for affirmance in the lower court. And if the primary purpose of "right for any reason" is to ensure that the appellate court reviews the *judgment* rather than the *reasons*, a preservation requirement should not be

290 *Id.* at 241–42.

291 *Id.* at 242.

292 *Id.*

293 *Id.* at 243.

294 *Id.*

295 *Id.*

296 *Id.*

297 *Id.* at 249–50.

298 *Id.* at 250.

299 *Id.* at 250 n.5 (emphasis added) (citing United States. v. Am. Ry. Express Co., 265 U.S. 425, 435 (1924)); *see also* Dahda v. United States, 138 S. Ct. 1491, 1496–98 (2018) (affirming a judgment based on a statutory interpretation argument that the Government raised for the first time in the Supreme Court).

necessary. After all, the court's objective is to determine whether the bottom-line result is correct—such that a remand would only waste judicial resources—not whether the court gave the right reasons for that result. A preservation requirement necessarily increases the risk that a correct judgment will be reversed simply because the lower court made an error, the very risk that "right for any reason" is intended to reduce.

But *Gowran*, *Schweiker*, and *Greenlaw* are not the only Supreme Court cases on point. In fact, there is another line of Supreme Court cases suggesting that an alternative ground for affirmance must be preserved in the lower court. In *Zellerbach Paper Co. v. Helvering*, for example, the Court refused to consider an alternative ground argued by the Government in a tax case because that argument had not been presented to the court of appeals.[300] *McGoldrick v. Compagnie Generale Transatlantique* is another example.[301] In that case, a taxpayer argued that a New York City tax was invalid because it impermissibly burdened interstate commerce.[302] The state's highest court agreed.[303] The Supreme Court rejected that argument, but the taxpayer offered an alternative ground for affirmance—namely, that the tax also was an unconstitutional impost on imports or exports.[304] The Court declined to consider that argument because it was not presented to the state courts below.[305]

Then, in 1979, the Court expressly modified the *American Railway Express* formulation—"any matter appearing in the record"—to include what appears to be a preservation requirement. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, the Court explained that it would consider an alternative ground for affirmance because the appellee "was of course free to defend its judgment on any ground *properly raised below* whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals."[306]

---

300 293 U.S. 172, 182 (1934).

301 309 U.S. 430 (1940).

302 *Id.* at 431.

303 *Id.*

304 *Id.* at 432–33.

305 *Id.* at 433–34.

306 439 U.S. 463, 476 n.20 (emphasis added). *Yakima Indian Nation* cited *American Railway Express* and *Dandridge v. Williams* as support for that statement of the rule, *see id.*, but neither case made preservation in the court below a requirement for consideration of an alternative ground for affirmance. *American Railway Express* authorized an appellee to urge "any matter appearing in the record," without reference to preservation in the district court or the court of appeals. United States v. Am. Ry. Express Co., 265 U.S. 425, 435 (1924). And while the alternative ground in *Dandridge* was, in fact, "fully argued both [in the Supreme Court] and in the District Court," the Court there said that an appellee could "assert . . . any ground in support of his judgment, whether or not that

That revised formulation, which appears to require preservation in at least one court below the reviewing court, has been applied in several cases since *Yakima Indian Nation*. In *Whitley v. Albers*, a prison inmate sued prison officials for violation of his Eighth Amendment rights by shooting him during a prison riot. The district court directed a verdict in favor of the prison officials on the grounds that (1) their actions were reasonable, and (2) in any event, they were entitled to qualified immunity.[307] The Ninth Circuit reversed that judgment in part, rejecting both grounds identified by the district court.[308] In the Supreme Court, the inmate argued, as an alternative ground for affirmance, that the shooting violated the Fourteenth Amendment Due Process Clause as well as the Eighth Amendment.[309] The Court addressed that alternative ground because an appellee may raise "any ground properly raised" in the lower court and the inmate adequately presented a Fourteenth Amendment claim in the district court.[310] The Court has repeated the "properly raised below" formulation in at least eight cases since *Whitley*.[311]

Moreover, even without reciting the "properly raised below" language, the Supreme Court has stated that it "typically will not address" a question that was not raised in or passed upon by the lower court, "even if the answer would afford an alternative ground for affirmance."[312]

---

ground was relied upon or even considered by the trial court." Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970). *Dandridge* did not say that the alternative ground must be "properly raised below" to be considered by the appellate court. *See id.*

307 475 U.S. 312, 317 (1986).

