

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10171

GWENDOLYN CARSWELL, *individually and as dependent administrator of and on behalf of* THE ESTATE OF GARY VALDEZ LYNCH III AND GARY VALDEZ LYNCH III'S
HEIRS AT LAW,

Plaintiff-Appellee,

v.

GEORGE A. CAMP; JANA R. CAMPBELL; HELEN M. LANDERS; KENNETH R. MARRIOTT;
KOLBEE A. PERDUE; TERI J. ROBINSON; VI N. WELLS; SCOTTY D. YORK,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

No. 3:20-CV-2935

Filed: November 30, 2022

Before BARKSDALE, ENGELHARDT, and OLDHAM, *Circuit Judges.*

ANDREW S. OLDHAM, *Circuit Judge:*

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED. On our own motion, we withdraw our prior opinion, 37 F.4th 1062, and issue the following in its place.

* * *

The question presented is whether a district court can deny a motion to dismiss based on qualified immunity through a boilerplate scheduling order. We hold no.

I.

Gary Lynch was arrested on an outstanding warrant and booked into the Hunt County, Texas jail on February 12, 2019. Seven days later, because of a gas leak, the jail staff evacuated all prisoners from the facility and temporarily housed them elsewhere. Jail staff held Lynch in the Tarrant County jail while repairs occurred and returned him to the Hunt County facility on the evening of February 22. The next morning, Lynch was discovered dead in his cell. Following an autopsy, a doctor concluded Lynch died from aortic valve endocarditis with myocardial abscess.

Plaintiff-Appellee Gwendolyn Carswell is Lynch's mother. She sued Hunt County and numerous county employees under 42 U.S.C. § 1983 and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). She alleged the individual defendants knew Lynch was suffering from a heart condition but failed to treat him. The individual defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting qualified immunity. On January 25, 2021, the district court denied that motion and entered its "standard QI scheduling order." That order is the subject of this appeal. It provided, in relevant part:

Any pending motions to dismiss on the basis of qualified immunity are denied without prejudice. See *Shultea v. Wood*, 47 F.3d 1427, 1431–34 (5th Cir. 1995) (en banc) (qualified immunity must be raised by filing answer). Any defendant desiring to assert qualified immunity who has not already done so by way of answer must file an answer asserting qualified immunity within 14 days of the date of this Order. Except as set forth below, all party discovery is stayed as to any defendant who asserts qualified immunity. Discovery is not stayed as to a defendant

asserting qualified immunity as to that person's capacity as a witness to the extent that there is any other defendant not asserting qualified immunity.

The individual defendants complied with the order and filed answers and affirmative defenses. But they also noticed an immediate appeal of the scheduling order. Carswell moved to dismiss the appeal for lack of jurisdiction, arguing the scheduling order was not an appealable collateral order because the district court had not ruled on qualified immunity. We carried that motion with the case.

In the meantime, back in district court, the individual defendants moved to stay all discovery and all proceedings. They argued that “[a]ll discovery in this matter should be stayed against all Defendants, including Hunt County, and all proceedings in this case should be stayed, pending resolution of the Individual Defendants’ assertions of qualified immunity.”

The district court denied defendants’ motion. In its October 8 order, the court “address[ed] the motion at greater length than it customarily would devote to what is essentially a motion to stay.” In so doing, it explained how (in its view) the January 25 scheduling order “attempts to follow the choreography of the Fifth Circuit’s QI dance.” Specifically:

[The scheduling order] requires any defendant wanting to assert QI to do so by answer, rather than by motion to dismiss; . . . it requires the plaintiff to file a rule 7 reply to any assertion of qualified immunity. If defendants believe QI can be resolved based on the pleadings, there is a deadline for filing a motion for summary judgment on that basis; if the plaintiff believes discovery is necessary to resolve the QI defense, he or she may raise that issue by way of a Rule 56(d) motion for discovery in response to the defendant’s motion for summary judgment. Significantly, unless the Court allows narrowly tailored discovery on QI, party discovery as to the QI defendants is stayed.

On October 13, in district court, Carswell filed an “advisory to the court concerning depositions” indicating that, on the *Monell* claim, she wished to depose all eight of the individual defendants asserting qualified immunity. She reminded the court that she had previously served all eight with deposition notices. She explained she wished “to notice these depositions again and proceed consistent with the Court’s October 8, 2021, Order.” Appellants moved in this court to stay discovery pending appeal. We granted the stay and subsequently heard oral argument.

II.

