No. 22-959

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

RESPONSE OF GEORGE A. CAMP; JANA R. CAMPBELL; HELEN M. LANDERS; KENNETH R. MARRIOTT; KOLBEE A. PERDUE; TERI J. ROBINSON; VI N. WELLS; SCOTTY D. YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Court should deny the petition for writ of certiorari because the Fifth Circuit's opinion in *Carswell* comports with long-established precedent from this Court and because no meaningful split exists among the circuit courts of appeals on the issues addressed in *Carswell*.

After refusing to determine whether Petitioner's complaint sufficiently pled claims to defeat each of the individual Defendants' assertions of qualified immunity made in their motions to dismiss, the district court in *Carswell* subjected the individual Defendants to significant burdens of litigation. The Fifth Circuit properly held that this order was immediately appealable and that Petitioner was not entitled to any discovery.

Petitioner's arguments concerning appealability of the district court order and the importance of the issues presented are meritless because they are based on misrepresentations about the *Carswell* case. Petitioner wrongly contends the Fifth Circuit's opinion improperly restricts district courts' conduct when resolution of an assertion of qualified immunity turns on a question of fact. However, the district court order at issue in *Carswell* did not even suggest that the Defendants' entitlement to qualified immunity turns on any fact question. To the contrary, resolution of the Defendants' motions to dismiss, in which they asserted qualified immunity, presents only pure questions of law. For

this reason, the *Carswell* opinion aligns with precedent from this Court and all circuit courts of appeals.

Petitioner's arguments concerning limitations on discovery pending resolution of an assertion of qualified immunity are similarly flawed, because Petitioner disregards the fact that the district court has not yet made the threshold determination which is necessary to open the doors of discovery. The Fifth Circuit's opinion faithfully applies this Court's precedent concerning: (1) the importance of resolving qualified immunity at the earliest possible stage of litigation; (2) prohibitions of discovery at certain phases of litigation; and (3) restrictions on discovery when qualified immunity is at issue. The *Carswell* opinion accords with cases from all circuit courts.

BACKGROUND

Petitioner's live complaint contains 162 paragraphs, many of which include multiple sub-parts, photographs, charts, and/or lengthy quotes from purported witness statements. Pet. App. 53a-154a. Petitioner's complaint is largely a disorganized regurgitation of information Petitioner appears to have obtained via public information requests before she filed suit against eight individuals and the county for which they work. The individual Defendants filed motions to dismiss this complaint in which they asserted their entitlement to qualified immunity. Pet. App. 3a.

Rather than analyze Petitioner's complaint to determine whether she had pled sufficiently to defeat each Defendant's entitlement to qualified immunity, the district court summarily denied the motions and ordered each individual Defendant to answer Petitioner's lengthy and convoluted complaint. Pet. App. 43a-48a. The district court did not find that the Defendants' entitlement to qualified immunity turned on any question of fact, nor did the court indicate any need for factual development to enable it to evaluate the Defendants' assertions of qualified immunity. *Id*. Instead, the district court simply refused to engage substantively with the individual Defendants' assertions of qualified immunity unless and until they filed motions for summary judgment, and the court forbade the individual Defendants from asserting qualified immunity in any other motion without leave of court. Pet. App. 44a-45a. In addition to requiring the individual Defendants to address all 162 paragraphs in Petitioner's complaint, the district court also subjected them to unlimited discovery in their roles as witnesses to Petitioner's related claim against Hunt County.[1] *Id*. Petitioner noticed depositions for all eight individual Defendants, and the district court refused to stay this discovery. Pet. App. 4a-5a.[2]

[1] The district court has not yet decided Hunt County's motion to dismiss Petitioner's complaint. ROA.313-44; ROA.5-10.

[2] The Fifth Circuit subsequently stayed discovery. Pet. App. 5a.

REASONS TO DENY THE PETITION

The Court should deny the petition because the *Carswell* opinion does not squarely present the issues on which Petitioner seeks review, the Fifth Circuit's opinion comports with this Court's precedent, and no meaningful circuit court split exists with respect to the issues addressed in *Carswell*.

1. Petitioner's First Question Presented.

Petitioner asks this Court to decide "[w]hether a district court can defer ruling on qualified immunity at the motion-to-dismiss stage without triggering an immediate appeal." Pet. at i.

The Court should deny the petition as to this Question Presented because: (1) this case does not squarely present this issue; (2) the circuit courts of appeals are in agreement on the issue as it relates to the circumstances in *Carswell*; and (3) the Fifth Circuit's opinion follows this Court's precedent.

