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PRESERVATION RULES IN THE FEDERAL COURTS OF APPEALS

Ian S. Speir and Nima H. Mohebbi*

I. INTRODUCTION

Litigation is a long journey, and legal arguments are perishable goods. Before beginning the journey, attorneys must consider not only which arguments to take with them, but also how to preserve those arguments for both trial and appeal. Appellate courts, particularly the federal courts of appeals, have developed a sophisticated, often complex, and sometimes conflicting set of preservation rules. These are part of the “winnowing process” of litigation, the “machinery by which courts narrow what remains to be decided.”¹

Preservation rules are a key component of every advocate’s toolkit. Trial counsel must know them. Appellate attorneys must use them. But the rules can also be a trap for the unwary. Sometimes, the argument that might have won on appeal wasn’t timely or adequately raised at trial, and it doesn’t survive the journey.

This article surveys preservation rules in the federal courts of appeals, focusing in particular on the Tenth Circuit, which has addressed in detail some of the more peculiar iterations of preservation principles. We begin by providing some brief background on preservation, then delve into the related doctrines of waiver, forfeiture, and plain error. We next explore legal contexts in which these doctrines either do not apply or have

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1. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008) (internal quotation marks and internal citation omitted).

unique application, such as subject-matter jurisdiction, sovereign immunity, and objections to evidence. Finally, we examine preservation rules in the context of appellate briefing.

This survey is designed to assist both trial and appellate counsel as they navigate the federal courts' preservation rules. As important as the rules are, it's critical to remember the reasons behind them. Requiring parties to timely and adequately raise the arguments they want the court to address vindicates both structural and prudential values and ensures basic fairness to all parties. Balanced against these objectives is the court's "insistence that obvious injustice be promptly redressed."² Each of these considerations is in play when preservation is at issue. Appellate counsel therefore has a unique opportunity: to argue not only for application of a particular preservation rule, but to explain to the court why, in a particular case, that rule serves the interests it is designed to serve.

II. PRESERVATION BASICS

Any discussion of preservation rules must begin with the nature of our adversarial system. Courts depend on the parties, as self-interested litigants, to raise the issues they want the court to rule on. Courts typically do not decide, or even discuss, issues that the parties have not raised. As the Supreme Court recently put it, "[t]he premise of our adversarial system is that . . . 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."³

The first place in which parties must raise their arguments is the district court. As a general rule, an argument not first presented to the district court is not a proper basis for appeal.⁴ As the Tenth Circuit has explained,

2. *United States v. Frost*, 684 F.3d 963, 971–72 (10th Cir. 2012) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

3. *NASA v. Nelson*, ___ U.S. ___, 131 S. Ct. 746, 756 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (internal quotation marks omitted)); *see also* *United States v. Mitchell*, 518 F.3d 740, 749 (10th Cir. 2008) ("Ours is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses.").

4. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

[i]n order to preserve the integrity of the appellate structure, we should not be considered a “second-shot” forum, a forum where secondary, back-up theories may be mounted for the first time. . . . Parties must be encouraged to “give it everything they’ve got” at the trial level.⁵

To properly preserve an issue, a party must do more than simply raise it. She must both “aler[t] the district court to the issue and see[k] a ruling.”⁶ Arguments asserted but never pursued are not a basis for appeal.⁷ Neither are “vague and ambiguous” arguments or “fleeting contention[s]” made in the district court.⁸

Sometimes, a party advances one argument to the district court and a different but related argument on appeal. Typically, this won’t do. For example, in *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, the Tenth Circuit found a “palpable distinction” between a challenge to the district court’s analysis of a rule and a challenge to whether the rule applies at all.⁹

There’s an important caveat to all of these principles, one that’s often overlooked. 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. The court of appeals traditionally “may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented . . . on appeal.”¹⁰ This in turn means that an 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.¹¹ By contrast, a party seeking reversal

5. *Tele-Comm’n, Inc. v. Comm’r*, 104 F.3d 1229, 1233 (10th Cir. 1997) (citation omitted).

6. *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1142 (10th Cir. 2009) (quoting *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141 (10th Cir. 2007)).

7. *See, e.g., Grynberg v. Total, S.A.*, 538 F.3d 1336, 1351 (10th Cir. 2008).

8. *U.S. Aviation*, 582 F.3d at 1142.

9. 497 F.3d 1135, 1142 (10th Cir. 2007).

10. *See, e.g., Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

11. *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011). We say “generally” because there are exceptions even to this rule. For example, in the Tenth Circuit, the argument that the opposing party is estopped from litigating a particular issue must be timely raised. If an appellee fails to timely raise an estoppel defense, the defense is waived on appeal, and the court will proceed to the merits of the appellant’s argument. *See*

of the district court's decision based on a newly minted theory faces an uphill climb, one shaped by the principles of waiver, forfeiture, and plain error. We turn to those principles now.

III. WAIVER, FORFEITURE, AND THE PLAIN-ERROR STANDARD

Common parlance and even some judicial decisions often fail to distinguish between arguments that are waived and arguments that are forfeited. The two concepts are distinct, and the differences can be, and often are, dispositive.

Waiver requires some intentional act by a party.¹² It occurs when a party has “intentionally relinquished or abandoned” an argument either in the district court or on appeal.¹³ For example, under the invited-error doctrine, a party may not induce action by the district court and later seek reversal on the same ground.¹⁴ Likewise, a party may not appeal based on an argument she has expressly abandoned.¹⁵ In either situation, a waiver has occurred, and the party “is not entitled to appellate relief.”¹⁶

Forfeiture is different. It happens not by a deliberate act, but by neglecting to present an argument to the district court.¹⁷ Unlike a waived argument, a forfeited argument may be grounds for reversal on appeal, but only if affirming the district court would result in plain error.¹⁸ Plain error generally requires the proponent of the new argument to show “(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of

Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019, 1030 (10th Cir. 2003).

12. See *United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008).

13. *Richison*, 634 F.3d at 1127.

14. See *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006); *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1229 (10th Cir. 2003).

15. See *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272–73 (10th Cir. 2007).

16. *Teague*, 443 F.3d at 1314.