“Jurisdiction is always first.” *Arulnanthy v. Garland*, 17 F.4th 586, 592 (5th Cir. 2021) (quotation omitted). Under the collateral order doctrine, we have jurisdiction to review orders denying qualified immunity. *See Backe v. LeBlanc*, 691 F.3d 645, 647–49 (5th Cir. 2012); *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). Likewise for district court orders “declin[ing] or refus[ing] to rule on a motion to dismiss based on a government officer’s defense of qualified immunity.” *Zapata v. Melson*, 750 F.3d 481, 484 (5th Cir. 2014). Such orders are “tantamount to . . . order[s] denying the defendants qualified immunity.” *Ibid.*

The collateral order doctrine permits immediate appeals of these orders because a defendant’s entitlement to qualified immunity must be determined “at the earliest possible stage of the litigation.” *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (per curiam). That’s because qualified immunity is more than “a mere defense to liability.” *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (quotation omitted). It’s also “an immunity from suit.” *Ibid.* (quotation omitted). And one of the

most important benefits of the qualified immunity defense is “protection from pretrial discovery, which is costly, time-consuming, and intrusive.” *Backe*, 691 F.3d at 648; *see also Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (per curiam) (a “refusal to rule on a claim of immunity” deprives a defendant of his “entitlement under immunity doctrine to be free from suit and the burden of avoidable pretrial matters”).

We have jurisdiction over the scheduling order here because the district court refused to rule on qualified immunity “at the earliest possible stage of the litigation.” *Ramirez*, 3 F.4th at 133. Defendants asserted qualified immunity in their motion to dismiss. That motion was the earliest possible opportunity for the district court to resolve the immunity question. It declined to do so. Instead, it required defendants to assert their qualified immunity defense by way of answer. And it postponed ruling on the immunity issue until summary judgment. That “effectively . . . denied [defendants] the benefits of the qualified immunity defense” and “vest[ed] this court with the requisite jurisdiction to review the discovery order.” *Wicks v. Miss. State Emp. Servs.*, 41 F.3d 991, 994 (5th Cir. 1995).

III.

We review the scheduling order for abuse of discretion. *Backe*, 691 F.3d at 649. We hold the district court abused its discretion by deferring its ruling on qualified immunity and subjecting the immunity-asserting defendants to discovery in the meantime. *See ibid.* Where public officials assert qualified immunity in a motion to dismiss, a district court must rule on the motion. It may not permit discovery against

the immunity-asserting defendants before it rules on their defense. *See id.* at 648 (It is “*precisely* the point of qualified immunity . . . to protect public officials from expensive, intrusive discovery *until and unless* the requisite showing overcoming immunity is made.” (second emphasis added)).

It is true that to ensure qualified immunity can be decided at the earliest possible time, we have authorized “discovery narrowly tailored to rule on [defendants’] immunity claims.” *Backe*, 691 F.3d at 649; *see also Lion Boulos v. Wilson*, 834 F.2d 504, 508–09 (5th Cir. 1987) (first articulating this limited-discovery procedure). We’ve described that limited-discovery process as “a careful procedure,” which permits a district court to “defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.” *Zapata*, 750 F.3d at 485 (quoting *Backe*, 691 F.3d at 648). The district court must first find that the plaintiff has pleaded “facts which, if true, would overcome the defense of qualified immunity.” *Ibid.* (quotation omitted). If it still finds itself “unable to rule on the immunity defense without further clarification of the facts,” *ibid.* (quotation omitted), then we allow the district court to order discovery “narrowly tailored to uncover only those facts needed to rule on the immunity claim,” *Wicks*, 41 F.3d at 994 (quoting *Lion Boulos*, 834 F.2d at 507–08).

Three points about this “careful procedure” bear emphasis. First, its purpose is *only* to allow the district court to rule on the defendant’s assertion of QI; its purpose is *not* to provide a backdoor for plaintiffs to circumvent the defendant’s immunity from suit. *Backe*, 691 F.3d at 649. Second, where the QI-asserting official determines

that any pre-ruling discovery sought or ordered in the district court crosses the line from permissible *Lion Boulous* discovery to impermissible vitiation of the official's immunity from suit, the collateral order doctrine authorizes an immediate appeal like the one we entertain today. *Ramirez*, 3 F.4th at 133. And third, *Lion Boulous* and its progeny must be understood in light of subsequent Supreme Court precedent. The Supreme Court has now made clear that a plaintiff asserting constitutional claims against an officer claiming QI must survive the motion to dismiss without *any* discovery.

