No. 22-__

IN THE
Supreme Court of the United States

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,
Petitioner,

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,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court can defer ruling on qualified immunity at the motion-to-dismiss stage without triggering an immediate appeal.

2. Whether a plaintiff is forbidden from seeking any discovery against an immunity-asserting defendant until that claim of immunity is resolved, even if the discovery is related to a claim against a separate defendant with no entitlement to qualified immunity.

PARTIES TO THE PROCEEDING

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, petitioner on review, was the plaintiff-appellee below.

George A. Camp, Jana R. Campbell, Helen M. Landers, Kenneth R. Marriott, Kolbee A. Perdue, Teri J. Robinson, Vi N. Wells, and Scotty D. York, respondents on review, were the defendants-appellants below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

Carswell v. *Camp*, No. 21-10171 (5th Cir. Nov. 30, 2022) (reported at 54 F.4th 307)

U.S. District Court for the Northern District of Texas:

Carswell v. *Hunt County*, No. 3:20-cv-02935-N (N.D. Tex. Jan. 25, 2021) (unreported)

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PETITION FOR A WRIT OF CERTIORARI

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, respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-14a) is reported at 54 F.4th 307. The District Court's opinion (Pet. App. 43a-48a) is not reported.

JURISDICTION

The Fifth Circuit issued its initial opinion and first entered judgment on June 17, 2022. *See* Pet. App. 15a-28a. Petitioners timely sought rehearing. The Fifth Circuit withdrew its initial opinion, denied rehearing, and issued a revised opinion on November 30, 2022. *See id.* at 1a-14a. On February 7, 2023, Justice Alito entered an order extending the deadline to petition for a writ of certiorari to and including March 30, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides in relevant part:

> The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

INTRODUCTION

This case implicates two circuit splits. The first concerns whether the courts of appeals have immediate appellate jurisdiction over a district court's decision to defer ruling on qualified immunity at the motion-to-dismiss stage because that claim of immunity turns on a question of fact. The second split concerns whether an individual's claim of immunity requires staying all discovery against that individual—including discovery as to claims against other defendants with no right to immunity—until that claim of immunity is resolved.

For decades, the Fifth Circuit employed a "careful procedure" in qualified-immunity cases that balanced a plaintiff's right to pursue justice with a defendant's right to be free from the burdens of litigation. *See, e.g.*, *Backe* v. *LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). Under this procedure, a district court was permitted to "defer its qualified immunity ruling" until after the motion-to-dismiss stage "if further factual development [wa]s necessary to ascertain the availability of that defense." *Id.* To pursue this procedure, the district court would "first find 'that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity.' " *Id.* (citing *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679 (2009)). "*After* the district court finds a plaintiff has so pled, if the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.' " *Id.* (emphasis in original) (quoting *Lion Boulos* v. *Wilson*, 834 F.2d 504 (5th Cir. 1987)). Such orders were not immediately appealable. *Id.*

In the decision below, the Fifth Circuit threw all that out the window. While housed as a pretrial detainee in Hunt County, Texas, 32-year-old Gary Valdez Lynch III died of a heart-related infectious disease after jail personnel repeatedly ignored his pleas for medical help and obvious signs of severe medical distress. After her son's death, Gwendolyn Carswell sued Hunt County and eight county employees under 42 U.S.C. § 1983 for violating Lynch's constitutional rights. The individual defendants (Respondents here) moved to dismiss, asserting qualified immunity. Citing the Fifth Circuit's "careful procedure" line of cases, the District Court denied that motion without prejudice in a scheduling order and directed the parties to confer on whether discovery was necessary to resolve the immunity issue.

Respondents instead lodged an immediate appeal, which the Fifth Circuit granted and used to effectively deny all subsequent plaintiffs the opportunity to develop an adequate factual record on qualified immunity. The panel first held that it could exercise immediate appellate "jurisdiction over the scheduling order here because the district court refused to rule on qualified immunity 'at the earliest possible stage of the litigation.' " Pet. App. 6a (citation omitted). It then replaced the circuit's "careful procedure" with a bright-line rule: "Where public officials assert qualified immunity in a motion to dismiss, a district court must rule on the motion." *Id.* at 6a-7a. The district court "may not permit discovery against the immunity-asserting defendants before it rules on their defense." *Id.* at 6a. This prohibition extends even to discovery related to that defendant's capacity as a non-party witness in a plaintiff's *Monell* claim, for which qualified immunity is unavailable. *Id.* at 11a-13a. And if

the district court denies immunity at this stage, "the defendant can immediately appeal." *Id.* at 9a.

The decision below further entrenches a circuit split over whether a district court's decision to defer ruling on immunity at the motion-to-dismiss stage in light of the need for further fact development is immediately appealable. On one side, the Seventh, Ninth, and Tenth Circuits allow district courts to defer ruling on immunity at that early stage without triggering an immediate appeal. Before the decision below, the Fifth Circuit agreed. But now the Fifth Circuit stands with the Second, Third, Fourth, Eighth, and Eleventh Circuits in *requiring* district courts to rule on qualified immunity at the motion-to-dismiss stage and exercising immediate appellate jurisdiction over a district court's attempt to defer.

The Fifth Circuit had it right the first time. In *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), this Court held "that a district court's denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*, is an appealable 'final decision.' " *Id.* at 530 (emphasis added). But in *Johnson* v. *Jones*, 515 U.S. 304 (1995), this Court unanimously held that an order denying qualified immunity at the summary-judgment stage that "resolved a *fact*-related dispute" is not immediately appealable. *Id.* at 307 (emphasis added). A district court's deferral of the qualified-immunity issue at the motion-to-dismiss stage to allow for further factual development is a quintessential "fact-related dispute" that is not immediately appealable under *Johnson*.

That is not all. In holding that district courts cannot allow even *Monell* discovery against immunity-asserting defendants until immunity is resolved, the Fifth

Circuit created a circuit split. The First, Fourth, and Sixth Circuits, in addition to many district courts, have rejected the need to stay all discovery against an immunity-asserting defendant solely because that defendant asserted immunity. These circuits correctly recognize that immunity is a protection against certain *claims*—not from litigation in general.

