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HOW THE PARTY PRESENTATION RULE LIMITS JUDICIAL DISCRETION

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In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.¹

The party presentation rule is a common law principle discouraging federal courts from considering legal arguments and issues that were not raised by litigants. Unlike the norms against ex parte communications or outside factual research, courts often reject the rule when they believe it is necessary to ascertain controlling law and ensure the integrity of the judicial system. Correct law pronouncement is certainly a proper goal, but such sua sponte decision-making undermines the American adversarial system and interferes with a litigant’s rights to notice and the opportunity to argue against a judicially crafted legal justification. This essay examines the party presentation rule and why it is inconsistently followed in the federal courts and recommends a solution by highlighting a 2006 dissent written by (then-Judge) Justice Sonia Sotomayor. In that case, Judge Sotomayor raised “the question of whether the ‘issue or claim is properly before the court’” as potential grounds for refusing to decide a case on a new legal justification not raised by a party.

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¹ *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

INTRODUCTION

The “party presentation rule” is a norm against judicially created legal arguments and an essential element of the American legal system.² The rule serves as a check on judicial discretion by strongly discouraging judges from entertaining legal claims and arguments that were not raised by litigants at the first opportunity.³ As Justice Antonin Scalia once wrote, “[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”⁴

Nevertheless, despite such seemingly broad and sweeping language, the norm is more recommendation than requirement.⁵ For as long as judges have had the discretion to decide a case, they have justified their decisions on the strongest legal grounds conceivable. *Erie Railroad Co. v. Tompkins*,⁶ *Mapp v. Ohio*,⁷ *Washington v. Davis*,⁸ and *Dickerson v. United States*⁹ are just a few of the more notable cases that were decided on legal grounds not argued by the parties. While federal courts routinely invoke the doctrines of forfeiture or waiver as justification for denying untimely legal arguments raised by litigants,¹⁰ the same courts are sometimes remarkably less restrained from considering novel legal arguments raised by their own chambers.¹¹ The current party presentation rule is more aptly summarized by a unanimous Supreme Court decision from 1991, which declared “[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”¹²

This essay examines the party presentation rule (or lack of one) in the federal courts. Part I considers the pros and cons of the rule and examines why it is inconsistently followed by many federal judges. Part II looks at the conflicting ways the rule is applied or ignored in the different

² See *id.*; see also Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009).

³ See *Greenlaw*, 554 U.S. at 243.

⁴ *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

⁵ See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (“The 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. We announce no general rule.”).

⁶ 304 U.S. 64 (1938).

⁷ 367 U.S. 643 (1961).

⁸ 426 U.S. 229 (1976).

⁹ 530 U.S. 428 (2000).

¹⁰ See *United States v. Olano*, 507 U.S. 725, 733 (1993) (“Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, ‘waiver is the intentional relinquishment or abandonment of a known right.’” (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

¹¹ See *infra* Part I.

¹² *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

circumstances that exist at the district court and appellate court levels. Finally, Part III proposes an argument an aggrieved party can make against a decision involving *sua sponte* decision-making by highlighting a 2006 dissent written by Justice Sonia Sotomayor (then Judge Sotomayor).¹³ In that case, Judge Sotomayor disagreed with the majority opinion reversing a district court on legal grounds neither party had argued. Acknowledging that a “court is not limited to the particular legal theories advanced by the parties,” she wrote, “the question of whether the ‘issue or claim is properly before the court’” could be grounds for refusing to decide a case based on a judicially created legal argument.¹⁴ This essay proposes that, when a court decides a case on legal grounds that neither party has argued, such issue or claim was not “properly before the court.” Therefore, the parties should be given a chance for rehearing (if at the appellate court level) or remand with supplemental briefing (if at the district court level).