A. This Case Does Not Squarely Present This Issue.

The district court in *Carswell* did not defer ruling on the individual Defendants' motions to dismiss. Instead, the judge summarily denied these motions, refused to address Defendants' assertions of qualified immunity made in their motions to dismiss, and permitted Defendants to pursue qualified immunity only

through motions for summary judgment. Pet. App. 44a-45a.

The Fifth Circuit characterized the district court's order as both a summary denial of the individual Defendants' motions to dismiss and a refusal to rule on an assertion of qualified immunity at the earliest possible stage of the litigation. Pet. App. 2a, 3a, 5a-6a, 11a. The Fifth Circuit held that the district court's order was immediately appealable under the collateral order doctrine and multiple Fifth Circuit opinions because: (1) orders declining or refusing to rule on a motion to dismiss based on immunity are tantamount to orders denying immunity; and (2) a defendant's entitlement to qualified immunity must be determined at the earliest possible stage of the litigation. Pet. App. 5a-6a. This is consistent not only with this Court's reasoning in *Mitchell*[3] and *Iqbal*,[4] but also with holdings of all circuit courts of appeals. This case is, therefore, an inappropriate vehicle for addressing Petitioner's first Question Presented, and the Court should deny the petition.

B. In the Circumstances of This Case, Circuit Courts are in Accord on the Issue.

This Court held long ago not only that orders denying pre-trial claims of immunity are immediately appealable, but also that "[u]nless the plaintiff's allegations state a claim of violation of clearly established

[3] *Mitchell v. Forsyth*, 472 U.S. 511, 526-30 (1985).

[4] *Ashcroft v. Iqbal*, 556 U.S. 662, 672, 675 (2009).

law, a defendant pleading qualified immunity is **entitled to dismissal** before the commencement of discovery." *Mitchell*, 472 U.S. at 526 (emphasis added).

The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Eleventh and District of Columbia Circuit Courts of Appeals understand this holding in *Mitchell* to apply equally to district court orders which, like the order at issue in *Carswell*, disregard or refuse to address pre-trial immunity claims, because such a refusal effectively denies the defendant the benefits of qualified immunity. *E.g.*, *Valiente v. Rivera*, 966 F.2d 21, 22-23 (1st Cir. 1992) (per curiam) (court's refusal to consider a pre-trial immunity claim is immediately appealable); *see also Zayas-Green v. Casaine*, 906 F.2d 18, 23 (1st Cir. 1990) ("Without question, defendants had . . . a right to appeal from the district court's announced refusal to entertain any further pretrial motions raising the qualified immunity defense."); *Ford v. Moore*, 237 F.3d 156, 161-62 (2d Cir. 2001) (exercising appellate jurisdiction when district court did not consider qualified immunity); *Musso v. Hourigan*, 836 F.2d 736, 741 (2d Cir. 1988) (immediate appeal is available when district court fails to address qualified immunity); *Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir. 1988) (per curiam) (same); *In re Montgomery County*, 215 F.3d 367, 374 (3d Cir. 2000) (same); *see also Roth v. City of Hermitage*, 709 Fed. App'x 733, 735-36 (3d Cir. 2017) (relying on *Crawford-El v. Britton*, 523 U.S. 574, 597-98 (1998) to hold that district court was required to rule on qualified immunity); *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc) (district

court's refusal to consider qualified immunity in a motion to dismiss was immediately appealable); *Nero v. Mosby*, 890 F.3d 106, 125 (4th Cir. 2018) (same); *Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (per curiam) (refusal to rule on a motion asserting qualified immunity is immediately appealable); *Myers v. City of Centerville, Ohio*, 41 F.4th 746, 756-57 (6th Cir. 2022) (an order refusing to rule on qualified immunity until summary judgment is immediately appealable); *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526-27 (6th Cir. 2002) (district court's failure to rule on a motion asserting qualified immunity is immediately appealable); *Payne v. Britten*, 749 F.3d 697, 700-01 (8th Cir. 2014) (permitting immediate appeals from a failure or refusal to rule on qualified immunity); *see also Carter v. Ludwick*, No. 21-3510, 2022 WL 16707933, *1 (8th Cir. Nov. 4, 2022) (per curiam) (requiring district court to address assertion of qualified immunity in motion to dismiss); *Howe v. City of Enter.*, 861 F.3d 1300, 1301-03 (11th Cir. 2017) (per curiam) (exercising jurisdiction when district court required defendants to confer about a discovery plan while reserving a ruling on their motion to dismiss asserting qualified immunity); *Bouchard Transp. Co. v. Florida Dep't of Envtl. Prot.*, 91 F.3d 1445, 1447-48 (11th Cir. 1996) (per curiam) (exercising jurisdiction when district court refused to rule on immunity and ordered parties to mediate); *Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 581-82 (D.C. Cir. 2020) (order refusing to rule on immunity in a motion to dismiss was appealable because the effect of the order was to deny the protections of immunity) (citing *Zapata v.*