These issues are exceptionally important, as they implicate the balance of rights in our judicial system. The decision below introduces yet another roadblock in civil-rights plaintiffs' path to recovery for egregious misconduct by government officials, while relieving government officials of the nominal burden already acknowledged and contemplated by this Court's precedents. And the panel's radical restriction of discovery in civil-rights cases stretches qualified immunity well past the breaking point. This Court's intervention is needed.

STATEMENT

A. Factual Background

In February 2019, 32-year-old Gary Lynch was arrested on an outstanding warrant and booked at the Hunt County jail. Pet. App. 2a, 62a, 88a-89a. During intake, he indicated on a screening form that he had "major medical problems that needed to be addressed." *Id.* at 95a. From the day he arrived, Lynch complained to jail staff, medical personnel, and his fellow inmates about "his heart" and a litany of related symptoms: pain in his chest and left arm, difficulty breathing, dizziness, headaches, and nausea. *Id.* at 69a, 70a-72a, 74a, 76a, 79a, 82a. But Lynch never received any medical care.

Cell checks were cursory. Officers would peek through a window for "approximately 2-3 seconds."

Id. at 84a. But because his bunk was in the back of the cell, Lynch was never fully visible during these drive-by inspections. *Id*.

Medical checks were similarly perfunctory. Too weak to get out of his bunk, Lynch did not have his blood pressure taken most days. *Id.* at 71a. A nurse later logged entries indicating that Lynch had "refused" a blood-pressure check on the days he could not leave the cell—including one entry claiming he had "refused" a check *the day after he died*. *Id.* at 92a-93a.

Lynch's condition continued to deteriorate. At one point, too weak to hold himself up, Lynch collapsed in the hallway and pled for water. *Id.* at 66a-67a. One officer responded: "Lynch, get up. We don't have time for your B.S." *Id.* at 67a. When Lynch was unable to comply, the officer grabbed him and put him into an empty cell. *Id.* at 67a, 73a. Lynch collapsed again a few days later and pled for medical assistance. *Id.* at 75a. Officers instead forced him back to his cell. *Id.* at 76a.

Eleven days after Lynch was first booked, one of Lynch's cellmates heard him moaning in pain. *Id.* at 67a. Lynch soon thereafter took one long, final breath before becoming completely still. *Id.* Cellmates yelled for help. *Id.* at 75a. About ten to twenty minutes later, jail and medical personnel arrived at the cell. *Id.* A medical officer checked for Lynch's pulse and found him cold to the touch. *Id.* at 80a. Paramedics were unable to revive him. *Id.* at 78a. Lynch was taken to a local hospital, where he was pronounced dead at the age of 32. *Id*. at 62a, 87a.

An autopsy later revealed that Lynch died as a result of aortic valve endocarditis with myocardial abscess, a life-threatening but curable heart disorder

that could have been treated had Lynch been taken to a local emergency room. *Id*. at 86a.

B. Procedural Background

1. Lynch's mother, Gwendolyn Carswell, sued Hunt County and Respondents under 42 U.S.C. § 1983 and *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Pet. App. 2a-3a. Carswell alleged that the county and Respondents violated Lynch's constitutional rights by responding unreasonably and with deliberate indifference to Lynch's serious medical needs. *Id.* at 138a-150a.

Respondents asserted qualified immunity and moved to dismiss. *Id.* at 3a. The District Court denied any such pending motions without prejudice in a carefully drafted scheduling order. *Id.* at 43a-48a. Citing Fifth Circuit precedent, the court directed all defendants who intended to assert qualified immunity and who had not already done so by way of answer to file an answer asserting qualified immunity. *Id.* at 44a. The court further directed the parties to "confer regarding whether discovery is needed for the Court to assess the assertion of qualified immunity." *Id.* If the defendants thereafter filed a motion for summary judgment without discovery, the court instructed Carswell "to respond to such motion" with a "Rule 56(d) motion for discovery." *Id.* at 44a-45a. In the meantime, the court stayed all discovery "as to any defendant who asserts qualified immunity," except discovery "as to that person's capacity as a witness to the extent that there is any other defendant not asserting qualified immunity." *Id.* at 44a.

Respondents appealed the scheduling order. *Id.* at 3a. They also moved in the District Court to stay *all*

discovery pending resolution of their qualified-immunity claim—including discovery against the county, which, as a municipality, is not entitled to qualified immunity. *See id.* at 4a; *Owen* v. *City of Independence*, 445 U.S. 622, 633, 638-640 (1980). The District Court denied that motion. Pet. App. 29a-30a. Respondents then sought a stay of discovery pending appeal in the Fifth Circuit, which that court granted. *Id.* at 5a.

2. The Fifth Circuit ultimately vacated the scheduling order, holding that "the district court abused its discretion by deferring its ruling on qualified immunity and subjecting the immunity-asserting defendants to discovery in the meantime." *Id*. at 6a. It took the panel two opinions, however, to offer an explanation that stuck.

In the first opinion, the panel recognized that a line of cases beginning with the 1987 decision *Lion Boulos* provided for "a careful procedure" permitting a district court to "defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense." *Id.* at 21a (citations omitted). Under those cases, if the court finds that a plaintiff has pled sufficient facts "which, if true, would overcome the defense of qualified immunity" but nonetheless "remains 'unable to rule on the immunity defense without further clarification of the facts,' [the court] may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.' " *Backe*, 691 F.3d at 648 (first quoting *Helton* v. *Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986); then quoting *Lion Boulos*, 834 F.2d at 507-508).

The Fifth Circuit "lack[ed] jurisdiction to review interlocutory orders in qualified immunity cases complying with these requirements." *Id.*

Despite this longstanding precedent, the panel held that it had "jurisdiction over the scheduling order here because the district court refused to rule on qualified immunity 'at the earliest possible stage of the litigation.' " Pet. App. 19a-20a (citation omitted). The panel then "overruled" the circuit's "careful procedure," citing *Iqbal* as justification. *Id.* at 21a-23a. According to the panel, "[w]here public officials assert qualified immunity in a motion to dismiss, a district court must rule on the immunity question at that stage." *Id.* at 20a. The district court cannot "permit discovery against the immunity-asserting defendants before it rules on their defense." *Id.* This prohibition extends even to discovery related to that defendant's capacity as a non-party fact witness in a *Monell* claim against a municipality. *Id.* at 24a-26a.