I. WHY HAVE A PARTY PRESENTATION RULE AND WHY MAKE EXCEPTIONS

The party presentation rule—also known as the “norm against judicial issue creation” or “norm against *sua sponte* decision-making”—flows out of a judge’s neutral role in the adversarial system as one “who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”¹⁵ While outside *factual* research is highly controversial and strongly discouraged because it raises evidentiary and due process concerns and infects the trial record that is vital on an appeal,¹⁶ outside *legal* research is not *per se* discouraged because of the judge’s unique responsibility to know the law and apply it to the facts correctly.¹⁷ Outside legal research and *sua sponte* decision-making becomes controversial, however, when judges disregard party autonomy and raise new legal arguments that were intentionally or accidentally omitted by the litigants.¹⁸ Such unilateral actions have the effect of helping one party at the expense of another and feed into the damaging narrative that “courts are more likely to raise an issue *sua sponte* if they think a case is really important or if the judges really want to reach a particular result.”¹⁹ While most judges and legal scholars agree that *sua sponte* decision-making is not justified when used to help one side in an adversarial proceeding or to promote a judge’s personal agenda, many

¹³ See *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006).

¹⁴ *Id.* at 109 (Sotomayor, J., dissenting) (quoting *Kamen*, 500 U.S. at 114).

¹⁵ *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

¹⁶ See Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 135–40 (2008) (discussing judicial research, the ABA Model Code of Judicial Conduct, and the impact judicial factual development can have on a case’s trial record).

¹⁷ See, e.g., Frost, *supra* note 2, at 455–56.

¹⁸ See Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1260 (2002).

¹⁹ *Id.* at 1287.

judges (and some legal scholars) believe the party presentation rule does not prohibit judicial creation of new legal arguments that support a litigant's existing claims.²⁰

Federal judges (and the federal courts²¹) have two important roles. First, in their "dispute resolution" capacity, judges are required to resolve concrete conflicts, between individual parties, involving particularized facts.²² Second, in their "law pronouncement" or "public values" role, judges are required "to make accurate statements about the meaning of the law that govern beyond the parameters of the parties and their dispute."²³ Courts are usually able to perform each function without conflict, but tensions arise when an individual dispute that is poorly or insufficiently litigated has the potential to have an impact on precedent. In such circumstances, legal scholars, judges, and litigants will sometimes disagree about which role is supreme.²⁴

The dispute resolution capacity provides the strongest justifications for an absolute party presentation rule. When viewing a judge's responsibilities from this vantage, the rule preserves the essential and unique roles adversarial litigants and neutral judges play in the American legal system.²⁵ "[J]udges are more likely to reach the 'right' legal answer when two parties, each with a stake in the matter, compete to present the most persuasive case to the court."²⁶ Absolute preservation of the adversarial roles also creates buy-in by the parties and results in greater acceptance of a final judgment because the parties believe that they received a fair opportunity before the court.²⁷ A second justification rests on principles of due process by ensuring that the parties have notice and an opportunity to respond to all issues and arguments considered by the judge.²⁸ Here again, an absolute rule helps avoid the one-sided inconsistency that occurs when courts refuse to consider a party's arguments that were not raised at the first opportunity, but remain free to entertain their own post-briefing ideas.²⁹ Finally, the rule has beneficial practical effects to dispute resolution by conserving scarce judicial resources, preventing judicial activism and agenda setting, and ensuring efficient resolution of cases by identifying all relevant matters early in the litigation.³⁰

²⁰ *Id.* at 1256; Frost, *supra* note 2, at 457; *but see infra* Part III.

²¹ This essay discusses the party presentation rule as it applies to federal judges. Federal judges have less discretion in the cases and controversies that they may decide than state judges because the federal courts are courts of limited jurisdiction. *See* U.S. CONST. art. III, § 2.

²² *See* Frost, *supra* note 2, at 452.

²³ *Id.*

²⁴ *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976) (discussing the dispute resolution capacity where "the lawsuit is a vehicle for settling disputes between private parties about private rights" and the public rights capacity where "the object of litigation is the vindication of constitutional or statutory policies").

²⁵ *See supra* note 4 and accompanying discussion.

²⁶ Frost, *supra* note 2, at 452.

²⁷ *Id.* at 459; Dodson, *supra* note 2, at 2.

²⁸ *See* Frost, *supra* note 2, at 460–61.

²⁹ *See supra* note 10 and accompanying discussion.

³⁰ *See* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 183 (2012).