17. See *Richison*, 634 F.3d at 1128.

18. *Id.*

judicial proceedings.”¹⁹ If each of these elements is satisfied, the court “may exercise discretion to correct the error.”²⁰

A. The Elements of Plain Error

Plain error has the unique distinction of being both a standard of review and a multi-pronged test, and the court will grant relief only if each prong of the test is satisfied. Still, always bear in mind the driving force behind the test: preserving the court’s discretion to correct “clear legal error that implicates a miscarriage of justice.”²¹ As the Seventh Circuit has aptly put it, relief is appropriate when a district court’s error “shakes one’s faith in the judicial process.”²²

1. Error

The first prong of the test goes to the merits of the forfeited argument. It requires the appellant to explain why the district court erred, or why error would otherwise result if the district court’s ruling is affirmed. Sometimes, the court tackles this element head-on, concludes there was no error, and declines to address the remaining prongs of the test.²³ In this situation, the argument gets its day in court as if it were not forfeited.

2. Plain

The second prong of the test examines whether the alleged error is plain. To be plain, the error must be “clear or obvious under current law.”²⁴ “Clear or obvious” means that there is

19. *Id.*; see also *United States v. Olano*, 507 U.S. 725, 732 (1993) (referring to “plain” error that affects both “substantial rights” and the “fairness, integrity or public reputation of judicial proceedings”).

20. *United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1284 (10th Cir. 2010) (quoting *Therrien v. Target Corp.*, 617 F.3d 1242, 1253–54 (10th Cir. 2010)). The standard as articulated by the Tenth Circuit is largely similar to the plain-error standards employed by other circuits. See, e.g., *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 877 (8th Cir. 2012); *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002).

21. *Jordan*, 668 F.3d at 1199.

22. *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996).

23. See *Eller v. Trans Union, LLC*, 739 F.3d 467, 480 (10th Cir. 2013); see also *United States v. Waller*, 689 F.3d 947, 960 (8th Cir. 2012).

24. *United States v. Bader*, 678 F.3d 858, 868 (10th Cir. 2012).

controlling precedent on point, either from the Supreme Court, the relevant federal circuit, or (if the issue is one of state law) the relevant state courts.²⁵ In the absence of binding precedent, the clear weight of authority in other federal circuits might make an error plain.²⁶ By contrast, a circuit split will almost always foreclose a finding of plain error.²⁷

The error must be clear or obvious “under current law.”²⁸ Sometimes, a district court’s decision may be correct when rendered but erroneous at the time of appeal due to an intervening change in the law (such as new, binding precedent from the Supreme Court). Prior to 2013, there was a circuit split on how to handle this situation. The rule in the Tenth Circuit was to assess the error “at the time of appeal.”²⁹ The Supreme Court recently affirmed this approach in *Henderson v. United States*, drawing on the basic principle that “an appellate court must apply the law in effect at the time it renders its decision.”³⁰

3. *Affects Substantial Rights.*

To satisfy the third prong of plain-error review, the appellant must show that the error affected her “substantial

25. See *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012) (“In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue.” (citation omitted)); *Therrien v. Target Corp.*, 617 F.3d 1242, 1253 (10th Cir. 2010) (looking to Oklahoma caselaw to determine that error was not plain under Oklahoma law); *Hornick v. Boyce*, 280 Fed. App’x 770, 775–76 (10th Cir. 2008) (noting that “this is an unsettled question under Colorado law, and the [appellants] have therefore failed to show any plain error”).

26. See *United States v. Hardwell*, 80 F.3d 1471, 1484 (10th Cir. 1996) (“Although neither the Supreme Court nor this court has decided the issue, given the weight of authority from other circuits, we conclude that the error was sufficiently clear and obvious to be plain error . . .”).

27. See *Teague*, 443 F.3d at 1319 (“If neither the Supreme Court nor the Tenth Circuit has ruled on the subject, we cannot find plain error if the authority in other circuits is split.”); *United States v. Wynn*, 684 F.3d 473, 480 (4th Cir. 2012) (finding that error was not plain where “[o]ur court has never addressed the convergence argument, and the other circuits are split on the issue”); cf. *United States v. Story*, 635 F.3d 1241, 1248, 1249 (10th Cir. 2011) (noting that a circuit split is “strong evidence that an error is not plain,” but is ultimately “not dispositive”).

28. *Bader*, 678 F.3d at 868.

29. *United States v. Cordery*, 656 F.3d 1103, 1107 (10th Cir. 2011).

30. ___ U.S. ___, 133 S. Ct. 1121, 1129 (quoting *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 281 (1969)).

rights.”³¹ This generally requires a showing of prejudice—“a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.”³² Put otherwise, the appellant must convince the court of appeals that the error was not harmless.³³ “[A]n error affecting a substantial right of a party is an error which had a ‘substantial influence’ on the outcome or [which] leaves one in ‘grave doubt’ as to whether it had such effect.”³⁴

This showing is easy when a district court’s plainly erroneous ruling was dispositive of the case or of an issue.³⁵ In that situation, the error was clearly prejudicial. However, when error is predicated on a district court’s incorrect evidentiary ruling or erroneous jury instruction, a showing of prejudice is much more difficult. The court of appeals must assess the error in light of the entire record³⁶ and must often make counterfactual predictions about how a factfinder would have decided the case in the absence of the error.³⁷

31. *Richison*, 634 F.3d at 1128.

32. *Cordery*, 656 F.3d at 1108 (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 733 (10th Cir. 2005)) (internal quotation marks omitted).

33. By statute and rule, appellate courts are required to ignore “harmless error,” that is, error that does “not affect the substantial rights of the parties.” See 28 U.S.C. § 2111 (Westlaw 2015); FED. R. CIV. P. 61 (Westlaw 2015); FED. R. CRIM. P. 52(a) (Westlaw 2015); see also *United States v. Kieffer*, 681 F.3d 1143, 1158 (10th Cir. 2012) (“Rule 52(a) harmless error analysis and the third or ‘substantial rights’ prong of Rule 52(b) plain error analysis ‘normally require[] the same kind of inquiry.’” (alteration in original) (quoting *Olano*, 507 U.S. at 734)).

34. *United States v. Charley*, 189 F.3d 1251, 1270 (10th Cir. 1999) (quoting *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc)) (alteration in original); see also *Perkins v. Silver Mountain Sports Club & Spa, LLC*, 557 F.3d 1141, 1151 (10th Cir. 2009) (indicating that under substantial-rights prong, proponent must show that error “affected the outcome of the proceedings”).