Carswell petitioned for rehearing en banc. Nearly six months later, the panel withdrew its initial opinion, issued a new opinion, and denied rehearing. *Id.* at 1a-14a. The panel reiterated in its revised opinion that it had jurisdiction "because the district court refused to rule on qualified immunity 'at the earliest possible stage of the litigation.' " *Id.* at 6a (citation omitted). This refusal "effectively * * * denied [defendants] the benefits of the qualified immunity defense' and 'vest[ed] this court with the requisite jurisdiction to review the discovery order.' " *Id.* (citation omitted).

The panel then reached the same conclusion it had reached in the original opinion, but this time by "in-

terpreting"—rather than overruling—circuit precedent. *Id.* at 8a-9a. The panel now held that *Iqbal* "prohibits interpreting" the Fifth Circuit's "careful procedure" precedent "as allowing tailored discovery before a district court rules on an official's motion to dismiss." *Id.* Instead, "where the pleadings are insufficient to overcome [qualified immunity], the district court *must* grant the motion to dismiss without the benefit of pre-dismissal discovery." *Id.* at 9a. Likewise, "where the pleadings are sufficient to overcome [qualified immunity], the district court *must* deny the motion to dismiss without the benefit of pre-dismissal discovery." *Id.* In such cases, "the defendant can immediately appeal * * * under the collateral order doctrine." *Id.* The panel then reiterated that a plaintiff cannot seek *any* discovery—including discovery related to a *Monell* claim—"against official defendants before a ruling that a plaintiff had met his burden to overcome the qualified immunity defense at the pleading stage." *Id.* at 12a.

3. Carswell again petitioned for rehearing en banc. The Fifth Circuit informed Carswell that it was "taking no action" on the rehearing petition because the new opinion had issued "*nunc pro tunc*" to the original opinion nearly six months earlier. *Id.* at 51a. Carswell moved to refile the rehearing petition, arguing that a *nunc pro tunc* correction is appropriate only for non-substantive corrections, not wholesale replacements. The Fifth Circuit denied that unopposed motion without explanation. *See id.* at 50a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THERE IS A NINE-CIRCUIT SPLIT ON WHETHER A COURT CAN DEFER RULING ON IMMUNITY AT THE MOTION-TO-DISMISS STAGE.

The Fifth Circuit's "careful procedure" allowed district courts to defer ruling on qualified immunity at the motion-to-dismiss stage without triggering an immediate appeal. The panel below held instead that district courts *must* rule on immunity at that early stage. This holding deepens a circuit split. It also departs from this Court's precedents. This Court's review is needed to supply a uniform answer to this important and recurring question.

A. The Decision Below Implicates A Deep Split.

Nine courts of appeals have considered whether a district court can defer ruling on immunity at the motion-to-dismiss stage if immunity turns on a question of fact without triggering an immediate appeal. Three circuits—the Seventh, Ninth, and Tenth—hold that a district court can so defer and that the appellate court lacks immediate jurisdiction over that decision. Six other circuits—the Second, Third, Fourth, Eighth, Eleventh, and now the Fifth—hold that a district court *cannot* defer the immunity issue and that a district court's attempt to do so triggers an immediate appeal.

1. In the Seventh, Ninth, and Tenth Circuits, a district court may defer ruling on immunity at the motion-to-dismiss stage if immunity turns on a question of fact, and such deferrals are not immediately appealable.

The Seventh Circuit adopted this approach in *Khorrami* v. *Rolince*, 539 F.3d 782 (7th Cir. 2008). The plaintiff alleged that officers violated his Fifth Amendment right to due process. *Id.* at 786. "The Government moved to dismiss on grounds of qualified immunity and failure to state a claim." *Id.* "The district court granted the motion * * * with respect to all parts of the case except for those relying on the Fifth Amendment; it explicitly declined to rule on the qualified immunity motion," "stating that 'these attacks on Plaintiff's complaint are premature.' " *Id.*

The Seventh Circuit dismissed the government's appeal for want of jurisdiction. As the court explained, the district court "did not reject the qualified immunity defense. Instead, it explicitly set the claim aside to be adjudicated later." *Id.* This deferral "in no way touch[ed] on the merits of the claim but only relate[d] to pretrial procedures." *Id.* (citation omitted). And "[i]f the district court has not yet issued an order ruling on the qualified immunity assertion, it is difficult, if not impossible, for an appellate court to intervene." *Id.* at 787. The court continued that "[a]ny doubt on the matter is resolved by a look at *Johnson* [v. *Jones*]," which "stand[s] for the proposition that an interlocutory appeal is inappropriate where substantial steps remain to be taken in the district court before the facts, and hence the applicable law, are brought into focus." *Id.* Such was the case there: The qualified-immunity "defense depends entirely on facts that have not yet been explored." *Id.*

The Ninth Circuit is in accord. In *Miller* v. *Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), the defendants moved to dismiss the plaintiff's Section 1983 complaint on both Eleventh Amendment immunity and

absolute-immunity grounds. *Id.* at 894. The district court dismissed the claims against the defendants "in their official capacities on Eleventh Amendment grounds," but "declined to grant or deny the motion to dismiss insofar as it requested dismissal upon the basis of absolute immunity." *Id.* "Explaining that not enough information was available to determine whether absolute immunity applied, the court granted leave to raise absolute immunity as a defense at the completion of limited discovery." *Id.* The court then allowed "discovery on the narrow and limited issue of absolute immunity" and "deferred ruling on immunity pending such discovery." *Id.*

The Ninth Circuit, sitting en banc, held that "[d]istrict court orders deferring a ruling on immunity for a limited time to ascertain what relevant functions were performed generally are not appealable." *Id.* Such orders do not "deny the claimed existence of immunity," *id.*; nor do "they conclusively decide a collateral issue," *id.* at 895. In short, "[a]n order deferring a ruling is not conclusive" and is "not itself immediately appealable." *Id.* The court then construed the appeal as a petition for a writ of mandamus and concluded that, given the unresolved factual questions, "the district court did not err when it deferred ruling on the motion to dismiss." *Id.* at 899.