Judges, however, do not operate in a vacuum. The second—and equally significant—role courts must perform requires that they state and apply the law correctly.³¹ This is especially true in the courts of appeals where review by the next higher court is highly unlikely because the Supreme Court only accepts a handful of cases each term.³² A circuit judge’s responsibility “as both the guardian of a fair proceeding and final arbiter of applicable law”³³ may also be why it appears that the courts of appeals are much more likely than the district courts to disregard the party presentation rule and render decisions on the legal grounds of their choosing.³⁴

In the law pronouncement capacity, an absolute rule is problematic in situations where the litigants agree on a misstatement of the law or an incorrect interpretation of a constitutional or statutory provision.³⁵ As a result, federal courts uniformly recognize certain uncontroversial “exceptions” to the rule that are predictable to the parties and necessary to the integrity of the legal system.³⁶ For example, federal judges may (and in most cases, must) *sua sponte* dismiss cases that do not meet jurisdictional thresholds such as federal subject matter, diversity, or standing.³⁷ Judges may even “entertain quasi-jurisdictional issues” *sua sponte*, such as qualified immunity, claim or issue preclusion, and the canons of constitutional avoidance or comity.³⁸ Outside these sorts of circumstances—in which the Constitution mandates a certain outcome and the decision is indisputable—judicial abrogation of the party presentation rule without first allowing the parties an opportunity to rebut the legal justification, is controversial. Nevertheless, such abrogation occurs and is usually justified by the practical effects of the court order.³⁹

The strongest argument against an absolute party presentation rule—and in favor of outside legal research and *sua sponte* judicial decision-making—focuses on maintaining consistency and accuracy within the law.⁴⁰ Some legal scholars (and most likely, many judges) believe that the impact on party autonomy and control is balanced by the need to avoid the effects an incorrect decision (or less than perfectly logical opinion) would have on future cases.⁴¹ These legal scholars believe that allowing judges to look beyond the litigant’s briefs results in a more correct

³¹ See Frost, *supra* note 2, at 453.

³² See Hon. Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 FORDHAM L. REV. 945, 948 (2016) (“[T]oday’s Justices decide which cases to hear with the unbridled exercise of their certiorari power, while the courts of appeals are left to plead, cajole, and exhort them to take up important questions of law through opinions, articles, speeches, and the like.”).

³³ Weigand, *supra* note 30, at 180.

³⁴ See *infra* note 45 and accompanying discussion.

³⁵ See, e.g., Singleton v. Wulff, 428 U.S. 106 (1976).

³⁶ See Melissa M. Devine, *When the Courts Save Parties from Themselves*, 21 TUL. J. INT’L & COMP. L. 329 (2013).

³⁷ See *id.* at 333; see also *supra* note 21.

³⁸ See Devine, *supra* note 36, at 333–34.

³⁹ See Dodson, *supra* note 2 (arguing in favor of *sua sponte* decision-making); Frost, *supra* note 2 (same); see also *infra* Part II.

⁴⁰ See Frost, *supra* note 2, at 452–53 (“[C]ourts have the power to look beyond the parties’ arguments when failing to do so would lead to an inaccurate and incomplete description of the law.”).

⁴¹ See, e.g., Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991); Frost, *supra* note 2.

decision for the legal system as a whole than if courts were compelled to only rely on the parties' submissions.⁴² By allowing "courts [to] save parties from themselves,"⁴³ abrogation of the party presentation rule provides a check on the wealth issue: where richer parties, who can afford higher quality legal representation, are more likely to win. The balance between the dispute resolution and law pronouncement responsibilities, however, is not totally clear.

II. HOW THE PARTY PRESENTATION RULE LIMITS JUDICIAL DISCRETION IN THE FEDERAL COURTS (OR FAILS TO)

The party presentation rule operates in slightly different ways at the different levels of the federal court system—even though district and circuit judges are given similarly broad discretion to choose a legal argument when deciding a case.⁴⁴ Understandably, most courts do not reference the rule when it is followed and move directly to the task of issuing a decision that reflects legal justifications raised by one or both parties. Interestingly, *sua sponte* decision-making at the district court level appears to occur less often than at the courts of appeals.⁴⁵ This could be because district courts must evaluate legal arguments of first impression, and therefore, prioritize whether parties are stating the law correctly—not necessarily whether the legal argument is the strongest or most accurate restatement of the law. It could also be the result of the district courts' focus on developing the trial record and evaluating mixed questions of law and fact—issues that the courts of appeals do not have to consider to the same level of detail.