35. See *Flud v. United States ex rel. Dep’t of Veterans Affairs*, 528 Fed. App’x 796, 799 (10th Cir. 2013) (“[T]he district court dismissed Flud’s claim solely because he failed to comply with § 19, which the Oklahoma Supreme Court has since ruled is void and unconstitutional. Accordingly, the district court plainly erred in basing its dismissal on Flud’s failure to comply with § 19.” (citation omitted)).

36. *United States v. MacKay*, 715 F.3d 807, 842 n.21 (10th Cir. 2013) (“In conducting this analysis, we review the record as a whole.”); *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1312 (10th Cir. 1986) (“In determining whether plain error applies in this case, we must view the instruction error in the context of the entire record.”).

37. See *Ryan Dev. Co. v. Indiana Lumbermens Mut. Ins. Co.*, 711 F.3d 1165, 1172 (10th Cir. 2013); *United States v. Brooks*, 736 F.3d 921, 936 (10th Cir. 2013); see also *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005) (calling this a “mentally taxing and inherently speculative task”).

Although most kinds of error are amenable to harmless-error analysis under the third prong of plain-error review, the Supreme Court has recognized that “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome.”³⁸ These so-called “structural errors” are constitutional defects that “affect[] the framework within which the trial proceeds, rather than simply . . . the trial process itself.”³⁹ Examples include the total denial of counsel, a biased trial judge, or racial discrimination in jury selection.⁴⁰ Like all arguments, a structural-error argument must first be presented to the district court and, if unpreserved, is subject to plain-error review. Yet because an analysis of its prejudicial effect is impossible, it is likely that structural error automatically satisfies the substantial-rights prong.⁴¹

4. Discretion.

If the first three prongs of the plain-error test are met, the court then asks whether the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.”⁴² If so, the court “may exercise discretion to correct the error.”⁴³ This final prong of the test is purely discretionary, and it’s impossible to say in the abstract when it will apply. Courts typically exercise their discretion “when an error is ‘particularly egregious’ and the failure to remand for correction would

38. *Olano*, 507 U.S. at 735.

39. *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)) (internal quotation marks omitted); see *United States v. Gonzalez-Huerta*, 403 F.3d 727, 734 (10th Cir. 2005) (“[G]enerally speaking structural errors must, at a minimum, be constitutional errors.”).

40. See *Neder*, 527 U.S. at 8 (citing cases).

41. The Supreme Court and Tenth Circuit have consistently reserved this question, see *Puckett v. United States*, 556 U.S. 129, 140 (2009); *Kieffer*, 681 F.3d at 1158, but other circuits have so held, see *United States v. Barnett*, 398 F.3d 516, 527 (6th Cir. 2005); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001); *United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996).

42. E.g., *Bahrani*, 624 F.3d at 1284.

43. *Id.*

produce a ‘miscarriage of justice.’”⁴⁴ This standard is “formidable.”⁴⁵

At times, the Tenth Circuit has hinted at factors that help guide its discretion to consider new arguments. The court is more likely to consider a new argument if it presents a “strictly legal question the proper resolution of which is beyond doubt,”⁴⁶ or in “instances where public interest is implicated, . . . or where manifest injustice would result.”⁴⁷ In exercising its discretion, the court is “mindful of the policies behind the general rule” of preservation.⁴⁸ Thus, whether the court will entertain an unpreserved argument depends on, among other things, the adequacy of the factual record; prejudice or unfair surprise to the parties; whether the issue is antecedent to or dispositive of another issue before the court; the age and complexity of the case; the interests at stake, including the extent of liability faced by one or more of the parties; and whether resolving the newly raised issue allows the court to avoid a more difficult issue, such as an unsettled constitutional question.⁴⁹ Other circuits have articulated similar considerations.⁵⁰

44. *United States v. Trujillo-Terrazas*, 405 F.3d 814, 820 (10th Cir. 2005) (quoting *Gonzalez-Huerta*); *see also* *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1075 (10th Cir. 2009) (similarly equating the fourth prong with a “miscarriage of justice”).

45. *Trujillo-Terrazas*, 405 F.3d at 820.

46. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992); *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990).

47. *Rademacher v. Colo. Ass’n of Soil Conservation Dists. Med. Benefit Plan*, 11 F.3d 1567, 1572 (10th Cir. 1993); *see also* *Singleton*, 428 U.S. at 121 (“Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where ‘injustice might otherwise result.’” (citation omitted)).

48. *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991).

49. *See* *United States v. Hardman*, 297 F.3d 1116, 1123–24 (10th Cir. 2002) (en banc); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996); *Hicks*, 928 F.2d at 970–71.

50. *See, e.g.,* *United States v. Gewin*, 759 F.3d 72, 78 (D.C. Cir. 2014); *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 615 (6th Cir. 2014); *N.J. Carpenters & Trustees v. Tishman Constr. Corp. of N.J.*, 760 F.3d 297, 305 (3d Cir. 2014).

*B. The Origins of Plain Error and Hints
of a Criminal-Civil Distinction*

Preservation rules are probably as old as the judicial system,⁵¹ though an exploration of their provenance is beyond the scope of this article. For now, suffice it to note that the Tenth Circuit and other appellate courts have long recognized the ability, in both civil and criminal cases, to notice and correct a “plain error” not presented to the court below.⁵²

Today, plain-error jurisprudence is both rules-based and judge-made. In criminal cases, it’s governed by Federal Rule of Criminal Procedure 52(b), which provides that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”⁵³ Although there is no comparable provision in the rules governing civil cases (except with respect to erroneous jury instructions⁵⁴ and rulings on evidence,⁵⁵ both discussed below), the appellate courts “have recognized the possibility of plain error in other circumstances,”⁵⁶ and most courts apply the same plain-error test in both criminal and civil appeals.⁵⁷

Despite this seeming congruence, the caselaw suggests that plain error has less stringent application in criminal cases. The Supreme Court, for example, has noted that an appellate court should correct unpreserved errors “especially in criminal

51. *See, e.g.*, *Kerr v. Watts*, 19 U.S. 550, 561 (1821) (“There can be no doubt that this question passed *sub silentio* in the Court below, but it does not appear from any thing on the record, that the point was waived . . .”).