The Tenth Circuit blessed this approach in *Workman* v. *Jordan*, 958 F.2d 332 (10th Cir. 1992). The district court "postponed" the issue of qualified immunity, which defendants had raised in a motion to dismiss, "until trial." *Id.* at 334. The Tenth Circuit held that it *did* have immediate appellate jurisdiction over that decision, *id.* at 336, but recognized that that jurisdiction was limited. Citing *Lion Boulos*, the

Tenth Circuit explained "that an order is not immediately appealable if it defers" resolving a claim of qualified immunity "because the claim turns, at least partially, on a fact question; the court is unable to rule on the claim without further factual clarification; and the court permits discovery narrowly tailored to uncover only those facts needed to rule on the claim." *Id.*

2. Before the decision below, the Fifth Circuit had long recognized that "when the district court is unable to rule on the immunity defense" at the motion-to-dismiss stage "without further clarification of the facts," and when an order of discovery is "narrowly tailored to uncover only those facts needed to rule on the immunity claim," the court can defer deciding on immunity without triggering an immediate appeal. *Lion Boulos*, 834 F.2d at 507-508. Now, like the Second, Third, Fourth, Eighth, and Eleventh Circuits, the Fifth Circuit holds that district courts *must* rule on immunity if that defense is raised in a motion to dismiss, and that any attempt to defer that determination for further fact development is immediately appealable.

In *X-Men Security, Inc.* v. *Pataki*, 196 F.3d 56 (2d Cir. 1999), the Second Circuit held that it could exercise jurisdiction over an order denying the defendants' assertions of qualified immunity in motions to dismiss on the ground that "the motions were premature in advance of discovery." *Id.* at 64. According to the Second Circuit, "[w]here the district court bases its refusal to grant a qualified-immunity motion on the premise that the court is unable to, or prefers not to, determine the motion without discovery," then such an order "constitutes at least an implicit decision that the complaint alleges a constitutional claim on which

relief can be granted." *Id*. at 66. As such, a "district court's perceived need for discovery does not impede immediate appellate review of the legal questions of whether there is a constitutional right * * * and, if so, whether it was clearly established * * *, for until 'th[ese] threshold immunity question[s are] resolved, discovery should not be allowed.' " *Id.* (citation omitted). The court ultimately concluded that the plaintiff had "fail[ed] to state a claim" and that the defendants were entitled to qualified immunity. *Id.* at 72.

The Third Circuit adopted the reasoning of *X-Men Security* in *George* v. *Rehiel*, 738 F.3d 562 (3d Cir. 2013). The defendants asserted qualified immunity in motions to dismiss. *Id.* at 568-569. The court denied the motions, finding that "the amended complaint alleges claims for relief that are 'plausible on [their] face,' " but did not explicitly rule on qualified immunity. *Id.* at 569 (citation omitted). When defendants sought clarification, the court explained that "qualified immunity 'may be clarified by discovery.' " *Id.* at 570 (citation omitted).

The Third Circuit held that it had jurisdiction to review the order. *Id.* Although "the district court did not specifically engage in the traditional qualified immunity analysis before denying the individual federal defendants' motions to dismiss," the Third Circuit explained that the district court *did* hold that "the amended complaint stated a valid claim against each federal defendant." *Id.* at 571. The "practical effect of" that order "was a denial of the defense of qualified immunity," which made the order immediately appealable. *Id.* (citing *X-Men Sec.*, 196 F.3d at 66). The Third Circuit cautioned district courts that "any claim of qualified immunity must be resolved at the earliest

possible stage of the litigation." *Id.* (citation omitted). After considering the issue for itself, the appellate court granted qualified immunity. *Id.* at 586.

Similarly, in *Jenkins* v. *Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc), the district court denied the defendant's motion to dismiss because the defendant's "entitlement to qualified immunity might rest on factual issues not yet before the court." *Id.* at 1158. The court accordingly could not "now determine whether [the defendant] is entitled to a qualified immunity defense." *Id.* (citation omitted). The Fourth Circuit, sitting en banc, concluded that it could exercise immediate jurisdiction over this order. *Id.* at 1159. "When a district court denies qualified immunity at the dismissal stage, that denial subjects the official to the burdens of pretrial matters, and some of the rights inherent in a qualified immunity defense are lost." *Id.* According to the Fourth Circuit, the same is true when a district court *declines* to rule on immunity at the motion-to-dismiss stage, which "subject[s]" the defendant "to further pretrial procedures." *Id.* Following *Jenkins*, "a district court's refusal to rule on an immunity-from-suit defense decide[s] the immunity question for purposes of the collateral order doctrine." *Nero* v. *Mosby*, 890 F.3d 106, 125 (4th Cir. 2018).

Likewise, in *Payne* v. *Britten*, 749 F.3d 697 (8th Cir. 2014), the Eighth Circuit held that a "district court may not force public officials into subsequent stages of district court litigation without first ruling on a properly presented motion to dismiss asserting the defense of qualified immunity." *Id.* at 702. The district court had responded to the defendants' assertion of qualified immunity in a motion to dismiss by ordering

them "to supplement the record with evidence supporting their claims for qualified immunity." *Id.* at 700. Finding it "apparent that the court must consider matters outside of the pleadings to resolve this matter," the court converted the motion to dismiss to a motion for summary judgment, which it then "denied"—still "without ruling on qualified immunity." *Id.*

The Eighth Circuit held that it had immediate jurisdiction over this "failure or refusal to rule on qualified immunity," reasoning that the district court did not rule on qualified immunity at the earliest instance. *Id.* at 701. At the motion-to-dismiss stage, the Eighth Circuit explained, "[c]ourts may ask *only* whether the facts as alleged plausibly state a claim and whether that claim asserts a violation of a clearly established right." *Id.* at 702. The court remanded to "the district court to conduct the proper analysis." *Id.* at 701.