On the lattermost point, consider *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There the district court gave the plaintiff discovery before ruling on the officials' motion to dismiss for qualified immunity. *See id.* at 670. The plaintiff tried to defend that discovery on the ground that "the Court of Appeals ha[d] instructed the district court to cabin discovery in such a way as to preserve petitioners' defense of qualified immunity as much as possible in anticipation of a summary judgment motion." *Id.* at 684 (quotation omitted). The Supreme Court had none of it. Instead, it reaffirmed its prior holding "that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Id.* at 684–85 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007)). And the Court made a point of emphasizing that its "rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity." *Id.* at 685. It

concluded the respondent was “not entitled to discovery, cabined or otherwise.” *Id.* at 686.

Thus, *Iqbal* squarely prohibits interpreting our “careful procedure” as allowing tailored discovery before a district court rules on an official’s motion to dismiss. When defendants assert qualified immunity in a motion to dismiss, the district court may not defer ruling on that assertion. It may not permit discovery—“cabined or otherwise”—against immunity-asserting defendants before it has determined plaintiffs have pleaded facts sufficient to overcome the defense. *Ibid.* The rule is that “a defendant’s entitlement to qualified immunity should be determined at the earliest possible stage of the litigation”—full stop. *Ramirez*, 3 F.4th at 133 (citing *Mitchell*, 472 U.S. at 526–27).

None of this means, of course, that the QI determination must be made once-and-for-all at the motion-to-dismiss stage. Today we only hold that where the pleadings are insufficient to overcome QI, the district court *must* grant the motion to dismiss without the benefit of pre-dismissal discovery. Similarly, where the pleadings are sufficient to overcome QI, the district court *must* deny the motion to dismiss without the benefit of pre-dismissal discovery. In the latter scenario, however, our precedent gives the defendant-official at least two choices after his motion to dismiss is denied. First, the defendant can immediately appeal the district court’s denial under the collateral order doctrine. *See Backe*, 691 F.3d at 647–49; *Mitchell*, 472 U.S. at 526–27. Or second—à la *Lion Boulos* and its progeny—the defendant can move the district court for discovery limited to the factual disputes relevant to whether QI

applies, then reassert QI in a summary judgment motion. *Hutcheson v. Dallas Cnty.*, 994 F.3d 477, 481 (5th Cir. 2021) (“Before limited discovery is permitted, a plaintiff seeking to overcome QI must assert facts that, if true, would overcome that defense.”). Why does the defendant alone enjoy this choice? Because only the defendant-official enjoys qualified immunity from suit. *See Iqbal*, 556 U.S. at 685 (“The basic thrust of the qualified-immunity doctrine is to free *officials* from the concerns of litigation, including avoidance of disruptive discovery.” (emphasis added) (quotation omitted)).

IV.

Carswell offers three additional points in defense of the scheduling order. Each is unavailing.

A.

Carswell first argues the district court did not refuse to rule on qualified immunity. The district court, for its part, admitted that it “require[d] any defendant wanting to assert QI to do so by answer, rather than by motion to dismiss.” But Carswell says this was “the opposite of a refusal or failure to rule” because the “district court clearly indicated it would timely address Individual Defendants’ qualified immunity defense.”

All this gives short shrift to the requirement that qualified immunity must be adjudicated at the earliest possible opportunity. *See Ramirez*, 3 F.4th at 133. “Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery.*” *Mitchell*, 472 U.S. at 526 (emphasis added). The

Supreme Court has repeatedly made clear that “the driving force” behind qualified immunity is “a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery,” and it has “stressed the importance of resolving immunity questions at *the earliest possible stage* in litigation.” *Pearson*, 555 U.S. at 231–32 (emphasis added).

The district court declined to rule on qualified immunity at the motion-to-dismiss stage. It deferred answering that question until the summary-judgment stage. That is, *ipso facto*, a refusal to rule at the earliest possible stage in litigation. It does not matter that the court promised to rule promptly once it arrived at the *next* stage of litigation.

B.

Carswell next defends the scheduling order because it stayed discovery *as to qualified immunity*. Specifically, the court stayed “all party discovery . . . as to any defendant who asserts qualified immunity,” but not “as to a defendant asserting qualified immunity as to that person’s capacity as a witness to the extent that there is any other defendant not asserting qualified immunity.” So the district court would have allowed Carswell to proceed with discovery on her *Monell* claim, including by noticing depositions for all eight of the individual defendants asserting qualified immunity.

Iqbal squarely forecloses that, too. Responding to concerns about the burdens litigation imposes on public officials, the Court explained:

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It

is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Iqbal, 556 U.S. at 685–86. In other words, the Court ruled out even “minimally intrusive discovery” against official defendants before a ruling that plaintiff had met his burden to overcome the qualified immunity defense at the pleading stage. *Id.* at 686.