308 *Id.* at 317–18.

309 *Id.* at 326.

310 *Id.* at 326–27. Although the Court cited *New York Telephone Co.* to support the proposition that "any ground properly raised below" may be urged as a basis at proposition, *New York Telephone Co.* did not expressly require preservation; that case merely noted that the alternative grounds argued by the appellee were, in fact, "considered by both the District Court and the Court of Appeals and fully argued" in the Supreme Court. United States v. N.Y. Tel. Co., 434 U.S. 159, 166 n.8 (1977).

311 *See* CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 434 (2016); Yeager v. United States, 557 U.S. 110, 126 (2009); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273 (2009); Jones v. United States, 527 U.S. 373, 396 (1999); Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 364 (1994); Reno v. Flores, 507 U.S. 292, 300 n.3 (1993); Lytle v. Household Mfg., 494 U.S. 545, 551 n.3 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38 (1989).

312 MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 31 (2008) (declining to consider an alternative ground for affirmance); *see also* Glover v. United States, 531 U.S. 198, 205 (2001) ("[D]espite the fact the parties have joined issue at least in part on these [alternative grounds for affirmance], they were neither raised in nor passed upon by the Court of Appeals. In the ordinary course we do not decide questions neither raised nor resolved below."); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996) ("While it is true that a respondent may defend a

Again, "if a non-jurisdictional argument was not raised below, [the Court] generally will not consider it as an alternative ground for affirmance."[313] Although the Court has recognized that it may consider grounds for affirmance that were not raised below, it is "not required" to do so[314] and will "exercise this authority 'only in exceptional cases.'"[315]

The bottom line appears to be that although the Court has authority to consider an alternative ground for affirmance that was not preserved in the lower court—as in *Schweiker* and *Greenlaw*—the Court will not do so as a matter of course but only where there are "exceptional" circumstances.

Courts of appeals sometimes have considered unpreserved alternative grounds.[316] The Second Circuit has stated that "right for any reason" "applies even when the alternate grounds were not asserted until the court's questioning at oral argument."[317] The Tenth Circuit has explained that the "general rule" against considering issues not raised in the district court is "relaxed . . . where the argument presents an alternative ground for affirming a lower court ruling on a *pure question of law*."[318] Other courts have considered the good-faith exception to the exclusionary rule—not a pure question of law—as an alternative ground for affirmance even where the Government failed to argue good faith in

---

judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below."); Ryder v. United States, 515 U.S. 177, 184–85 & n.4 (1995) (declining to consider "alternative grounds for affirmance which the Government did not raise below"); Taylor v. Freeland & Kronz, 503 U.S. 638, 645 (1992) (declining to consider an alternative ground for affirmance "because [the appellee] raised the argument for the first time in his opening brief on the merits" in the Supreme Court); Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86 (1988) ("We are not required . . . to entertain [alternative grounds for affirmance] . . . when there is no indication that they were raised below . . . .").

313 Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1010 (2022); *see also Granfinanciera*, 492 U.S. at 38.

314 *Peralta*, 485 U.S. at 86 (declining to consider an unpreserved alternative ground for affirmance raising a question of state law that should have been presented to state courts in the first instance).

315 *Granfinanciera*, 492 U.S. at 39 (quoting Heckler v. Campbell, 461 U.S. 458, 468 n.12 (1983)).

316 *See, e.g.*, Harris v. Sharp, 941 F.3d 962, 991 n.25 (10th Cir. 2019); Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 413 (2d Cir. 2014); Kennedy v. City of Villa Hills, 635 F.3d 210, 214 n.2 (6th Cir. 2011); Hillman v. IRS, 263 F.3d 338, 343 n.6 (4th Cir. 2001); Shell Offshore, Inc. v. Dir., Off. of Workers' Comp. Programs, 122 F.3d 312, 317 (5th Cir. 1997). *See generally* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 15A FEDERAL PRACTICE AND PROCEDURE § 3904 (3d ed. 2022) ("At times a party may be able to urge in support of a judgment arguments that were not . . . advanced in the district court.").