52. *See Williams v. United States*, 158 F. 30, 36 (8th Cir. 1907); *Nat’l Bank of Commerce v. First Nat’l Bank*, 61 F. 809, 811–12 (8th Cir. 1894). Decisions of the Eighth Circuit made prior to its division into the Eighth and Tenth Circuits in 1929 may be binding in the Tenth Circuit. *See Boynton v. Moffat Tunnel Improvement Dist.*, 57 F.2d 772, 781 (10th Cir. 1932); *but see Estate of McMorris v. Comm’r*, 243 F.3d 1254, 1258 (10th Cir. 2001) (“[W]e have never held that the decisions of our predecessor circuit are controlling in this court.”).

53. FED. R. CRIM. P. 52(b) (Westlaw 2015).

54. FED. R. CIV. P. 51(d)(2) (Westlaw 2015).

55. FED. R. EVID. 103(e) (Westlaw 2015).

56. *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 769 (10th Cir. 2004).

57. *E.g., id.* (noting that “[t]here is no ‘plain error’ provision in the rules governing civil matters except with respect to erroneous instructions . . . and rulings on evidence,” but acknowledging that “[i]n reviewing for plain error [in civil cases], we have used the standard applied in criminal proceedings”); *see also infra* notes 61–62.

cases.”⁵⁸ The Tenth Circuit regularly states that “[t]he plain error exception *in civil cases* . . . is an extraordinary, nearly insurmountable burden”⁵⁹—language that does not appear in criminal cases, though the burden in criminal cases is often described as “heavy” or “rigorous.”⁶⁰ Several federal circuits expressly recognize a criminal-civil distinction in applying plain error.⁶¹ Others have gestured in this direction.⁶²

III. PRESERVATION RULES IN UNIQUE CONTEXTS

The principles of waiver, forfeiture, and plain error constitute the general rules of preservation, but there are some legal contexts in which these rules either don’t apply or have unique application.

58. *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (referring to cases in which “the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings”).

59. *See, e.g., Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 802 (10th Cir. 2001) (emphasis added); *see also Richison*, 634 F.3d at 1130 (“In civil cases [plain error] often proves to be an ‘extraordinary, nearly insurmountable burden[.]’” (quoting *Employers Reinsurance*, 358 F.3d at 770)).

60. *See United States v. Archuleta*, 737 F.3d 1287, 1296 (10th Cir. 2013); *MacKay*, 715 F.3d at 831 n.17.

61. *See Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 15 (1st Cir. 1999) (“*Olano* was a criminal case but in this circuit, the same requirements are commonly imposed in civil cases, and even more stringently.”); *C.B. v. City of Sonora*, 769 F.3d 1005, 1016 (9th Cir. 2014) (“[T]he plain error standard of review in the civil context is similar to, but stricter than, the plain error standard of review applied in criminal cases.”); *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) (“[A]lthough . . . we may notice plain error in civil cases, we have also reasoned that its scope is significantly narrower in that context.” (citation omitted)).

62. *See Williams*, 399 F.3d at 455 (“[T]he ability of appellate courts to correct unpreserved error might be greater in criminal cases”); *Watson v. O’Neill*, 365 F.3d 609, 615 (8th Cir. 2004) (“The plain-error exception ‘must be confined to the most compelling cases, especially in civil, as opposed to criminal, litigation.’” (quoting *Johnson v. Ashby*, 808 F.2d 676, 679 n.3 (8th Cir. 1987))); *Ocean Atl. Dev. Corp. v. Aurora Christian Sch., Inc.*, 322 F.3d 983, 1005 (7th Cir. 2003) (“Although forfeited arguments typically remain subject to review for plain error in criminal cases, the plain error doctrine will rarely permit this court to reach forfeited arguments in civil litigation.”); *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995) (“If anything, the plain error power in the civil context—which is judicially rather than statutorily created—should be used even more sparingly.”).

A. Subject Matter Jurisdiction and Sovereign Immunity

Subject matter jurisdiction is a limitation on the adjudicatory power of the federal courts and “an inseparable element of the constitutional system of checks and balances.”⁶³ It cannot be conferred by the parties’ consent and so is not subject to principles of waiver and forfeiture. A party may challenge subject matter jurisdiction at any point in the proceedings—for the first time on appeal, or even for the first time in the Supreme Court.⁶⁴ Indeed, federal courts are required to raise the issue *sua sponte* whenever subject matter jurisdiction “does not affirmatively appear in the record.”⁶⁵

The rule for sovereign immunity is similar: Sovereign immunity may be raised for the first time on appeal.⁶⁶ But unlike subject matter jurisdiction, sovereign immunity is waivable, and the court may, but need not, consider the issue *sua sponte*.⁶⁷

Because jurisdictional issues are not subject to the principles of waiver and forfeiture, appellants often seek to characterize newly raised arguments—particularly arguments based on statutory language—as jurisdictional in nature. The Supreme Court “has endeavored in recent years to bring some discipline to the use of the term ‘jurisdictional.’”⁶⁸ It has adopted what it calls a “readily administrable bright line”: Has Congress “clearly stated that the rule is jurisdictional”?⁶⁹ If not, the restriction is non-jurisdictional and is subject to the rules of waiver and forfeiture.⁷⁰

The Tenth Circuit “has always maintained a distinction between its obligation to consider arguments which might undermine its subject matter jurisdiction and arguments which

63. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986) (quoting *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)).

64. *See Kontrick v. Ryan*, 540 U.S. 443, 456 (2004).

65. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702 (1982).

66. *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 942 (10th Cir. 2008).

67. *Id.*

68. *Gonzalez v. Thaler*, ___ U.S. ___, 132 S. Ct. 641, 648 (2012) (quoting *Henderson v. Shinseki*, ___ U.S. ___, 131 S. Ct. 1197, 1202–03 (2011)) (internal quotation marks omitted).

69. *See Sebelius v. Auburn Reg’l Med. Ctr.*, ___ U.S. ___, 133 S. Ct. 817, 824 (2013).