Carswell responds that “*Monell* discovery presents no undue burden to the Individual Defendants because they would be required to participate as witnesses in discovery even if they had not been named as defendants.” Red Br. at 30. We disagree for three reasons.

First, there are significant differences between naming an individual defendant and then deposing him in two capacities (one personal and the other *Monell*/official) and not suing the individual and deposing him only in his *Monell*/official capacity. The former puts the individual’s own money on the line. And the dual-capacity defendant must be particularly careful in a deposition about how his answers can be used against him in not one but two ways. So the stakes differ substantially. Carswell cannot elide these differences by saying the defendant would have to testify either way.

Second, it’s no answer to say the defendant can be deposed twice—once on *Monell* issues (before the district court adjudicates the immunity defense) and once on personal-capacity issues (afterwards). It only exacerbates the burdens of litigation

to make a defendant sit for two depositions instead of one. And it turns qualified immunity on its head by doubling the “heavy costs” of litigation. *Iqbal*, 556 U.S. at 685.

Third, Carswell conceded at oral argument that bifurcation of discovery would radically complicate the case. Carswell suggested that a special master could be appointed to police the *Monell*/official-capacity depositions so that no party could cross the line into personal-capacity questions before the district court adjudicated the immunity defense. But the very fact that Carswell can foresee the need for a special master proves that bifurcated discovery imposes unreasonable burdens on the defendants.

C.

Carswell also argues the scheduling order must pose no problem because it is “obviously a form order” the district court uses frequently in cases like this one. The district court likewise noted that defendants’ motion to stay discovery presented “a frontal attack on [its] standard qualified immunity (‘QI’) scheduling order.” And Carswell points us to similar district court orders permitting *Monell* discovery against individual defendants whose assertions of qualified immunity remained pending in motions to dismiss. *See, e.g., Saenz v. City of El Paso*, No. 14-cv-244, 2015 WL 4590309, at *2 (W.D. Tex. Jan. 26, 2015) (declining to stay discovery despite “acknowledg[ing] the force” of defendant’s arguments based on *Iqbal*).

That the scheduling order here is “standard” in qualified immunity cases tells us nothing about whether it correctly understands the governing law. Today we

clarify the governing law. And we trust that will harmonize our circuit's discovery practices with the Supreme Court's instructions.

V.

Finally, Carswell argues that any error in the district court's scheduling order is harmless because she has clearly stated plausible claims sufficient to defeat the individual defendants' assertion of qualified immunity in their motion to dismiss. But all agree the district court has not yet ruled on that question. We decline to do so in the first instance. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view.”); *see also, e.g., Arnold v. Williams*, 979 F.3d 262, 269 (5th Cir. 2020) (remanding for the district court to consider qualified immunity in the first instance “[b]ecause as a general rule, we do not consider an issue not passed upon below” (quotation omitted)).

* * *

Carswell's motion to dismiss for lack of jurisdiction is DENIED. We VACATE the district court's scheduling order and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10171

GWENDOLYN CARSWELL, *individually and as dependent administrator of and on behalf of* THE ESTATE OF GARY VALDEZ LYNCH III AND GARY VALDEZ LYNCH III'S HEIRS AT LAW,

Plaintiff-Appellee,

v.

GEORGE A. CAMP; JANA R. CAMPBELL; HELEN M. LANDERS; KENNETH R. MARRIOTT; KOLBEE A. PERDUE; TERI J. ROBINSON; VI N. WELLS; SCOTTY D. YORK,

Defendants-Appellants.

Appeal from the United States District Court
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No. 3:20-CV-2935

Filed: June 17, 2022

Before BARKSDALE, ENGELHARDT, and OLDHAM, *Circuit Judges.*

ANDREW S. OLDHAM, *Circuit Judge:*

The question presented is whether a district court can deny a motion to dismiss based on qualified immunity through a boilerplate scheduling order. We hold no.

I.

Gary Lynch was arrested on an outstanding warrant and booked into the Hunt County, Texas jail on February 12, 2019. Seven days later, because of a gas leak, the jail staff evacuated all prisoners from the facility and temporarily housed them elsewhere. Jail staff held Lynch in the Tarrant County jail while repairs occurred and

returned him to the Hunt County facility on the evening of February 22. The next morning, Lynch was discovered dead in his cell. Following an autopsy, a doctor concluded Lynch died from aortic valve endocarditis with myocardial abscess.

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II.