Finally, *Howe* v. *City of Enterprise*, 861 F.3d 1300 (11th Cir. 2017) (per curiam), concerned an order that "denied without prejudice the defendants' second motion to dismiss"—in which the defendants had asserted qualified immunity—and that instructed the plaintiff "to file a second amended complaint" clarifying his claims. *Id.* at 1301. The district court also instructed the parties to "confer and develop a proposed discovery plan." *Id.*

In addressing whether it had immediate appellate jurisdiction over this order, the Eleventh Circuit cited circuit precedent holding that the appellate court "had jurisdiction to review district court orders that reserved ruling on a defendant's claim to immunity." *Id.* at 1302. Those cases reasoned that "by requiring the defendants to further defend from liability while the

immunity issue remained pending, the district court had effectively denied immunity, which provides 'an entitlement not to stand trial or face the other burdens of litigation.' " *Id.* (citation omitted). The portions of the district court's order requiring the parties to develop a proposed discovery plan violated that precedent. *Id.* As the Eleventh Circuit concluded, "immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted." *Id.* The court therefore remanded, instructing the district court to reach a decision on immunity "before requiring that the parties litigate * * * any further." *Id.* at 1303.

In the decision below, the Fifth Circuit joined this side of the split. The panel held that it had jurisdiction over the scheduling order "because the district court refused to rule on qualified immunity 'at the earliest possible stage of the litigation.' " Pet. App. 6a (citation omitted). It then announced the same bright-line rule applied by the other courts on this side of the split: "When defendants assert qualified immunity in a motion to dismiss, the district court may not defer ruling on that assertion." *Id.* And if the district court denies that motion—even if that denial turns on the need for further factual development—"the defendant can immediately appeal * * * under the collateral order doctrine." *Id.*

* * *

The majority of the courts of appeals have weighed in on this issue. The result is a persistent split. This Court's intervention is needed to restore uniformity across the federal courts on this important issue.

B. The Decision Below Is Wrong.

Under this Court's precedents, a district court's decision to defer ruling on qualified immunity at the motion-to-dismiss stage for limited fact development is not an immediately appealable final order.

1. Congress has vested the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court "held that certain so-called collateral orders amount to 'final decisions' " under § 1291. *Johnson*, 515 U.S. at 310 (quoting *Cohen*, 337 U.S. at 545). Such collateral orders "are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' " *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996) (quoting *Cohen*, 337 U.S. at 546).

This category of immediately appealable orders includes certain types of orders denying qualified immunity. *See Mitchell*, 472 U.S. at 530. "This is so because qualified immunity * * * is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.' " *Iqbal*, 556 U.S. at 672 (quoting *Mitchell*, 472 U.S. at 526). But this right to an immediate appeal is limited to where the order denying qualified immunity "turns on an 'issue of law.' " *Behrens*, 516 U.S. at 311 (quoting *Mitchell*, 472 U.S. at 530). "Provided it turns on an issue of law, a district-court order denying qualified immunity conclusively determines that the defendant must bear the burdens of discovery; is conceptually distinct from the

merits of the plaintiff's claim; and would prove effectively unreviewable on appeal from a final judgment." *Iqbal*, 556 U.S. at 672 (cleaned up).

A district court order "resolv[ing] a fact-related dispute" regarding qualified immunity, on the other hand, is not immediately appealable. *Johnson*, 515 U.S. at 307. In *Johnson*, this Court unanimously held that an order at the summary-judgment stage denying qualified immunity was not immediately appealable if the order "determines only a question of 'evidence sufficiency.' " *Id.* at 313. *Johnson* explained that such an order does not concern a "legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Id.* Nor is this type of fact question "conceptually distinct from the merits of the plaintiff's claim." *Id.* at 314 (citation omitted). As this Court explained, where "a defendant simply wants to appeal a district court's" sufficiency-of-the-evidence determination, "it will often prove difficult to find any such 'separate' question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claims on the merits." *Id.* This Court also considered the "comparative expertise of trial and appellate courts," which counseled against allowing immediate appeals from orders that turn on "the kind of issue that trial judges, not appellate judges, confront almost daily." *Id*. at 316-317.

Under *Johnson*, defendants can appeal only those denials of qualified immunity that "present[ ] neat abstract issues of law." *Id.* at 317 (citation omitted). "Cases fitting that bill typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity

of pre-existing law." *Ortiz* v. *Jordan*, 562 U.S. 180, 190 (2011). In so ruling, *Johnson* nodded approvingly at the Fifth Circuit's decision in *Lion Boulos*. 515 U.S. at 308 (citing *Lion Boulos* as one of the cases falling on the side of the circuit split *Johnson* endorsed).

2. Under these precedents, a scheduling order like the one at issue here is not immediately appealable. For one thing, such orders do not actually *deny* qualified immunity. Indeed, they do not "conclusively determine" anything. *Id.* at 310 (citation omitted). Such orders instead merely recognize that "further factual development is necessary to ascertain the availability of" qualified immunity. *Backe*, 691 F.3d at 648. The order at issue here is even less final than that: It did not even order discovery. Pet. App. 44a-45a. The scheduling order contemplates that if the parties agreed that discovery was not necessary—or if the court disagreed that discovery was necessary—the court would rule on qualified immunity on the pleadings. *Id.* at 44a-45a; *id.* at 36a. The scheduling order is thus not even a final ruling that Respondents are subject to limited discovery. There is no "significant harm" to defendants warranting an immediate appeal in these circumstances. *Johnson*, 515 U.S. at 311.