70. *Id.*

might support it.”⁷¹ New appellate arguments in support of jurisdiction or opposing sovereign immunity are treated differently than new arguments contesting jurisdiction or asserting sovereign immunity. The former are subject to plain-error review; the latter are not.⁷²

B. Objections to Evidence

Federal Rule of Evidence 103(a) requires a party to timely object or make an offer of proof when the district court erroneously admits or excludes evidence.⁷³ Claims of evidentiary error, if properly preserved, are reviewed for abuse of discretion.⁷⁴ If a party does not timely object to the admission or exclusion of evidence, Rule 103(e) states that “[a] court may take notice of a plain error affecting a substantial right.”⁷⁵ This is the familiar plain-error standard.⁷⁶

Often, a party will tee up an evidentiary issue through a pretrial motion in limine. If the court rules on the motion, is it necessary for a party to renew an objection or offer of proof at trial? Rule 103(b) seems to say no: “Once the [district] court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”⁷⁷ Yet the Tenth Circuit has added its own gloss to this requirement. It applies a three-part test, called the contemporaneous-objection rule, to determine whether a party must object at the time of trial (when the evidence is actually admitted or excluded) in order to preserve objections made in an earlier motion in limine.⁷⁸ A party need not

71. *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1152 (10th Cir. 2012) (citing *Daigle*).

72. *See id.*; *Daigle*, 972 F.2d at 1539 (“[O]ur responsibility to ensure even sua sponte that we have subject matter jurisdiction before considering a case differs from our discretion to eschew untimely raised legal theories which may support that jurisdiction. . . . We have no duty under the general waiver rule to consider the latter.” (citation omitted)).

73. FED. R. EVID. 103(a) (Westlaw 2015).

74. *Nat’l Envtl. Serv. Co. v. Ronan Eng’g Co.*, 256 F.3d 995, 1001 (10th Cir. 2001).

75. FED. R. EVID. 103(e) (Westlaw 2015).

76. *See Prager v. Campbell Cnty. Memorial Hosp.*, 731 F.3d 1046, 1054 (10th Cir. 2013).

77. FED. R. EVID. 103(a), (b) (Westlaw 2015).

78. *National Environmental*, 256 F.3d at 1001.

contemporaneously object if “(1) the matter was adequately presented to the district court; (2) the issue was of a type that can be finally decided prior to trial; and (3) the court’s ruling was definitive.”⁷⁹

1. Adequately Presented

The “key inquiry” under the first prong of the test is “whether trial counsel substantially satisfied the requirement of putting the court on notice as to his concern.”⁸⁰ It’s best to commit the issue to writing through, for example, a motion in limine⁸¹ or a trial brief.⁸² If objection must be made orally, the court is a bit more generous, recognizing that “in the heat of a trial, counsel might not explain the evidentiary basis of his argument as thoroughly as might ideally be desired.”⁸³

2. Amenable to Final Pretrial Determination

To excuse a party from having to contemporaneously object, the evidentiary issue must be “of a type that could be decided prior to trial.”⁸⁴ Not every issue will meet this standard, as

some evidentiary issues are akin to questions of law, and the decision to admit such evidence is not dependent upon the character of the other evidence admitted at trial. . . . On the other hand, some admission decisions are fact-bound

79. *Id.* (quoting *Pandit v. Am. Honda Motor Co.*, 82 F.3d 376, 380 (10th Cir. 1996)) (internal quotation marks omitted). To implement the contemporaneous objection rule, the Tenth Circuit’s local rules require principal briefs to “cite the precise reference in the record where a required objection was made and ruled on.” 10TH CIR. R. 28.2(C)(3) (2016).

80. *Prager*, 731 F.3d at 1054 (citation omitted).

81. See *National Environmental*, 256 F.3d at 1001 (“Here, the issues were adequately presented to the district court in NESCO’s initial motion in limine . . .”).

82. *Pandit v. Am. Honda Motor Co.*, 82 F.3d 376, 380 (10th Cir.1996) (noting that counsel “argued the question” in trial briefs).

83. *Prager*, 731 F.3d at 1054 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988)) (internal quotation marks omitted).

84. *National Environmental*, 256 F.3d at 1001.

determinations dependent upon the character of the evidence introduced at trial.⁸⁵

Examples of evidentiary issues not amenable to final pretrial determination are relevance of a given piece of evidence and whether relevant evidence is unduly prejudicial. To properly preserve these issues for appeal, a party must interpose a contemporaneous objection.⁸⁶

3. *Definitive*

Finally, the district court's ruling must be "definitive." Sometimes, a district court will make a "conditional" ruling on a motion in limine. For example, a party might move pretrial to exclude certain evidence as irrelevant. Since relevance is often hard to assess in the abstract, a district court may "conditionally deny" the motion and reserve a final ruling for trial. In this situation, the party must raise a contemporaneous objection when the evidence is actually introduced at trial. Failure to do so means forfeiture and plain-error review.⁸⁷

C. Jury Instructions

Objections to jury instructions in civil cases are governed by Federal Rule of Civil Procedure 51, which requires objections to be timely raised in the district court.⁸⁸ Under the Tenth Circuit's jurisprudence, "the objection must proffer the same grounds raised on appeal with sufficient clarity to render the grounds obvious, plain, or unmistakable."⁸⁹ If an objection is not properly preserved, Rule 51(d)(2) provides that "[a] court

85. *United States v. Mejia-Alarcon*, 995 F.2d 982, 987 (10th Cir. 1993) (citations omitted).

86. *See id.* at 985 n.1, 987 n.3; *United States v. McGlothlin*, 705 F.3d 1254, 1260 n.9 (10th Cir. 2013).

87. *See McGlothlin*, 705 F.3d at 1260 & n.9.

88. *See* FED. R. CIV. P. 51(c)(2) (Westlaw 2015).