“Jurisdiction is always first.” *Arulnanthy v. Garland*, 17 F.4th 586, 592 (5th Cir. 2021) (quotation omitted). Under the collateral order doctrine, we have jurisdiction to review orders denying qualified immunity. *See Backe v. LeBlanc*, 691 F.3d 645, 647–49 (5th Cir. 2012); *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). Likewise for district court orders “declin[ing] or refus[ing] to rule on a motion to dismiss based on a government officer’s defense of qualified immunity.” *Zapata v. Melson*, 750 F.3d 481, 484 (5th Cir. 2014). Such orders are “tantamount to . . . order[s] denying the defendants qualified immunity.” *Ibid.*

The collateral order doctrine permits immediate appeals of these orders because a defendant’s entitlement to qualified immunity must be determined “at the earliest possible stage of the litigation.” *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (per curiam). That’s because qualified immunity is more than “a mere defense to liability.” *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (quotation omitted). It’s also “an immunity from suit.” *Ibid.* (quotation omitted). And one of the most important benefits of the qualified immunity defense is “protection from pretrial discovery, which is costly, time-consuming, and intrusive.” *Backe*, 691 F.3d at 648; *see also Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (per curiam) (a “refusal to rule on a claim of immunity” deprives a defendant of his “entitlement under immunity doctrine to be free from suit and the burden of avoidable pretrial matters”).

We have jurisdiction over the scheduling order here because the district court refused to rule on qualified immunity “at the earliest possible stage of the litigation.” *Ramirez*, 3 F.4th at 133. Defendants asserted qualified immunity in their motion to dismiss. That motion was the earliest possible opportunity for the district court to resolve the immunity question. It declined to do so. Instead, it required defendants to assert their qualified immunity defense by way of answer. And it postponed ruling on the immunity issue until summary judgment. That “effectively . . . denied [defendants] the benefits of the qualified immunity defense” and “vest[ed] this court with the requisite jurisdiction to review the discovery order.” *Wicks v. Miss. State Emp. Servs.*, 41 F.3d 991, 994 (5th Cir. 1995).

III.

We review the scheduling order for abuse of discretion. *Backe*, 691 F.3d at 649. We hold the district court abused its discretion by deferring its ruling on qualified immunity and subjecting the immunity-asserting defendants to discovery in the meantime. *See ibid.* Where public officials assert qualified immunity in a motion to dismiss, a district court must rule on the immunity question at that stage. It cannot defer that question until summary judgment. Nor can it permit discovery against the immunity-asserting defendants before it rules on their defense. *See id.* at 648 (It is “precisely the point of qualified immunity . . . to protect public officials from expensive, intrusive discovery *until and unless* the requisite showing overcoming immunity is made.” (second emphasis added)).

It's true that, a long time ago, we authorized discovery in violation of these rules. For example, we once authorized a "narrow exception to the general rule that qualified immunity should be decided as early in the litigation as possible." *Randle v. Lockwood*, 666 F. App'x 333, 336 n.6 (5th Cir. 2016) (per curiam); see also *Lion Boulos v. Wilson*, 834 F.2d 504, 508–09 (5th Cir. 1987) (first articulating this exception). We described that "narrow exception" as "a careful procedure," which permitted a district court to "defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense." *Zapata*, 750 F.3d at 485 (quoting *Backe*, 691 F.3d at 648). We required the district court to first find that the plaintiff has pleaded "facts which, if true, would overcome the defense of qualified immunity." *Ibid.* (quotation omitted). If it still found itself "unable to rule on the immunity defense without further clarification of the facts," *ibid.* (quotation omitted), then we allowed the district court to order discovery "narrowly tailored to uncover only those facts needed to rule on the immunity claim," *Wicks*, 41 F.3d at 994 (quoting *Lion Boulos*, 834 F.2d at 507–08).

Call it "careful," or call it "narrow"; either way, today we call *Lion Boulos* and its progeny overruled. The Supreme Court has now made clear that a plaintiff asserting constitutional claims against an officer must survive the motion to dismiss (and the qualified immunity defense) *without any* discovery. Our prior decisions to the contrary are overruled. See *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021) (We must declare circuit precedent overruled where "a former panel's

decision has fallen unequivocally out of step with some intervening change in the law.”).

Consider, for example, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There the district court gave the plaintiff discovery before ruling on the officials’ motion to dismiss for qualified immunity. *See id.* at 670. The plaintiff tried to defend that discovery on the ground that “the Court of Appeals ha[d] instructed the district court to cabin discovery in such a way as to preserve petitioners’ defense of qualified immunity as much as possible in anticipation of a summary judgment motion.” *Id.* at 684 (quotation omitted). The Supreme Court had none of it. Instead, it reaffirmed its prior holding “that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.” *Id.* at 684–85 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007)). And the Court made a point of emphasizing that its “rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity.” *Id.* at 685. It concluded the respondent was “not entitled to discovery, cabined or otherwise.” *Id.* at 686.