Moreover, such deferrals do not turn on issues of law—they turn on issues of fact. *Johnson* itself confirmed as much when it cited *Lion Boulos* favorably. *See id.* at 308. As the Fifth Circuit explained in *Lion Boulos*, in some cases, "the defendant's immunity claim turns at least partially on a factual question." 834 F.2d at 507. Although a plaintiff's "version of the facts" might be sufficient to overcome an assertion of qualified immunity, the district court might nonethe-

less require "a clearer picture of what [actually] occurred" before being able to rule on immunity. *Id.* at 510; *see also Khorrami*, 539 F.3d at 787 (explaining that in certain cases, immunity "depends entirely on facts that have not yet been explored"); *Ortiz*, 562 U.S. at 190 (noting that some qualified-immunity claims "involve contests * * * about what occurred, or why an action was taken or omitted"). For example, immunity might turn on whether someone "gave voluntary consent" to the defendant to allow a search, *Lion Boulos*, 834 F.2d at 509; whether a defendant "acted with deliberate indifference by subjectively disregarding a known risk," *Webb* v. *Livingston*, 618 F. App'x 201, 210 (5th Cir. 2015); or whether the defendant "knew of the falsity of the facts" asserted in an affidavit, *Khorrami*, 539 F.3d at 787. In such cases, "substantial steps remain to be taken in the district court before the facts, and hence the applicable law, are brought into focus." *Id.*

As *Johnson*'s favorable citation to *Lion Boulos* makes clear, a defendant does not enjoy an immediate appeal from such a fact-bound determination. Where immunity turns on the facts, the qualified-immunity issue is by definition not "significantly different from the fact-related legal issues that likely underlie the plaintiff's claims on the merits." *Johnson*, 515 U.S. at 314. The qualified-immunity issue is instead *bound up* in those "fact-related legal issues": It depends on the "facts the parties might be able to prove." *Id.* at 314, 311. There is no " 'separate' question"—one distinct from the underlying merits—for appellate courts to review. *Id.* at 314. And just as determining "the existence, or nonexistence, of a triable issue of fact[ ] is the kind of issue that trial judges, not appellate judges, confront almost daily," *id.* at 316, so too is the

question of whether certain *facts* allow a defendant to take advantage of a particular defense. Finally, this sort of interlocutory appeal "make[s] it more difficult for trial judges to do their basic job—supervising trial proceedings." *Id.* at 309. "Appellate courts do not sit to prescribe motions calendars for district courts." *Khorrami*, 539 F.3d at 787.

3.a. The Fifth Circuit ignored all this and instead held that it could exercise jurisdiction over the scheduling order "because the district court refused to rule on qualified immunity at the earliest possible stage of litigation," which "effectively * * * denied [Respondents] the benefits of the qualified immunity defense." Pet. App. 6a (cleaned up). But as *Johnson* explains, the bare fact that a defendant might have to proceed to the next stage of litigation is not grounds for an immediate appeal. *Johnson* recognized that not allowing defendants to immediately appeal fact-bound denials of qualified immunity at the summary-judgment stage "forces public officials to trial." 515 U.S. at 317. "And, to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits) that (the *Mitchell* Court held) militates in favor of immediate appeals." *Id.* A claim of qualified immunity, however, does not override everything in its path. As *Johnson* held, the "countervailing considerations" of "precedent, fidelity to statute, and underlying policies[ ] are too strong to permit the extension of *Mitchell* to encompass appeals" from fact-bound denials of qualified immunity at the summary-judgment stage. *Id.*

Johnson's rationale applies with even more force here. *Johnson* allowed qualified-immunity-asserting defendants to *go to trial* before being able to appeal a

denial of qualified immunity. Here, in contrast, the scheduling order did not even order discovery—it merely required Respondents to confer with Petitioner Carswell regarding whether discovery was necessary to decide immunity. Pet. App. 44a-45a. Any policy interest in shielding defendants from the limited burden of filing an answer and conferring with their opponent is vastly outweighed by the "countervailing considerations" discussed in *Johnson*. 515 U.S. at 317. After all, this Court has "emphasize[d] that even such pretrial matters as discovery are to be avoided *if possible*." *Mitchell*, 472 U.S. at 526 (emphasis added). Sometimes, as *Johnson* recognized, it is not possible.

b. After erroneously exercising jurisdiction over the scheduling order, the Fifth Circuit closed the door behind it: It prohibited district courts from deferring qualified immunity at the motion-to-dismiss stage—orders not immediately appealable under *Johnson*—and required district courts to *rule* on immunity at the motion-to-dismiss stage—which could potentially lead to an immediately appealable order. The panel rooted this abrupt shift in *Iqbal*, which it read to "squarely prohibit[ ] our 'careful procedure' as allowing tailored discovery before a district court rules on an official's motion to dismiss." Pet. App. 8a-9a; *see also id.* at 23a (original panel opinion purporting to "overrule[ ]" "*Lion Boulos* and its progeny" in light of *Iqbal*).

Iqbal does nothing of the sort. The relevant issue in that case was whether the pleading standard articulated in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), applied to constitutional claims brought against high-level officials asserting qualified immunity. *See Iqbal*, 556 U.S. at 675-683. The plaintiff had

argued that "Rule 8 should be tempered" where the district court can carefully control 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 (internal quotation marks omitted). This Court rejected that approach, 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 684-685. A district court thus may not "relax the pleading requirements" and deny a motion to dismiss "on the ground that [a court] promises * * * minimally intrusive discovery." *Id.* at 686.

Contrariwise, compliance with Federal Rule of Civil Procedure 8—and with *Iqbal*—is baked into the Fifth Circuit's "careful procedure." That procedure *required* district courts to "first find that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." *Backe*, 691 F.3d at 648 (citing *Iqbal*, 556 U.S. at 678-679). Only then, "*[a]fter* the district court finds a plaintiff has so pled, if the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.' " *Id.* (quoting *Lion Boulos*, 834 F.2d at 507-508). The Fifth Circuit's "careful procedure" is nothing like the relaxed pleading standard at issue in *Iqbal*, and the panel grievously erred in conflating the two.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT ON WHETHER A CLAIM OF IMMUNITY REQUIRES STAYING UNRELATED DISCOVERY.

The panel's errors do not end there. According to the decision below, plaintiffs cannot pursue *any* discovery—including *Monell*-related discovery—"against official defendants before a ruling that plaintiff had met his burden to overcome the qualified immunity defense at the pleading stage." Pet. App. 12a. In so holding, the panel both created a circuit split and broke from this Court's precedents.

A. The Decision Below Splits With Three Circuits And Multiple District Courts.

In the decision below, the panel held that district courts cannot allow *any* discovery to proceed against an immunity-asserting defendant—even discovery against that defendant in his "capacity as a witness" in the plaintiff's *Monell* claim—before that defendant's immunity defense is resolved. *Id.* at 11a-12a. This new rule splits with at least three circuits.