89. *Therrien*, 617 F.3d at 1252 (quoting *Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1179 (10th Cir. 2005)) (internal quotation marks omitted). To implement this requirement, the Tenth Circuit's local rules require principal briefs to "cite the precise reference in the record where a required objection was made and ruled on." This is the same rule applicable to evidentiary objections. 10TH CIR. R. 28.2(C)(3).

may consider a plain error in the instructions . . . if the error affects substantial rights.”⁹⁰

In criminal cases, objections to jury instructions must also be “timely and specific.”⁹¹ Failure to preserve an objection results in review for plain error under Federal Rule of Criminal Procedure 52(b).⁹² Whether civil Rule 51(d)(2) or criminal Rule 52(b) applies, the four-prong plain-error test is the same.⁹³

D. Preservation in Criminal Cases

Federal Rule of Criminal Procedure 52(b), which governs unpreserved errors in criminal cases, provides that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”⁹⁴ The Supreme Court’s 1993 decision in *United States v. Olano*⁹⁵ remains the principal precedent construing this rule. Under *Olano*, all forfeited errors in a criminal proceeding are subject to Rule 52(b), regardless of how serious the alleged error may be.⁹⁶

Although the Tenth Circuit has never so held, the Second Circuit has persuasively reasoned that plain-error review under Rule 52 should have less stringent application to sentencing errors than to errors occurring in the conduct of a jury trial.⁹⁷ The reason is the difference in judicial and social costs. “A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and

90. FED. R. CIV. P. 51(d)(2) (Westlaw 2015).

91. *Bader*, 678 F.3d at 867.

92. *Kieffer*, 681 F.3d at 1157.

93. *See id.*

94. FED. R. CRIM. P. 52(b) (Westlaw 2015).

95. 507 U.S. 725 (1993).

96. *See id.* at 731 (noting that “‘a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal . . . cases by the failure to make timely assertion of the right’” (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944))); *United States v. Reyna*, 358 F.3d 344, 350 (5th Cir. 2004) (en banc) (pointing out that “the [Supreme] Court [in *Olano*] suggested that all forfeited errors in a criminal proceeding are subject to Rule 52(b) analysis” regardless of “the seriousness of the claimed error”); *see also United States v. Luepke*, 495 F.3d 443, 447 (7th Cir. 2007) (“[T]he seriousness of claimed errors does not operate to remove them from Rule 52(b).”).

97. *See United States v. Williams*, 399 F.3d at 456–58; *see also Gonzalez-Huerta*, 403 F.3d at 755 (Briscoe, J., concurring) (citing *Williams*).

court personnel.”⁹⁸ A second trial is much more costly in terms of “time, resources, and disruption in the lives of participants,” and so, to remedy unpreserved error, a court should order a second trial only “sparingly.”⁹⁹

When the issue on appeal concerns a criminal defendant’s waiver of a right rather than forfeiture of an error, Rule 52 does not apply, and special considerations come into play. Most of a criminal defendant’s rights are waivable, but some, like jury unanimity, are not.¹⁰⁰ Courts must also consider whether the waiver requires personal participation by the defendant, whether certain procedures are required for waiver, and whether the defendant’s choice must be particularly informed or voluntary.¹⁰¹

E. Waiving the Waiver, Forfeiting the Forfeiture

Waiver and forfeiture are substantive arguments that must be asserted on appeal if a party wants the court to consider them. An appellee’s failure to interpose a forfeiture defense when it clearly applies is itself a forfeiture, and the Tenth Circuit is more likely in that instance to “overlook” a preservation problem and reach the merits of an issue.¹⁰² This is known as “forfeiting the forfeiture,”¹⁰³ though the court sometimes (incorrectly) calls it “waiving the waiver.”¹⁰⁴

If true waiver has occurred, the Tenth Circuit has admonished that “a party that has waived a right is not entitled to appellate relief.”¹⁰⁵ Nonetheless, the court will reach the merits of a waived argument in criminal cases when the

98. *Williams*, 399 F.3d at 456.

99. *Id.*

100. *Teague*, 443 F.3d at 1316–17.

101. *See Olano*, 507 U.S. at 733; *Teague*, 443 F.3d at 1317.

102. *See United States v. McGehee*, 672 F.3d 860, 873 n.5 (10th Cir. 2012); *see also Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1139 (10th Cir. 2010); *Niemi v. Lasshofer*, 728 F.3d 1252, 126–62 (10th Cir. 2013) (refusing to entertain forfeiture argument where appellee failed to assert forfeiture in its answer brief and raised it for the first time in a Rule 28(j) letter following oral argument).

103. *See Cook*, 618 F.3d at 1139 (“Plaintiffs have themselves forfeited any forfeiture argument they may have on this issue, and this court will consider the merits of Defendants’ argument.”); *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013).

104. *See, e.g., United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006).

105. *Teague*, 443 F.3d at 1314 (emphasis omitted).

government fails to invoke the waiver on appeal.¹⁰⁶ Whether the court would follow a similar path in civil cases is not clear. We have uncovered no civil case in the Tenth Circuit in which an appellee's failure to invoke waiver on appeal led the court to take up an argument that the appellant had waived in the district court.¹⁰⁷

IV. APPELLATE BRIEFING AND ORAL ARGUMENT

Appellate briefs and oral argument are the primary vehicles for presenting arguments to the federal courts of appeals, and they come with their own set of preservation rules.

A. Briefs and Oral Argument

1. Opening Brief

The appellant's opening brief to the court of appeals is all-important. It is "the most highly structured of all the briefs,"¹⁰⁸ and it must contain, among other things, "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."¹⁰⁹ An argument or issue not raised in an opening brief is "deemed waived,"¹¹⁰ and the court "will not address it on the merits."¹¹¹

106. See *United States v. Contreras-Ramos*, 457 F.3d 1144, 1145 (10th Cir. 2006) ("[T]he waiver is waived when the government utterly neglects to invoke the waiver in this court." (quoting *United States v. Calderon*, 428 F.3d 928, 930-31 (10th Cir. 2005) (internal quotation marks omitted)); *United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996).

107. But the Tenth Circuit seems at least to have recognized the possibility. See, e.g., *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 837 (10th Cir. 2014) ("Sometimes it may even be improper not to consider an issue waived by the parties."); *Richison*, 634 F.3d at 1127 ("If the theory was intentionally relinquished or abandoned in the district court, we *usually* deem it waived and refuse to consider it.") (emphasis added).

108. 16AA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3974.1, 230 (4th ed. 2008).

109. *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (quoting *FED. R. APP. P.* 28(a)(9)(a)) (internal quotation marks omitted).

110. *Murphy v. Sloan*, 764 F.3d 1144, 1152 n.9 (9th Cir. 2014) (noting that the issue was raised neither in the opening brief on appeal nor in the trial court); *Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007).