Judges in two recent Southern District of New York cases involving *sua sponte* decision-making, rejected complaints raised by the losing party. In *U.S. Bank v. Commonwealth Land Title*, the court "denied a motion for reargument" that was made by a third-party defendant.⁴⁶ In the original case—for which the aggrieved defendant sought reargument—Judge Naomi Reice Buchwald dismissed the defendant's indemnity claim against another defendant on legal grounds that were not argued by the winning party. When the aggrieved defendant sought "reargument" so that it could contest the court's legal justification, Judge Buchwald refused to reconsider her decision by noting that the winning party had tangentially alluded to the argument in two

⁴² See Devine, *supra* note 36; see also Frost, *supra* note 2.

⁴³ See Devine, *supra* note 36, at 1, 41.

⁴⁴ See Dodson, *supra* note 2, at 7 ("[E]ven when the law allows parties to exercise litigation choices, courts retain largely unfettered discretion—cabined only by law—to disregard or override those choices."); see also *Kamen*, 500 U.S. at 99 ("[T]he court is not limited to the particular legal theories advanced by the parties.").

⁴⁵ In a recent WestLaw search, of the 111 cases that cited to *Kamen v. Kemper Financial Services*'s rejection of an absolute party presentation rule (see *supra* note 12 and accompanying discussion), seventy-seven were circuit court decisions while only sixteen were from a district court.

⁴⁶ *U.S. Bank, Nat. Ass'n v. Commonwealth Land Title Ins. Co.*, No. 13 CIV. 7626 NRB, 2015 WL 3457060 (S.D.N.Y. May 27, 2015).

sentences of its Reply Memorandum.⁴⁷ In *In re Term Commodities Cotton Futures Litigation*, Judge Andrew Carter rejected an aggrieved party's complaint that he had decided the case on grounds that were outside the parties' briefings, writing: "Defendants' suggestion that they were denied due process when the Court's opinion cited to a case that was not raised in the briefing approaches absurdity."⁴⁸

In the courts of appeals, judges appear to be more willing (and perhaps, more able) to venture around the party presentation rule.⁴⁹ In *Thompson v. Runnels*, the Ninth Circuit rejected a habeas petitioner's claim that California had waived or forfeited an argument "by failing to raise it in its briefs to the district court and to us in its original response brief."⁵⁰ The majority declared that "we have the authority to identify and apply the correct legal standard, whether argued by the parties or not."⁵¹ In a dissenting opinion, however, Judge Marsha Berzon pushed back on the majority's declaration of authority "[b]ecause the majority misapplies [the law] and upends the fundamental principle of civil litigation that litigants are ordinarily expected to raise open questions if they want them decided."⁵²

In *Ms. S. v. Regional School Unit 72*, the court identified a statute that "[c]uriously, neither party's briefing, either to us or the district court, refers to" and "[n]ot surprisingly, given this omission, the district court did not refer to it in its order."⁵³ Given "these omissions," the court declared, "we arguably could avoid the question of the appropriate standard for judicial review by invoking the waiver doctrine" but nevertheless decided that "it would be imprudent to ignore a factor critical to a challenge to a rule's adequacy."⁵⁴ Interestingly, the court stopped short of issuing a decision based on the newly discovered statute stating, "we raise this issue to properly frame the district court's review of the case on remand."⁵⁵

Most notably, in *Hankins v. Lyght*, Second Circuit Judges Ralph Winter and Barrington Parker vacated and remanded a case back to the district court on legal grounds that neither party had argued.⁵⁶ The decision drew a strong dissent from future Supreme Court Justice Sonia Sotomayor who argued that the majority's reliance on the Religious Freedom Restoration Act (RFRA) was not appropriate. One of the reasons Judge Sotomayor dissented was because the "appellees have unambiguously indicated that they do not seek to raise a RFRA defense, and the

⁴⁷ *Id.* at *2.