Melson, 750 F.3d 481, 484 (5th Cir. 2014) and *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992)).

Petitioner mistakenly claims that the Ninth and Tenth Circuits are in conflict with the Fifth Circuit with respect to Petitioner's first Question Presented. Pet. at 12-15. In reality, these courts expressly agree with their sister circuits on this issue. *Denby v. Lujan*, 798 Fed. App'x 1001, 1002 (9th Cir. 2020) (exercising jurisdiction and requiring district court to rule on qualified immunity asserted in motion to dismiss); *Alto v. Black*, 738 F.3d 1111, 1130 (9th Cir. 2013) (noting that a district court's refusal to rule on a motion to dismiss based on an assertion of immunity would be subject to interlocutory appeal); *Lowe v. Town of Fairland, Okla.*, 143 F.3d 1378, 1380 (10th Cir. 1998) ("Regardless of whether a district court merely postpones its ruling or simply does not rule on the qualified immunity defense, if we deny appellate review, a defendant loses the right not to stand trial. . . . Accordingly, we may properly exercise jurisdiction over this appeal.") (citing *Workman*, 958 F.2d at 336); *see also Dyer v. Rabon*, 212 Fed. App'x 714, 716 (10th Cir. 2006) ("a district court's postponement of or failure to rule on a qualified immunity defense is immediately appealable").

Contrary to Petitioner's contention,[5] the Seventh Circuit is not meaningfully in conflict, because the case on which Petitioner relies, *Khorrami v. Rolince*, 539 F.3d 782 (7th Cir. 2008), addresses a different

[5] Pet. at 12-13.

circumstance—interlocutory appellate jurisdiction when immunity turns on a fact question. *Infra* at 16-19.

More recently, the Seventh Circuit has cited with approval Sixth Circuit cases exercising jurisdiction over interlocutory appeals challenging a district court's refusal to address the merits of a motion asserting qualified immunity. *Chasensky v. Walker*, 740 F.3d 1088, 1095 (7th Cir. 2014) (quoting *Smith v. Leis*, 407 Fed. App'x 918, 927 (6th Cir. 2011) and *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004) for the proposition that a "'district court's refusal to address the merits of [a] motion asserting qualified immunity constitutes a conclusive determination for the purposes of allowing an interlocutory appeal'"). Indeed, when a district court denied a motion to dismiss without adjudicating an immunity defense, the Seventh Circuit exercised interlocutory appellate jurisdiction and found *Khorrami* distinguishable. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 668 (7th Cir. 2012). The Seventh Circuit also exercised interlocutory appellate jurisdiction over a discovery order which "effectively" rejected a claim of immunity. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 790 (7th Cir. 2011). This, too, falls in line with the Fifth Circuit's holding in *Carswell*, in which the district court effectively rejected Defendants' immunity by subjecting them to discovery on a claim against their employer before determining whether any claim was sufficiently pled. Pet. App. 4a-6a, 44a.

With respect to the situation at issue in *Carswell*, the circuit courts are uniformly in agreement that a district court order disregarding or refusing to rule on an assertion of qualified immunity is immediately appealable. This Court's review of *Carswell* is unnecessary.

2. Petitioner's Gloss on her First Question Presented.

Notwithstanding the broad wording of her first Question Presented, Petitioner argues that "[n]ine 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." Pet. at 12 (emphasis added).

A. This Case Does Not Squarely Present This Issue.

This case does not squarely present this issue because the district court in *Carswell* did not defer ruling on immunity at the motion to dismiss stage **because immunity turned on a question of fact**. The district court gave no indication that immunity turned on a question of fact. Instead, the court simply refused to permit the Defendants to assert qualified immunity in a motion to dismiss and required **the parties** to confer regarding "whether discovery is needed for the Court to assess the assertion of qualified immunity" which the district court permitted the Defendants to pursue

only by means of motions for summary judgment. Pet. App. 44a-45a.