111. *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1490 (10th Cir. 1995). Technically, of course, the omission of arguments in an opening brief is a forfeiture, not a waiver. See

The same is true if an argument is “inadequately presented” in an opening brief.¹¹² “[W]e expect attorneys appearing before this court to state the issues on appeal expressly and clearly, with theories adequately identified and supported with proper argument,” the Tenth Circuit has said.¹¹³ Thus, “[s]cattered statements,”¹¹⁴ “bald assertions,”¹¹⁵ and issues briefed “in a perfunctory manner,” without citations to authority or the record and without developed argumentation,¹¹⁶ are not enough to preserve an issue for appeal. As the Sixth Circuit has put it, “[i]t is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.”¹¹⁷

2. Reply Brief

Generally, the court will not consider an argument raised for the first time in a reply brief.¹¹⁸ This would be unfair to both the appellee, who has no opportunity for a written response, and the court itself, which would “run the risk of an improvident or ill-advised opinion, given [its] dependence . . . on the adversarial process for sharpening the issues for decision.”¹¹⁹ Nonetheless, the Tenth Circuit “make[s] an exception when the new issue argued in the reply brief is offered in response to an argument raised in the appellee’s brief,”¹²⁰ especially if the appellee has posited an alternative ground for affirmance.¹²¹ And, of course,

Bronson, 500 F.3d at 1104. But it’s a forfeiture that, like waiver, results in the court’s refusal to consider the issue; hence the term “deemed waiver.”

112. *Bronson*, 500 F.3d at 1104.

113. *Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011).

114. *Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1133 n.4 (10th Cir. 2004).

115. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

116. *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 915 (10th Cir. 2012).

117. *Hayward*, 759 F.3d at 618 n.9 (alteration in original) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997)) (internal quotation marks omitted).

118. *See United States v. Bass*, 661 F.3d 1299, 1301 n.1 (10th Cir. 2011). Such arguments are also “deemed waived.” *Byrd v. Workman*, 645 F.3d 1159, 1166 n.8 (10th Cir. 2011) (quoting *United States v. Harrell*, 642 F.3d 907, 918 (10th Cir. 2011)) (internal quotation marks omitted).

119. *Hill v. Kemp*, 478 F.3d 1236, 1251 (10th Cir. 2007) (quoting *Headrick v. Rockwell Int’l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994) (White, J.)) (internal quotation marks omitted).

120. *Beaudry v. Corrs. Corp. of Am.*, 331 F.3d 1164, 1166 n.3 (10th Cir. 2003).

121. *United States v. Brown*, 348 F.3d 1200, 1213 (10th Cir. 2003).

if the argument pertains to (a lack of) subject-matter jurisdiction, the court is obliged to consider it.¹²²

It bears re-emphasis that, like most preservation rules, the rule against new arguments in reply is discretionary. Whether the court will consider such an argument depends on the complexity of the question,¹²³ the adequacy of the factual record, whether the parties addressed the issue in the district court,¹²⁴ and (perhaps) a need to avoid manifest injustice.¹²⁵

3. *Oral Argument*

Oral argument is an important part of the appellate process. “It contributes to judicial accountability, it guards against undue reliance upon staff work, and it promotes understanding in ways that cannot be matched by written communication.”¹²⁶ It also “assures the litigant that his case has been given consideration by those charged with deciding it.”¹²⁷ But oral argument is no place to “supplement” the record or the briefs.¹²⁸ Indeed, Tenth Circuit “precedent holds that issues may not be raised for the first time at oral argument.”¹²⁹

122. *See* *Sadeghi v. INS*, 40 F.3d 1139, 1143 (10th Cir. 1994) (indicating that the court “generally” will not “consider issues raised for the first time in a reply brief . . . except when those issues relate to jurisdictional requirements”).

123. *United States v. Jenkins*, 904 F.2d 549, 554 n.3 (10th Cir. 1990).

124. *See* *Coit v. Zavaras*, 280 F. App’x 791, 793 (10th Cir. 2008) (indicating that both parties addressed the issue in the district court).

125. *See* *Hooks v. Workman*, 689 F.3d 1148, 1173 n.12 (10th Cir. 2012) (exercising discretion to consider and reject new argument raised in reply brief filed in capital case, and noting that new argument would warrant court’s reaching a different result).

126. WRIGHT ET AL., *supra* note 108, at § 3980 (quoting Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 254–255 (1975)) (internal quotation marks omitted).

127. *Id.*

128. *See* *Nero v. Rice*, 986 F.2d 1428, at *2 (10th Cir. 1993) (unpublished table decision).

129. *United States v. Abdenbi*, 361 F.3d 1282, 1289 (10th Cir. 2004).

B. The Rule of Richison: Appellant's Affirmative Duty to Raise Plain Error

Richison v. Ernest Group, Inc.,¹³⁰ addressed an appellant who raised a new argument on appeal but failed to explain how it satisfied plain-error review. Refusing to consider the argument, the court held that “the failure to argue for plain error and its application on appeal . . . marks the end of the road for an argument for reversal not first presented to the district court.”¹³¹ Under *Richison*, the appellant has an affirmative duty to explain how a newly raised argument satisfies each prong of the plain-error test. The court will not, on its own, craft a plain-error argument for the appellant.¹³²

After *Richison*, it is not clear how an appellant fulfills her duty to raise plain error. Must she argue for plain-error review in her opening brief? Or is it sufficient to make the argument in a reply brief, or even at oral argument? So far, the Tenth Circuit has punted on these questions.¹³³

In our view, the appellant should *not* be required to articulate a plain-error argument in her opening brief. She should be permitted to raise it in a reply brief, and then only if it's necessary. Recall that forfeiture is akin to an affirmative defense, and if an appellee doesn't raise the forfeiture, the court is free to proceed to the merits of the issue.¹³⁴ A rule requiring the appellant to argue for plain error in her opening brief would put the cart before the horse, requiring the appellant to raise her own forfeiture at the outset. Plus, there are many reasons why the appellee may want to forego a forfeiture argument on appeal. Perhaps the appellee also wants the court to rule on the merits of the issue. Perhaps it's not clear whether a forfeiture occurred, and the appellee prefers not to sidetrack the court into a tedious review of the record and arguments below. In any event, forfeiture is the appellee's prerogative to raise. If the appellee

130. 634 F.3d 1123 (10th Cir. 2011).