In *In re Flint Water Cases*, 960 F.3d 820 (6th Cir. 2020), the Sixth Circuit rejected the argument that immunity-asserting officers "cannot be deposed on *any* matter pending resolution of their qualified-immunity appeal." *Id.* at 825. The officers in that case had appealed the denial of their qualified-immunity-based motion to dismiss. *Id.* In the meantime, however, the district court allowed plaintiffs to pursue discovery against the officers in their capacity as "non-party fact witnesses" as to claims brought against other defendants who could not assert qualified immunity. *Id.* at 825-826. The Sixth Circuit held that

such discovery should not be stayed. "The 'right to immunity is a right to immunity from *certain claims*, not from litigation in general.' " *Id.* at 826 (quoting *Behrens*, 516 U.S. at 312). Moreover, the court explained, allowing such discovery would "prevent the litigation from stalling out." *Id.* For these reasons, among others, the Sixth Circuit denied the officers' request for a stay. *Id.* at 828.

Likewise, in *District of Columbia* v. *Trump*, 959 F.3d 126 (4th Cir. 2020) (en banc), the Fourth Circuit rejected the argument that "discovery directed at *anyone* in a case in which" an individual defendant asserts immunity "constitutes a denial of immunity." *Id.* at 131 n.4. Plaintiffs brought both individual-capacity claims and official-capacity claims against the President. *Id.* at 128-129. The President moved to dismiss each set of claims in separate motions, asserting absolute immunity in the individual-capacity motion. *Id.* at 129. The district court denied the official-capacity motion and allowed discovery with respect to those claims. *Id.* The court did not rule on the individual-capacity motion or allow discovery as to those claims. *Id.* On appeal, the en banc Fourth Circuit held that allowing such official-capacity discovery did not constitute a denial of immunity. *Id.* at 131 n.4. "Although separating a single public official into multiple legal persons is a legal fiction, it is a fiction we are bound to observe." *Id.* "The discovery ordered here would have proceeded apace, regardless of whether the President in his individual capacity had been dismissed." *Id.* The discovery thus did not effectively deny the President immunity. *Id.*

The First Circuit shares this view. The plaintiff in *Lugo* v. *Alvarado*, 819 F.2d 5 (1st Cir. 1987), asserted

claims for damages and injunctive relief against a government officer. *Id.* at 5. The officer moved for summary judgment, asserting qualified immunity. *Id.* at 6. He also sought a stay of all discovery until immunity was resolved. *Id.* The district court denied the stay, and the First Circuit dismissed the resulting appeal for want of jurisdiction. *Id.* at 8. The appellate court explained that the officer's assertion of immunity applied *only* to the damages claims; the "defense of qualified immunity is totally immaterial" to the claims for injunctive relief. *Id.* at 7. So "[r]egardless of what happens to the damages claim in this case, the equitable requests stand on a different footing." *Id.* Suspending discovery on the injunctive-relief claims would "only delay[ ] the case unnecessarily." *Id.* Concluding that "no valid ground exists for permitting interlocutory appeal from this order," the First Circuit dismissed the appeal. *Id.* at 8.

District courts in the First Circuit continue to apply *Lugo* to deny "broad requests to stay all discovery on the basis that the individual capacity claim may be subject to qualified immunity." *Drewniak* v. *Customs & Border Prot.*, 563 F. Supp. 3d 1, 5 (D.N.H. 2021). District courts in other circuits agree; "[m]ost courts faced with this issue have ruled in favor of allowing discovery to proceed on the claims to which qualified immunity does not apply." *Roth* v. *President & Bd. of Trs. of Ohio Univ.*, No. 2:08-CV-1173, 2009 WL 2579388, at *3 (S.D. Ohio Aug. 18, 2009) (collecting cases); *see also, e.g.*, *Galarza* v. *Szalczyk*, No. CIV.A. 10-6815, 2012 WL 627917, at *1 (E.D. Pa. Feb. 28, 2012); *Mendia* v. *Garcia*, No. 10-CV-03910-MEJ, 2016 WL 3249485, at *5 (N.D. Cal. June 14, 2016).

Had Carswell's claims arisen in any one of these courts, she would have been free to pursue discovery against Respondents in their capacities as non-party fact witnesses in the *Monell* claim against the county, despite Respondents' assertions of immunity. But her claims arose in the Fifth Circuit, and so the assertions of qualified immunity effectively froze the entire case.

B. The Decision Below Is Wrong.

The Fifth Circuit's radical expansion of immunity is unfounded. This Court has explained that "the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense." *Crawford-El* v. *Britton*, 523 U.S. 574, 597 (1998). But "[t]he * * * right to immunity is a right to immunity *from certain claims*, not from litigation in general." *Behrens*, 516 U.S. at 312. Qualified immunity protects officials from "unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-598. Put another way, qualified immunity frees defendants from "the burdens of broad-reaching discovery." *Mitchell*, 472 U.S. at 526 (citation omitted).

Discovery against an immunity-asserting defendant as to a claim where immunity is unavailable is neither "unnecessary" nor "broad-reaching." Such discovery would have "proceeded apace" whether the officer was named as a defendant or not. *Trump*, 959 F.3d at 131 n.4. As the First Circuit explained, "[r]egardless of what happens to the" claim for which immunity is relevant, the other claims "stand on a different footing." *Lugo*, 819 F.2d at 7. And immunity does not protect against "litigation in general." *Behrens*, 516 U.S. at 312.

The Fifth Circuit's contrary rule rests on its misinterpretation of *Iqbal*. The panel highlighted *Iqbal*'s statement that "[i]t is no answer to" concerns about pretrial discovery against officials "to say that discovery" against them "can be deferred while pretrial proceedings continue for other defendants." Pet. App. 11a (quoting *Iqbal*, 556 U.S. at 685-686). This statement was made in the context of rejecting the plaintiff's "invitation to relax the pleading requirements" of Rule 8. *Iqbal*, 556 U.S. at 686. But, as discussed, compliance with Rule 8 and *Iqbal* is a prerequisite for employing the Fifth Circuit's "careful procedure." *See supra* p. 26. *Iqbal* is inapposite.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

1. The decision below will yet further impede recovery for civil-rights plaintiffs. Previously, district courts in the Fifth Circuit could defer deciding on qualified immunity at the motion-to-dismiss stage without triggering an immediate appeal. Now, district courts *must* decide immunity at the motion-to-dismiss stage—even if immunity turns on a question of fact. Allowing immediate appeals from such determinations imposes the same "inconvenience and costs of piecemeal review" this Court warned about in *Johnson*, 515 U.S. at 315, even though none of the rationales identified by this Court for allowing certain interlocutory appeals apply in this context.