Indeed, the district court characterized its order as requiring "any defendant wanting to assert QI to do so by answer, rather than by motion to dismiss" and "[i]f defendants believe QI can be resolved based on the pleadings, there is a deadline for filing a motion for summary judgment on that basis." Pet. App. 4a. Thus, the district court did not find that immunity turned on any question of fact.

The Fifth Circuit perceived no fact question underlying the district court's order. Instead, the Fifth Circuit defined the question presented in *Carswell* as "whether a district court can deny a motion to dismiss based on qualified immunity through a boilerplate scheduling order. We say no." Pet. App. 2a.

B. No Circuit Court Split Justifies This Court's Review of This Issue.

Petitioner's arguments concerning a circuit split are based on an apples-to-oranges comparison in which Petitioner conflates qualified immunity decisions which are precluded by questions of fact with qualified immunity decisions which turn on issues of law. Pet. at 12-19. When, as in the case at bar, a district court simply refuses to engage substantively with a pre-trial assertion of qualified immunity without identifying any relevant fact question, the circuit courts are in accord that interlocutory appellate jurisdiction exists. *Supra* at 6-10.

i. The Tenth Circuit.

Petitioner's error in conflating disparate qualified immunity analyses is demonstrated by the Tenth Circuit case on which she relies to argue for a circuit split. Pet. at 14-15 (citing *Workman*, 958 F.2d at 334, 336). *Workman* agrees with the Fifth Circuit's long-held position that appellate jurisdiction exists when a district court declines to engage substantively with an assertion of qualified immunity without identifying any relevant fact question.

In *Workman*, the district court, without explanation, entered orders postponing until trial a decision on the defendants' motions to dismiss based on qualified immunity. *Workman*, 958 F.2d at 333-34. The Tenth Circuit, relying on a Fifth Circuit opinion from 1986, held that it had jurisdiction over appeals from orders postponing a decision on a motion to dismiss asserting qualified immunity. *Id*. at 335-36 (relying on *Helton*, 787 F.2d at 1017). Like the Fifth Circuit in *Helton*, the Tenth Circuit in *Workman* reviewed the reasoning this Court followed in *Mitchell* to find that appellate jurisdiction exists over an order denying a motion to dismiss asserting qualified immunity. Both circuit courts found this Court's reasoning in *Mitchell* equally applicable to district court orders postponing ruling on such a motion. *Id*. at 334-36 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) and *Mitchell*, 472 U.S. at 525-30). In either case, the district court orders subject defendants to the burdens of litigation and, therefore, conclusively deny the benefits of qualified immunity at the initial stage of litigation.

Petitioner relies on a statement in *Workman* construing a prior decision, *Maxey v. Fulton*, 890 F.2d 279, 282-83 (10th Cir. 1989), which addressed a different situation. Pet. at 14-15 (citing *Workman*, 958 F.2d at 336). Petitioner's reliance is misplaced. In *Maxey*, the Tenth Circuit found that it lacked jurisdiction to review a district court order which delayed determination of a **motion for summary judgment** asserting qualified immunity, pending discovery on fact issues raised by that motion. *Maxey*, 890 F.2d at 282. In *Maxey*, the district court had previously denied the defendant's motion to dismiss asserting qualified immunity, because the plaintiff adequately pled a violation of clearly established law. *Id*. at 283. *Maxey*'s different procedural posture explains its different outcome, as the Tenth Circuit held that "[b]y choosing not to appeal the district court's denial of the motion to dismiss, [the defendant] waived his right to object to discovery limited to the issue of his fact-specific qualified immunity claim" in connection with his motion for summary judgment. *Id*. The Tenth Circuit's holding under the situation presented in *Maxey* does not contradict the Fifth Circuit's holding in *Carswell*, which arose under the meaningfully different circumstance of a district court's refusal to address qualified immunity in a motion to dismiss based purely on a question of law.

Workman anticipated this Court's subsequent distinction in *Johnson* between situations in which the qualified immunity analysis turns on a question of law and is, therefore, immediately appealable, and

circumstances in which the qualified immunity analysis depends upon a disputed issue of fact, in which case it is not immediately appealable. *Cf. Mitchell*, 472 U.S. at 526-30 (involving a motion to dismiss); *Johnson v. Jones*, 515 U.S. 304, 313-16 (1995) (involving a motion for summary judgment); *Iqbal*, 566 U.S. at 673-75 (explaining that *Johnson* does not apply to motions to dismiss). The Fifth and Tenth Circuits agree that, for the reasons this Court explained in *Mitchell*, appellate courts have jurisdiction to review district court orders postponing a decision on qualified immunity which turns on the legal question of whether plaintiffs' allegations are sufficient to show a violation of clearly established law and, therefore, to defeat defendants' qualified immunity.