131. *Id.* at 1131.

132. *See id.*; *MacKay*, 715 F.3d at 813 n.17 (“[A]n appellant carries the heavy burden of satisfying plain error. And if an appellant fails to satisfy that burden, we do not develop a plain error argument for the appellant.” (citation omitted)).

133. *MacKay*, 715 F.3d at 831, 831 n.17.

134. *See Cook*, 618 F.3d at 1138–39.

fails to raise forfeiture in her answer brief, the appellant need not address it. If, on the other hand, the appellee does raise it, the appellant should be permitted in her reply brief to address the forfeiture and articulate a plain-error argument.¹³⁵

Whether an appellant may invoke plain error for the first time at oral argument is not clear. The Tenth Circuit has, on at least one occasion, addressed a plain-error argument raised for the first time at oral argument, though it ultimately found no plain error.¹³⁶

III. CONCLUDING THOUGHTS

We began this article by noting the limited power of Article III courts to decide the issues the parties present for their review. The Tenth Circuit frequently reiterates that it depends heavily on the adversarial process to fully air the parties' positions, sharpen the issues for review, and avoid ill-informed decisions.¹³⁷ As the court recently put it, “[i]n our adversarial system we don’t usually go looking for trouble but rely instead on the parties to identify the issues we must decide.”¹³⁸

Still, judicial decisionmaking isn’t like baseball arbitration—it’s not a binary either-or exercise.¹³⁹ A federal court of appeals isn’t limited to sifting the parties’ positions and selecting the position it likes best, nor is it bound by the parties’ framing of a particular issue. “[W]hen an issue or claim is properly before the court, the court is not limited to the

135. See *McKay*, 715 F.3d at 831 n.17 (“[W]e do not discount the possibility that we may consider a plain error argument made for the first time in an appellant’s reply brief.”); *Beaudry*, 331 F.3d at 1166 n.3 (recognizing that new issue may be raised in reply brief if it is “offered in response to an argument raised in the appellee’s brief”); cf. *Somerlott.*, 686 F.3d at 1151 (providing appellant opportunity to present plain-error argument in supplemental briefing, but concluding that she failed to do so).

136. *Ecclesiastes 9:10-11-12*, 497 F.3d at 1142–43.

137. See *Hill*, 478 F.3d at 1251.

138. *Niemi*, 728 F.3d at 1259.

139. Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQ. SPORTS L. REV. 109, 110 (2009) (explaining “baseball arbitration” by noting that “[t]his type of dispute resolution forces an arbitrator, or panel of arbitrators, to pick either one party’s offer or the other’s”); see also *Pa. Env’tl. Def. Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228, 233 n.1 (3d Cir. 1998) (“What may be appropriate for baseball salary arbitration is not necessarily appropriate for the law courts.”).

particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”¹⁴⁰ So, for example, even if the parties agree that a contract is unambiguous (but differ on its meaning), the court is free to decide otherwise.¹⁴¹ Or, where one party says a statute, contract, or case means “A” and the other says it means “B,” the court may decide that it means “C.”¹⁴² The court is more likely to address an issue not identified or briefed by parties if the issue is “antecedent to and ultimately dispositive of the dispute.”¹⁴³

The court’s inherent power to consider unraised issues only underscores the discretionary nature of appellate preservation rules. The rules are not mechanistic formulas. Rather, they “confer[] a discretion that may be exercised at any time, no matter what may have been done at some other time.”¹⁴⁴ The facts of individual cases matter.¹⁴⁵ Even stare decisis does not fully control a court’s power to consider unpreserved arguments on appeal.¹⁴⁶

Because preservation rules live in the realm of judicial discretion, counsel do well to remember the reasons behind the rules. As we have seen, the rules vindicate structural values, like respect for the division of labor between trial and appellate

140. *Moser*, 747 F.3d at 837 (alteration in original) (quoting *U.S. Nat’l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993)) (internal quotation marks omitted).

141. *See id.*

142. *See Carolina Cas. Ins. Co. v. Nanodetex Corp.*, 733 F.3d 1018, 1024 (10th Cir. 2013) (indicating that the court disagreed with both parties); *Fricke v. Sec’y of Navy*, 509 F.3d 1287, 1289 (10th Cir. 2007) (indicating that “both parties’ arguments are based on an incorrect reading of our case”); *see also In re Beineke*, 690 F.3d 1344, 1347 (Fed. Cir. 2012) (“[T]he parties offer quite different interpretations of the statute. . . . [W]e conclude that neither party is entirely correct.”).

143. *Moser*, 747 F.3d at 837 (quoting *U.S. Nat’l Bank*, 508 U.S. at 447) (internal quotation marks omitted).

144. *Weems v. United States*, 217 U.S. 349, 362 (1910); *Abernathy*, 713 F.3d at 552 (“[T]he decision regarding what issues are appropriate to entertain on appeal in instances of lack of preservation is discretionary.”).

145. *Singleton*, 428 U.S. at 121 (recognizing that whether to take up an issue not raised at trial is a matter of discretion “to be exercised on the facts of individual cases”).

146. *Weems*, 217 U.S. at 362 (“[T]he [plain-error] rule is not altogether controlled by precedent.”); *United States v. Vanover*, 630 F.3d 1108, 1123 n.10 (8th Cir. 2011) (Riley, J., concurring) (“[T]hat stare decisis applies in the plain-error context seems doubtful in light of *Weems*.”). Still, the Tenth Circuit will consider how it has resolved similar cases in the past. *See United States v. Hill*, 749 F.3d 1250, 1266–67 (10th Cir. 2014).

courts, and prudential values, like allowing the court to avoid difficult or unresolved questions of law. Of course, considerations of fairness are paramount. On the one hand, preservation rules help avoid prejudice and unfair surprise to the parties. On the other hand, appellate courts must retain the power to correct plain errors that implicate a fundamental miscarriage of justice, even if the error was not noticed below.

Every case involving forfeiture, waiver, or some other aspect of preservation is an attempt to strike a sensible balance among these competing considerations. Although the legal formulas (like the four-part plain-error test) matter, perhaps more important is the court's own sense of how these various considerations align with the facts and posture of a particular case. Prudent counsel, in her briefing and oral argument, will assist the court in striking the right judicial balance.