The procedural posture compounds this issue. As Judge Easterbrook has observed, "when defendants do assert immunity it is essential to consider facts in addition to those in the complaint." *Jacobs* v. *City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easter-

brook, J., concurring in part and concurring in judgment). Resolving claims of qualified immunity at the motion-to-dismiss stage can thus "present 'special problems for legal decision making' " because district courts have access only to the "skeletal" facts alleged in the complaint. *Sabra* v. *Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 892 (9th Cir. 2022) (citations omitted). Worse, whether qualified "immunity has been established depends on facts peculiarly within the knowledge and control of the defendant." *Gomez* v. *Toledo*, 446 U.S. 635, 641 (1980). Requiring district courts to decide immunity at the motion-to-dismiss stage, even if that defense turns on questions of fact, accordingly requires courts to rule based on a factual record that is both "nonexistent," *Wong* v. *United States*, 373 F.3d 952, 957 (9th Cir. 2004), and beyond plaintiffs' reach. Authorizing an immediate appeal of such a decision "can lead not only to a waste of scarce public and judicial resources, but to the development of legal doctrine that has lost its moorings in the empirical world." *Id.*

Trial courts already possess the "tools," such as narrowly tailored discovery orders, "to preserve the defendant's right to a speedy determination whether he or she must bear the burdens of litigation while at the same time allowing plaintiffs with colorable claims to proceed with their complaints." *Khorrami*, 539 F.3d at 787. The decision below replaces that toolkit with an across-the-board right to an immediate appeal. The result will be "delay, add[ed] costs and diminish[ed] coherence." *Johnson*, 515 U.S. at 309.

There is no corresponding policy justification for allowing immediate appeals from fact-bound deferrals

of immunity at the motion-to-dismiss stage. "[N]o irreparable harm" is "caused by [a] court's scheduling decision" that merely defers, rather than decides, the question of qualified immunity. *Khorrami*, 539 F.3d at 787. Qualified immunity is not "the right to be free from all burdens of litigation, period," but rather "the right to be free at the earliest point at which the court can be sure that the government official's conduct did not violate clearly established statutory or constitutional rights." *Id.* Protracted litigation over a fact-bound interlocutory appeal will thus unfairly delay civil-rights plaintiffs' ability to recover for unconstitutional conduct while relieving defendants from, if anything at all, the limited burden of necessary, narrow discovery. And if, after limited discovery, a court denies a qualified-immunity defense on the merits at the summary-judgment stage, defendants can—and inevitably will—take an interlocutory appeal to prevent the burdens of full discovery. *See* Pet. App. 31a.

2. Making matters worse, the decision below drastically curtails civil-rights plaintiffs' ability to pursue discovery as to claims where immunity is irrelevant.

After the decision below, defendants can use an assertion of qualified immunity to flood the zone. Once a defendant claims immunity, the plaintiff cannot seek discovery against that defendant even as to claims where qualified immunity has not been asserted or is unavailable. *See, e.g.*, *Miller* v. *LeBlanc*, No. CV 21-353-BAJ-RLB, 2022 WL 17490971, at *4-5 (M.D. La. Dec. 7, 2022) (staying all discovery against immunity-asserting defendants, including discovery related to claim against a non-immunity-asserting defendant). Indeed, courts have applied the decision below to bar plaintiffs from pursuing discovery even

against municipal defendants, who are not entitled to qualified immunity. *See, e.g.*, *Belknap* v. *Leon Cnty.*, No. 6:22-cv-01028, Order, Dkt. 28, at 2 (W.D. Tex. Dec. 15, 2022) (staying "*Monell* discovery against *Monell* defendants"); *Chavez* v. *Jefferson Cnty.*, No. 1:22-cv-00257, First Amended Scheduling Order, Dkt. 102, at 1 (E.D. Tex. Dec. 9, 2022) ("The parties may not commence discovery until the Court's resolution of pending motions to dismiss claiming qualified immunity."). The Eastern District of Texas has even amended its local rules after the decision below. Striking its prior rule that "Parties asserting the defense of qualified immunity may submit a motion to limit discovery to those materials necessary to decide the issue of qualified immunity," and citing the panel opinion, the court now directs that "*[e]xcept in cases involving qualified immunity or* a court order to the contrary, a party is not excused from responding to discovery because there are pending motions to dismiss." U.S. Dist. Ct., E.D. Tex., Gen. Order 22-08, at 3 (Nov. 7, 2022) (new language in italics).

Staying all discovery in a case because one defendant asserted qualified immunity will only further delay judicial proceedings and impede the pursuit of accountability. Even if an individual defendant may be entitled to qualified immunity for his personal conduct, he will often be a critical fact witness as to a plaintiff's *Monell* claim. And staying *all* discovery—even against *Monell* defendants—increases the likelihood that key pieces of evidence become stale or disappear during the time it takes for an assertion of immunity to be finally resolved. Qualified immunity has come far indeed.

3. The decision below is the latest in a line of Fifth Circuit decisions refusing to heed this Court's directives in qualified-immunity cases and inventing new hurdles to the pursuit of justice. *See McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021); *Taylor* v. *Riojas*, 141 S. Ct. 52 (2020); *Ramirez* v. *Guadarrama*, 142 S. Ct. 2571 (2022) (Sotomayor, J., dissenting from the denial of certiorari); *Cope* v. *Cogdill*, 142 S. Ct. 2573 (2022) (Sotomayor, J., dissenting from the denial of certiorari). The result: another "mother seeking some measure of recompense for the tragic and unnecessary death of her son," *Cope*, 142 S. Ct. at 2576 (Sotomayor, J., dissenting from the denial of certiorari), is left with none.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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