Indeed, in opinions issued after *Johnson*, the Tenth Circuit expressly held that orders failing or refusing to consider qualified immunity are immediately appealable. *Dyer*, 212 Fed. App'x at 716; *Lowe*, 143 F.3d at 1380. No conflict exists between the *Carswell* decision and the Tenth Circuit's position.

ii. The Ninth Circuit.

Miller v. Gammie is also insufficient to establish a circuit split because, unlike *Carswell*, *Miller* involved immunity analysis that turned on a fact question. Pet. at 13-14 (citing *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc)). In *Miller*, the Ninth Circuit decided that it lacked jurisdiction to review a district court order holding that, without factual development,

it could not determine whether the defendant was entitled to absolute immunity. *Miller*, 335 F.3d at 894. The Ninth Circuit issued a narrow ruling 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*. at 894. The court found that such an order is not conclusive and did not categorically deny the motion to dismiss. *Id*. at 894-95.

By contrast, the district court in *Carswell* did not defer ruling on immunity in order to ascertain any fact issue. To the contrary, it: (1) summarily denied Defendants' motions to dismiss; (2) subjected the qualified immunity-asserting Defendants to unlimited discovery on a related claim against their employer; (3) did not identify any factual development necessary to determine the Defendants' entitlement to qualified immunity; and (4) left it to **the parties** to confer regarding whether discovery was needed to enable the court to assess any assertions of immunity which the court permitted to be made only in subsequent motions for summary judgment. Pet. App. 4a-5a, 44a-45a. Because *Miller* addressed a different question than *Carswell, Miller* does not establish a split between the Ninth and Fifth Circuits.

Indeed, as to the question raised in *Carswell*, the Ninth Circuit is in accord with the Fifth Circuit's position. In *Denby v. Lujan*, the Ninth Circuit determined that it had interlocutory appellate jurisdiction when a district court refused to engage substantively with defendants' assertion of qualified immunity made in

motions to dismiss. *Denby*, 798 Fed. App'x at 1002.[6] The appellate court remanded the matter to the district court with directions to examine the specific allegations against each of the thirteen defendants to determine whether dismissal based on qualified immunity might be proper as to each defendant. *Id*. This is also what the Fifth Circuit required of the district court in *Carswell*, after the district judge refused to review Petitioner's allegations to determine whether each of the eight individual Defendants might be entitled to dismissal based on qualified immunity. Pet. App. 27a-28a. Further proceedings in *Denby* manifested the wisdom of this approach because, when required to engage with the complaint's allegations on remand, the district judge granted qualified immunity to eight of the thirteen defendants, thereby efficiently implementing the central protection of qualified immunity for those eight defendants and preserving judicial resources by narrowing the remaining issues in the lawsuit. *Denby v. Engstrom*, No. 20-16319, 2021 WL 2885846, *1 (9th Cir. July 9, 2021).

iii. The Seventh Circuit.

Petitioner's reliance on *Khorrami* is similarly misplaced because it is also based on an inapposite comparison. Pet. at 12-13 (citing *Khorrami*, 539 F.3d at 786-87).

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[6] *See also Alto*, 738 F.3d at 1130 (a district court's refusal to rule on a motion to dismiss based on an assertion of immunity would be subject to interlocutory appeal).

In *Khorrami*, the district court found that: (1) the plaintiff sufficiently pled a procedural due process claim;[7] and (2) to determine the defendant's entitlement to qualified immunity "it is essential to consider facts in addition to those in the complaint." *Id.* at 1074. The Seventh Circuit recognized that the plaintiff's allegations were sufficiently plausible "that we can conclude that he properly alleged a violation of clearly established law." *Khorrami*, 539 F.3d at 790. The appellate court further explained that defendant's qualified immunity defense "depends entirely on facts that have not yet been explored." *Id*. at 787. In this context, the Seventh Circuit found that it lacked appellate jurisdiction. *Id*. at 790.