317 Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279, 1286 (2d Cir. 1994).

318 Estate of McMorris v. Comm'r, 243 F.3d 1254, 1258 n.6 (10th Cir. 2001) (emphasis added).

the district court.[319] Thus, it is not clear whether, or in what circumstances, a court should apply "right for any reason" where the proffered ground for affirmance was not presented to the lower court.

1. Conflict with the Role of the Appellate Court as a Court of Review, Not First View, and the Goal of Judicial Economy

Considering alternative grounds for affirmance that were not presented to the lower court conflicts with the ordinary function of an appellate court as a court of review, not first view, and thus threatens to undermine the goal of promoting judicial economy. As explained above, appellate courts ordinarily do not consider issues that were not presented to the lower court in the first instance.[320] About a century ago, Professor Richard Campbell explained that the "primary basis" for that rule is simply "the inherent nature of a court of review"—that is, the function of an appellate court to review a lower court's work rather than to adjudicate the case de novo.[321] The writ-of-error model has conditioned appellate courts to analyze discrete issues rather than whole cases and to insist that those discrete issues be presented to the lower court in the first instance.

Requiring preservation "encourages efficiency by requiring parties to raise objections as soon as possible at the trial level," giving the trial court "an opportunity to correct or explain its decision" and creating "a fully-developed record" for appellate review.[322] In addition, preservation rules discourage sandbagging—withholding substantive arguments until

---

319 *See, e.g.*, United States v. Perkins, 78 M.J. 381, 386 n.8 (C.A.A.F. 2019); United States v. Rodriguez, 799 F.3d 1222, 1224 n.2 (8th Cir. 2015); United States v. Sager, 743 F.2d 1261, 1263 n.4 (8th Cir. 1984). *But see* United States v. Wurie, 728 F.3d 1, 14 & n.13 (1st Cir. 2013) (declining to consider a good-faith argument raised for the first time on appeal).

320 *See* Larry Cunningham, *Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the Interest of Justice*, 11 J. APP. PRAC. & PROCESS 285, 285 (2010); Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652, 654 (1951) (stating the "general rule" that "an appellate court will not hear issues which were not brought forth below"); Campbell, *supra* note 184, at 92 ("[C]ourts of review will refuse to consider questions which have not been raised and preserved in the trial court."); Note, *Raising New Questions on Appeal*, 40 HARV. L. REV. 997, 997 (1927) ("[A]s a general rule, questions not passed upon by the lower court will not be considered on appeal.").

321 Campbell, *supra* note 184, at 93.

322 Yuval Simchi-Levi, *Preservation: What Is It Good For?*, 37 PACE L. REV. 175, 180 (2016); *see* Cunningham, *supra* note 320, at 286 (stating that preservation encourages "the efficient resolution of the case"); *id.* at 292 (stating that preservation "ensures that the trial judge was at least presented with an opportunity to correct the error"); *id.* at 293 (stating that preservation is important because it helps ensure development of "a proper factual and legal record").

appeal—which wastes judicial resources.[323] And they ultimately "reduce[] the caseload for appellate courts" by "limit[ing] the claims [and arguments] that appellate courts can review."[324] In all these ways, ordinary preservation rules facilitate the appellate review process while promoting judicial economy.[325] Considering new arguments on appeal that the appellee did not present to the lower court wastes resources by requiring the parties and the appellate court to address such matters for the first time, perhaps without an adequate record.

2. Minimizing the Conflict

If an appellate court has discretion to consider an alternative ground for affirmance—because the appellee has not waived that ground—the court should consider, among other things, whether the appellee presented that ground to the lower court in the first instance.[326] The Supreme Court has said that "where the ground presented [in the appellate court] has not been raised below," the appellate court should consider that ground "only in exceptional cases."[327] In determining whether a case is sufficiently "exceptional" to warrant consideration of an unpreserved alternative ground for affirmance, the appellate court should keep in mind (1) its role as a court of review, not first view, and (2) the judicial-economy interest that justifies "right for any reason."