Thus, *Iqbal* squarely repudiated our “careful procedure” for allowing tailored discovery before a district court rules on an official’s motion to dismiss. When defendants assert qualified immunity in a motion to dismiss, the district court may not defer ruling on that assertion. It may not permit discovery—“cabined or otherwise”—against immunity-asserting defendants before it has determined

plaintiffs have pleaded facts sufficient to overcome the defense. *Ibid.* The rule is that “a defendant’s entitlement to qualified immunity should be determined at the earliest possible stage of the litigation”—full stop. *Ramirez*, 3 F.4th at 133 (citing *Mitchell*, 472 U.S. at 526–27). Although our court previously carved out a “narrow exception” to this rule, *Randle*, 666 F. App’x at 336 n.6, we now make clear the rule admits of no exceptions.

It does not matter that, after *Twombly* and *Iqbal*, we sometimes recited our “careful procedure” for premature discovery. *See, e.g., Hinojosa v. Livingston*, 807 F.3d 657, 670–74 (5th Cir. 2015) (approving, as “compli[ant] with our precedent,” order deferring ruling on motion to dismiss asserting qualified immunity and permitting “appropriately tailored” discovery); *Zapata*, 750 F.3d at 485 (vacating discovery order because it “did not follow the careful procedure set forth in *Backe*, *Wicks*, *Helton*, and *Lion Boulos*”); *Backe*, 691 F.3d at 649 (similar). None of those cases considered whether and to what extent our “careful procedure” could be squared with *Twombly* and *Iqbal*, and therefore, none of those cases bind us under the rule of orderliness. *See Gahagan v. U.S. Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018) (“An opinion restating a prior panel’s ruling does not *sub silentio* hold that the prior ruling survived an uncited Supreme Court decision.”). Today, we consider that previously unresolved question and hold that *Lion Boulos* and its progeny have been overruled.

IV.

Carswell offers three additional points in defense of the scheduling order. Each is unavailing.

A.

Carswell first argues the district court did not refuse to rule on qualified immunity. The district court, for its part, admitted that it “require[d] any defendant wanting to assert QI to do so by answer, rather than by motion to dismiss.” But Carswell says this was “the opposite of a refusal or failure to rule” because the “district court clearly indicated it would timely address Individual Defendants’ qualified immunity defense.”

All this gives short shrift to the requirement that qualified immunity must be adjudicated at the earliest possible opportunity. *See Ramirez*, 3 F.4th at 133. “Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery*.” *Mitchell*, 472 U.S. at 526 (emphasis added). The Supreme Court has repeatedly made clear that “the driving force” behind qualified immunity is “a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery,” and it has “stressed the importance of resolving immunity questions *at the earliest possible stage* in litigation.” *Pearson*, 555 U.S. at 231–32 (emphasis added).

The district court declined to rule on qualified immunity at the motion-to-dismiss stage. It deferred answering that question until the summary-judgment

stage. That is, *ipso facto*, a refusal to rule at the earliest possible stage in litigation. It does not matter that the court promised to rule promptly once it arrived at the *next* stage of litigation.

B.

Carswell next defends the scheduling order because it stayed discovery *as to qualified immunity*. Specifically, the court stayed “all party discovery . . . as to any defendant who asserts qualified immunity,” but not “as to a defendant asserting qualified immunity as to that person’s capacity as a witness to the extent that there is any other defendant not asserting qualified immunity.” So the district court would have allowed Carswell to proceed with discovery on her *Monell* claim, including by noticing depositions for all eight of the individual defendants asserting qualified immunity.

Iqbal squarely forecloses that, too. Responding to concerns about the burdens litigation imposes on public officials, the Court explained:

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Iqbal, 556 U.S. at 685–86. In other words, the Court ruled out even “minimally intrusive discovery” against official defendants before a ruling that plaintiff had met his burden to overcome the qualified immunity defense at the pleading stage. *Id.* at 686.

Carswell responds that “Monell discovery presents no undue burden to the Individual Defendants because they would be required to participate as witnesses in discovery even if they had not been named as defendants.” Red Br. at 30. We disagree for three reasons.

First, there are significant differences between naming an individual defendant and then deposing him in two capacities (one personal and the other *Monell*/official) and not suing the individual and deposing him only in his *Monell*/official capacity. The former puts the individual’s own money on the line. And the dual-capacity defendant must be particularly careful in a deposition about how his answers can be used against him in not one but two ways. So the stakes differ substantially. Carswell cannot elide these differences by saying the defendant would have to testify either way.