⁴⁸ *In re Term Commodities Cotton Futures Litigation*, No. 12 CIV. 5126 ALC, 2014 WL 5014235, at *2 n.3 (S.D.N.Y. Sept. 30, 2014).

⁴⁹ *See, e.g.*, *United States v. Tutty*, 612 F.3d 128, 131 (2d Cir. 2010) (stating court of appeals has power to consider unraised issues); *Gill v. INS*, 420 F.3d 82, 88 (2d Cir. 2005) (same); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993) (same); *see also supra* note 45 and accompanying discussion.

⁵⁰ *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013).

⁵¹ *Id.*

⁵² *Id.* at 1101–02 (Berzon, J., dissenting).

⁵³ *Ms. S. v. Reg'l Sch. Unit 72*, 829 F.3d 95, 107 (1st Cir. 2016).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006).

statute’s protections, even if otherwise applicable, are thus waived.”⁵⁷ While courts “retain[] the independent power to identify and apply the proper construction of governing law,” Judge Sotomayor wrote, the fact that the parties did not raise the legal claim “begs the question of whether the ‘issue or claim is properly before the court.’”⁵⁸

III. CONTESTING A SUA SPONTE DECISION

Considering the tremendous discretion given to judges to rule on a matter before them, and a decision-maker’s natural inclination to refuse to reconsider a decision that is well researched and thought-through,⁵⁹ what is an aggrieved party to do? This essay proposes two challenges a litigant can make against an instance of *sua sponte* decision-making. The actual challenge differs depending on the court that rendered in the decision, but the petition should be made to the courts of appeals because district court decisions are always subject to review at the circuit level and appealing *sua sponte* decision-making by a court of appeals to the Supreme Court is probably futile as the Supreme Court so rarely grants certiorari and “now tends exclusively to the most controversial and important questions of national law.”⁶⁰ Additionally, the courts of appeals appear more likely than district courts to decide a case on judicially created legal grounds.⁶¹ Therefore, the strongest chance of success on a challenge to judicial overreach is probably to focus on the body exercising that discretion.

At the district court level—if, after a motion for reargument to the same court,⁶² the district judge does not allow the aggrieved party to submit a supplemental brief addressing the court’s *sua sponte* legal justification—a litigant may find success by petitioning the circuit court for remand as the First Circuit ordered in *Ms. S. v. Regional School Unit 72*.⁶³ Abuse of discretion grounds would be appropriate for remand because “[a] district court abuses its discretion if it *applies legal standards incorrectly*.”⁶⁴ The essential elements of an adversarial legal system—party presentation and the due process right of notice and an opportunity to be heard—together establish the legal standard that a litigant must be given an opportunity to make an argument

⁵⁷ *Id.* at 109 (Sotomayor, J., dissenting).

⁵⁸ *Id.* at 114 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)) (“Given appellees’ clear indication that they do not seek to rely on RFRA, the applicability of that statute is not before us. The majority’s disagreement with appellees’ reasoning does not change that fact.”).

⁵⁹ See *supra* Part II (discussing district court cases rejecting claims of *sua sponte* decision-making).

⁶⁰ See Lohier, *supra* note 32, at 951.

⁶¹ See *supra* note 45.

⁶² See, e.g., *supra* note 46 and accompanying discussion.

⁶³ 829 F.3d 95 (1st Cir. 2016); see also *supra* notes 53–55 and accompanying discussion.