It is neither necessary nor appropriate to apply a strict preservation rule, refusing to consider any alternative ground for affirmance that the appellee failed to present in the lower court. While a strict rule of preservation for appellants and appellees alike seems fair, *American Railway Express* makes clear that appellees and appellants occupy different positions with respect to the judgment under review. Appellants bearing the burden to show error in the judgment must specify the error(s), while appellees always have the right to defend the judgment on

---

323 *See* Simchi-Levi, *supra* note 322, at 180; Cunningham, *supra* note 184, at 292.

324 Simchi-Levi, *supra* note 322, at 181; *see* Cunningham, *supra* note 320, at 286 (stating that preservation encourages "conservation of appellate resources").

325 *See* McGinnis v. Ingram Equip. Co., 918 F.2d 1491, 1495 (11th Cir. 1990) ("[J]udicial economy is served and prejudice is avoided by binding the parties to the theories argued below." (alteration in original) (quoting Higginbotham v. Ford Motor Co., 540 F.2d 762, 768 n.10 (5th Cir. 1976))).

326 *See* Glaxo Grp. Ltd. v. TorPharm, Inc., 153 F.3d 1366, 1371 (Fed. Cir. 1998) ("If the grounds urged in support of the judgment have not been presented to and passed upon by the trial court, an appellate court may prefer not to address them in the first instance.").

327 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 39 (1989) (quoting Heckler v. Campbell, 461 U.S. 458, 468 n.12 (1983)).

any ground appearing in the record.[328] Asymmetry in preservation rules simply reflects the general preference for affirmance of judgments once entered.

In any event, an appellate court exercising discretion to consider (or decline to consider) an alternative ground for affirmance may take into account the circumstances of each case, in light of the court's review function and the judicial-economy justification for "right for any reason." An unpreserved argument that presents a pure question of law, with no need for further factual development, may be decided by the court of appeals without significant harm to the "review, not first view" principle. Since the court would apply de novo review to the lower court's ruling on that kind of question anyway, affirmance on that ground (rather than remand for a first look by the lower court) would indeed promote judicial economy. Indeed, in both *Schweiker* and *Greenlaw*, the Supreme Court considered unpreserved alternative grounds for affirmance that were (1) statutory interpretation arguments that (2) could be decided on the basis of the factual records developed in the lower courts.[329] The Court thus could evaluate those arguments without compromising its role as a court of review rather than first view.

By contrast, an unpreserved argument that presents a novel or complex question of law, or a question of state law, or a question that is significantly fact-intensive, could not be decided without transforming the appeal into a "first view" enterprise, perhaps without an adequate record. In that circumstance, judicial economy would be promoted by remanding the case for the lower court's consideration of the alternative ground in the first instance. Thus, the Supreme Court in *Jenkins v. Anderson* declined to consider a warden's alternative-ground argument that the habeas petitioner had failed to raise certain constitutional claims during his state-court trial, because the warden "failed to raise [that

---

328 *See* United States v. Am. Ry. Express Co., 265 U.S. 425, 435 (1924) ("[T]he appellee may . . . 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.").

329 *See* Schweiker v. Hogan, 457 U.S. 569, 585 n.24 (1982); Greenlaw v. United States, 554 U.S. 237, 249–50 (2008); *see also* W.G. Fairfield Co. v. Occupational Safety & Health Rev. Comm'n, 285 F.3d 499, 504 (6th Cir. 2002) (affirming an agency decision based on a statutory interpretation argument that was not raised before the agency, because the issue could be decided based on the record developed before the agency (citing *Schweiker*, 457 U.S. at 585 n.24)); *Glaxo Grp.*, 153 F.3d at 1371 ("If . . . the [alternative ground for affirmance] is one of law, and that issue has been fully vetted by the parties on appeal, an appellate court may choose to decide the issue even if not passed on by the trial court.").