Second, it’s no answer to say the defendant can be deposed twice—once on *Monell* issues (before the district court adjudicates the immunity defense) and once on personal-capacity issues (afterwards). It only exacerbates the burdens of litigation to make a defendant sit for two depositions instead of one. And it turns qualified immunity on its head by doubling the “heavy costs” of litigation. *Iqbal*, 556 U.S. at 685.

Third, Carswell conceded at oral argument that bifurcation of discovery would radically complicate the case. Carswell suggested that a special master could be appointed to police the *Monell*/official-capacity depositions so that no party could cross the line into personal-capacity questions before the district court adjudicated

the immunity defense. But the very fact that Carswell can foresee the need for a special master proves that bifurcated discovery imposes unreasonable burdens on the defendants.

C.

Carswell also argues the scheduling order must pose no problem because it is “obviously a form order” the district court uses frequently in cases like this one. The district court likewise noted that defendants’ motion to stay discovery presented “a frontal attack on [its] standard qualified immunity (‘QI’) scheduling order.” And Carswell points us to similar district court orders permitting *Monell* discovery against individual defendants whose assertions of qualified immunity remained pending in motions to dismiss. *See, e.g., Saenz v. City of El Paso*, No. 14-cv-244, 2015 WL 4590309, at *2 (W.D. Tex. Jan. 26, 2015) (declining to stay discovery despite “acknowledg[ing] the force” of defendant’s arguments based on *Iqbal*).

This merely confirms the dissonance between our pre-*Iqbal* cases and *Iqbal* itself. That the scheduling order here is “standard” in qualified immunity cases tells us nothing about whether it correctly understands the governing law. Today we clarify the governing law. And we trust that will harmonize our circuit’s discovery practices with the Supreme Court’s instructions.

V.

Finally, Carswell argues that any error in the district court’s scheduling order is harmless because she has clearly stated plausible claims sufficient to defeat the individual defendants’ assertion of qualified immunity in their motion to dismiss. But

all agree the district court has not yet ruled on that question. We decline to do so in the first instance. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view.”); *see also, e.g., Arnold v. Williams*, 979 F.3d 262, 269 (5th Cir. 2020) (remanding for the district court to consider qualified immunity in the first instance “[b]ecause as a general rule, we do not consider an issue not passed upon below” (quotation omitted)).

* * *

Carswell’s motion to dismiss for lack of jurisdiction is DENIED. We VACATE the district court’s scheduling order and REMAND for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:20-CV-02935-N

GWENDOLYN CARSWELL,

Plaintiff,

v.

HUNT COUNTY, TEXAS, *et al.*,

Defendants.

Filed: January 25, 2021

SCHEDULING ORDER – QUALIFIED IMMUNITY

Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Local Rules of this Court (“LR”), and the Civil Justice Expense and Delay Reduction Plan (the “Plan”) for the Northern District of Texas, the Court ORDERS as follows:

1. This case is set for trial on March 7, 2022. The setting is for a one week docket. Reset or continuance of the trial setting does not alter the deadlines in this Order unless expressly provided by court order.

2. Any pending motions to dismiss on the basis of qualified immunity are denied without prejudice. See *Shultea v. Wood*, 47 F.3d 1427, 1431-34 (5th Cir. 1995) (en banc) (qualified immunity must be raised by filing answer). Any defendant desiring to assert qualified immunity who has not already done so by way of answer must file an answer asserting qualified immunity within 14 days of the date of this

Order. Except as set forth below, all party discovery is stayed as to any defendant who asserts qualified immunity. Discovery is not stayed as to a defendant asserting qualified immunity as to that person's capacity as a witness to the extent that there is any other defendant not asserting qualified immunity.

3. If plaintiff has not previously done so, plaintiff is ordered to file a Rule 7(a) reply to all assertions of qualified immunity within 28 days of the date of this Order, or 28 days after the filing of an answer asserting qualified immunity pursuant to paragraph 2 of this Order, whichever is later.