⁶⁴ *Kirschenbaum v. 650 Fifth Ave.*, 830 F.3d 107, 122 (2d Cir. 2016) (emphasis added) (internal quotation marks omitted).

against the *sua sponte* justification.⁶⁵ Absent that opportunity, a district court has abused its discretion, and the circuit court can remand for additional briefing.⁶⁶

Remand would allow the parties to further develop the record and introduce new evidence if necessary to proper application of the new legal argument. If, however, the district court's *sua sponte* decision does not require new facts, the court of appeals also has the option of reviewing the decision *de novo* and allowing the parties to argue the new legal theory in their appeal. While the outcome for the individual party in either situation may be the same if the circuit court agrees with the district court's *sua sponte* legal justification; by entertaining the appeal and holding open the possibility of remand, the additional allocation of judicial resources is minimal and the aggrieved party will have had the chance to be heard.⁶⁷

If it is the circuit court that has engaged in *sua sponte* decision-making, a party should challenge the decision (as Justice Sotomayor once did) by arguing that the “issue or claim [was not] properly before the court.”⁶⁸ Courts routinely find that issues and claims are not properly before them when the claim or issue “was not raised in the district court,”⁶⁹ or the petitioner “never raised such a claim before”⁷⁰ or “did not exhaust th[e] issue” in a lower proceeding.⁷¹ An appeals court that renders what is effectively a final judgment, on a new legal argument that was not raised by the parties, epitomizes “not properly before the court.”⁷²

Opponents to this view may point to *Singleton v. Wulff* to argue that “there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below.”⁷³ But the issue to which the Supreme Court was referring in that case was not an entirely new and judicially created legal argument and the circumstances the Court indicated were narrowly drawn: “where the proper resolution is beyond any doubt” or “injustice might otherwise result.”⁷⁴ *Singleton* does not prevent parties from challenging legal justifications that “w[ere] not raised in the district court” or “exhausted” by the parties.⁷⁵ The adversarial system, due process, and the Supreme Court's 2008 pronouncement in *Greenlaw v. United States*, mandate that

⁶⁵ See, e.g., *supra* notes 53–55 and accompanying discussion.

⁶⁶ See *supra* Part I; *infra* CONCLUSION.

⁶⁷ District court judges will also be on notice to avoid this problem from arising in the first place by ensuring litigants have an adequate opportunity to be heard on all legal justifications.

⁶⁸ *Hankins v. Lyght*, 441 F.3d 96, 114 (2d Cir. 2006) (Sotomayor, J., dissenting) (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)).

⁶⁹ *Tylicki v. Schwartz*, 401 F. App'x 603, 604 (2d Cir. 2010).

⁷⁰ *Ming Wei Zheng v. Keisler*, 250 F. App'x 388, 389 (2d Cir. 2007).

⁷¹ *Hua Guo v. Gonzales*, 240 Fed. App'x 901, 903 (2d Cir. 2007).

⁷² *Hankins*, 441 F.3d at 114.

⁷³ *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

⁷⁴ *Id.* at 120–21 (quoting *Hormel v. Helvering*, 312 U.S. 552, 721 (1941)).

⁷⁵ See *id.* at 120 (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”); see also *Westinghouse Credit Corp. v. D’Urso*, 371 F.3d 96, 103 (2d Cir. 2004) (“In general we refrain from passing on issues not raised below.”).

federal courts “rely on the parties to frame the issues for decision and assign to [judges] the role of neutral arbiter of matters the parties present.”⁷⁶

CONCLUSION

“The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.”⁷⁷ Although the Supreme Court has stressed the importance of the party presentation rule,⁷⁸ some judges and legal scholars continue to believe that “the party presentation principle constrains a court’s fundamental obligation to ascertain controlling law.”⁷⁹ This is not the case. Courts are always free to ascertain controlling law—the rule simply requires a court to give parties the opportunity to argue for or against any interpretation of the law. Moreover, the Supreme Court has stated very clearly that “the fundamental requirement of due process is an opportunity to be heard.”⁸⁰ Judicially created legal justifications deny litigants that opportunity and judges should resist deciding cases without giving the parties an opportunity to be heard on a new legal argument.



⁷⁶ *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

⁷⁷ *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J. concurring in judgment); *see also* *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J. concurring in part and concurring in judgment) (“Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”).

⁷⁸ *See Greenlaw*, 554 U.S. at 243.

⁷⁹ *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 980 (4th Cir. 2015).

⁸⁰ *Link v. Wabash R. Co.*, 370 U.S. 626, 632 (1962) (quoting *Anderson National Bank v. Lockett*, 321 U.S. 233, 246 (1944); *see also* *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 463 (2000); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978).