argument] in either the District Court or the Court of Appeals."[330] The court ordinarily would not consider unpreserved arguments, and "[c]onsiderations of judicial efficiency" required that the warden's argument—although presented as a ground for affirmance—be presented to the lower courts first.[331] The warden's argument required analysis of cause and prejudice, issues that "may turn on an interpretation of state law," and the Court did not wish to address those issues without the assistance of "the views of other federal courts that may possess greater familiarity with [the relevant state] law."[332] Moreover, the Court was concerned that "the 'cause'-and-'prejudice' [analysis] may turn on factual findings that should be made by a district court."[333] The Court also has declined to consider unpreserved alternative grounds that presented "grave question[s]" touching the rights of nonparties[334] or that impacted the laws of other jurisdictions[335] or that spawned additional "difficult questions."[336]

Appellate courts exercising discretion can determine when it makes sense—in light of their function as courts of review and the interest of judicial economy—to consider an alternative ground for affirmance that was not preserved in the lower court. As explained above, courts may consider (1) whether the alternative ground presents a pure issue of law, (2) whether the facts material to the alternative ground were fully developed in the lower court, (3) whether the legal issue is novel or unusually complex, and (4) whether the issue was fully briefed and argued by the parties.[337] Ordinarily, an alternative ground that was not presented to the lower court should not be considered on appeal because the costs of "first view" analysis will be greater than the benefits of affirmance. But if the alternative ground presents a pure issue of law that the parties have fully addressed, and there is no need for fact-intensive analysis, a court may apply "right for any reason" and affirm the judgment on that ground.

---

330 447 U.S. 231, 234 n.1 (1980).

331 *Id.*

332 *Id.*; *see also* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86 (1988) (declining to consider an alternative ground involving "disputes about Texas law that should have been presented to the state courts" in the first instance).

333 *Jenkins*, 447 U.S. at 234 n.1.

334 Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018).

335 MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 31 (2008).

336 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 39 (1989).

337 *See* discussion *supra* Section III.A.

CONCLUSION

Alternative grounds for affirmance are important arrows in the quiver of any appellee. Often the temptation is simply to defend the lower court's judgment on its own terms; after all, those terms were favorable to the judgment-winner. But the appeal gives three new judges a chance to look at the case, and they might not share the lower court's view of the critical issue(s). "Right for any reason" gives the appellee an opportunity to defend the lower court's judgment on any terms supported by the record, regardless of the lower court's judges' analysis. To win the appeal, the appellee need only provide some ground (supported by the record) that supports the result in its favor. Whether the lower-court coachman was sober, tipsy, or falling-down drunk, the appellee can win the appeal just the same. Thus, identifying and arguing alternative grounds for affirmance should be an important part of writing any appellee's brief.

Federal appellate courts should understand "right for any reason" as a discretionary tool to be employed when the circumstances allow the court to achieve important objectives of appellate review. Affirming judgments on alternative grounds avoids needless remands and retrials that waste judicial resources. But conserving resources is one reason why appellate courts refrain from deciding fact-intensive issues and even legal issues of first impression. So, when an alternative ground for affirmance would require the appellate court to act as a court of "first view," applying "right for any reason" would actually undermine, not promote, the objective of judicial economy. And so, the court should have discretion to decline to consider the alternative ground.

Applying "right for any reason" may also create conflicts with the principle of party presentation—a principle that the Supreme Court has recently emphasized as central to our adversarial system of adjudication. To avoid, or at least mitigate, such conflicts, appellate courts ordinarily should not consider alternative grounds for affirmance sua sponte, but should only consider the grounds that the appellee presents in its opening brief. Similarly, appellate courts ordinarily should not consider alternative grounds that the appellee did not present in the lower court. If an appellate court exercises its discretion (for whatever reason) to consider a "new" alternative ground on appeal, it should give the appellant a full opportunity to address the new ground through supplemental briefing.

Appellate courts review judgments, not reasons, and so they are able to identify legal errors without disturbing otherwise correct results. But

in determining whether a judgment is "right for any reason," courts should be careful to preserve other important aspects of appellate review.