4. Within 7 days of the plaintiff's Rule 7(a) reply, the parties shall confer regarding whether discovery is needed for the Court to assess the assertion of qualified immunity. See *Zapata v. Melson*, 750 F.3d 481, 484-85 (5th Cir. 2014) (citing *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012); *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995)). If, after conferring, a defendant asserting qualified immunity believes that discovery is not necessary, that defendant shall file a Rule 56 motion for summary judgment within 21 days of the plaintiff's Rule 7(a) reply. A plaintiff who believes discovery is necessary to respond to such motion for summary judgment shall include a Rule 56(d) motion for discovery in his or her response to the motion for summary judgment. Moving defendant shall incorporate his or her response to the Rule 56(d) motion into the reply to the motion for summary judgment. No reply on the Rule 56(d) motion is allowed. If the parties agree that discovery on qualified immunity is required and the defendant does not file an immediate motion for summary judgment, then the stay of discovery as to that defendant is lifted as to

qualified immunity only. Any other motion for summary judgment asserting qualified immunity (i.e., after discovery) must be filed within 120 days of the date of the Plaintiff's Rule 7(a) reply. If a defendant asserting qualified immunity does not file such motion for summary judgment by that time, the stay of discovery as to that defendant is lifted. Any other motion for summary judgment, motion to dismiss, or motion for judgment on the pleadings asserting qualified immunity desired to be filed after that date may be filed only with leave of Court and showing of good cause under Rule 16(b).

5. Any motions for leave to join additional parties must be filed within 90 days of the date of this Order. Any motion for leave to amend pleadings under Rule 15(a) must be filed within 180 days of this Order. Any motion for leave to amend pleadings after that date must show good cause pursuant to Rule 16(b).

6. The parties may by written agreement alter the deadlines in this paragraph, without the need for court order. No continuance of trial will be granted due to agreed extensions of these deadlines. Motions may become moot due to trial if filed after the deadline in this Order.

a. 150 days before trial – party with burden of proof must disclose experts pursuant to Rule 26(a)(2);

b. 120 days before trial – disclosure of opposing experts pursuant to Rule 26(a)(2);

c. 105 days before trial – disclosure of rebuttal experts pursuant to Rule 26(a)(2) or supplementation with rebuttal opinions pursuant to Rule 26(e)(1);

d. 90 days before trial – discovery closes; discovery requests must be served in time to permit response by this date;

e. 90 days before trial – all motions, including any objections to expert testimony, must be filed.

7. To facilitate orderly preparation for trial, the Court conducts an expedited discovery hearing docket on Monday afternoons. Any party may request expedited hearing of a discovery dispute. Requests must be made by separate letter to the Court's Judicial Assistant, Donna Hocker Beyer, and must be received at least ten (10) days prior to the requested docket; requests may be made concurrently with filing the motion. If the matter is set on the expedited docket, the Court will advise the parties of applicable procedures by separate order. Seeking relief from the Court on discovery disputes prior to conducting a meaningful, substantive conference with the opposing party is **STRONGLY** discouraged. A motion or objection to the taking of a deposition that is filed within three business days of the notice has the effect of staying the deposition pending court order on the motion or objection; otherwise the deposition will not be stayed except by court order.

8. Parties desiring entry of a protective order under Rule 26(c) must either (a) request entry of an order in the Court's standard form, which can be found at:

www.txnd.uscourts.gov/judges/dgodbey_req.htm

or (b) if entry of a protective order in a different form is requested, the motion must (1) explain why the Court's standard form is inadequate in the particular

circumstances of the case, and (2) include a redlined version of the requested form showing where it differs from the Court's standard form.

9. The parties shall file all pretrial materials 30 days before trial. Failure to file pretrial materials may result in dismissal for want of prosecution. Pretrial materials shall include the following:

a. pretrial order pursuant to LR 16.4;

b. exhibit lists, witness lists, and deposition designations pursuant to LR 26.2 and Rule 26(a)(3); witness lists should include a brief summary of the substance of anticipated testimony (not just a designation of subject area) and an estimate of the length of direct examination; exhibit lists must include any materials to be shown to the jury, including demonstrative aids; the parties shall comply with Rule 26(a)(3) regarding objections;

c. proposed jury charge pursuant to LR 51.1 or proposed findings of fact and conclusions of law pursuant to LR 52.1; any objections to the proposed jury charge shall be filed within 14 days thereafter; objections not so disclosed are waived unless excused by the court for good cause;

d. motions in limine; matters that are not case-specific are strongly discouraged;

e. requested voir dire questions.

10. The final pretrial conference will be set by separate order or notice. Lead counsel must attend the pretrial conference. The Court will likely impose time limitations for trial at the pretrial conference. Examination of witnesses will be

limited to direct, cross, re-direct, and re-cross. Any questions regarding this Order may be directed to the Court's Judicial Assistant, Donna Hocker Beyer, at 214-753-2700.

Signed January 25, 2021.

/s/ David C. Godbey
David C. Godbey
United States District Judge