Petitioner notes that the *Khorrami* decision relies on *Johnson*, which addressed appealability of a qualified immunity decision based on a fact question at the summary judgment stage. Pet. at 13 (citing *Khorrami*, 539 F.3d at 787); *Johnson*, 515 U.S. at 316. It is consistent for courts to find qualified immunity decisions immediately appealable when they turn on questions of law but non-appealable when they turn on questions of fact. *Iqbal*, 566 U.S. at 673-75. The Seventh Circuit recognizes this distinction and acknowledges that "the existence of qualified immunity is not always dependent on factual development—it is sometimes clear on the face of the complaint that the constitutional right invoked was not clearly articulated in the case law" in which case qualified immunity is a purely legal

[7] *Khorrami v. Rolince*, 493 F. Supp.2d 1061, 1072-73 (N.D. Ill. 2007).

question. *Doe v. Purdue Univ.*, 928 F.3d 652, 665 (7th Cir. 2019). Indeed, the Seventh Circuit has long recognized interlocutory appellate jurisdiction when qualified immunity turns on a pure legal issue. *Harer v. Casey*, 962 F.3d 299, 305 (7th Cir. 2020) (citing *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998)).

When, as in the case at bar, no fact question is involved, the Seventh Circuit's position is in accord with the Fifth Circuit's position in *Carswell*. The Seventh Circuit recognizes that, "before discovery begins, a defendant asserting qualified immunity is **entitled to dismissal** if the allegations in the complaint fail to state a claim of a clearly established right having been violated." *Hanson v. LeVan*, 967 F.3d 584, 591 (7th Cir. 2020) (emphasis added) (citing *Mitchell*, 472 U.S. at 526). In *Carswell*, the Fifth Circuit made this precise point. Pet. App. 10a (quoting *Mitchell*, 472 U.S. at 526).

Because *Khorrami* involves fact questions concerning the entitlement to qualified immunity, it is meaningfully distinguishable from *Carswell* and does not signify a split between the Seventh and Fifth Circuits. At most, *Khorrami* is a distinguishable, isolated case which has little current impact.[8] This Court should not devote its limited resources to addressing any analytical differences between *Khorrami* and

[8] The Seventh Circuit has not cited *Khorrami* for the proposition on which Petitioner relies since 2010, when, in *Mercado v. Dart*, 604 F.3d 360, 362-63 (7th Cir. 2010), the circuit court rejected the notion that a mid-trial motion for judgment as a matter of law was immediately appealable—a situation wholly different from the case at bar.

Carswell, particularly when other Seventh Circuit opinions demonstrate agreement with all other circuit courts on the issue Petitioner identifies in her first Question Presented. *Supra* at 6-10.

iv. Petitioner Misrepresents the Fifth Circuit's Holding.

Central to Petitioner's contention that a circuit split exists is her mistaken representation that, in *Carswell*, the Fifth Circuit held that if a district court denies a motion to dismiss asserting qualified immunity, the defendant can immediately appeal that decision, "even if that denial turns on the need for further factual development." Pet. at 19 (purporting to rely upon Pet. App. 6a).[9] This is incorrect.

Instead, the Fifth Circuit explained that, in response to a motion to dismiss asserting qualified immunity, district courts must determine whether plaintiffs have pled factual allegations sufficient to overcome the defendant's qualified immunity. Pet. App. 9a. If a plaintiff has not done so, "the district court *must* grant the motion to dismiss without the benefit of pre-dismissal discovery." *Id*. (emphasis in original). If the district court finds the complaint sufficient and denies the motion to dismiss, the district court's order

[9] The second and third quotations from the *Carswell* opinion which appear in the only full paragraph on page 19 of the petition are actually from Pet. App. 9a, not 6a. Petitioner's phrase "even if that denial turns on the need for further factual development" does not appear in the Fifth Circuit's opinion.

is appealable under the collateral order doctrine. *Id.* (citing *Mitchell*, 472 U.S. at 526-27). Only after the district court has made the threshold legal determination[10] that the allegations in the complaint are sufficient to defeat a defendant's assertion of qualified immunity does an inquiry into the actual facts, and any dispute relating to the facts, become relevant to the qualified immunity determination. *Id.*

The district judge in *Carswell* neither made this threshold determination nor identified any need for further factual development to decide the Defendants' assertions of qualified immunity. Pet. App. 44a-45a. For these reasons, arguments based on purported factual disputes concerning qualified immunity or a need for further factual development do not identify a split among the circuit courts and do not justify this Court's review of the Fifth Circuit's opinion in *Carswell*.

C. The Fifth Circuit's Opinion Follows This Court's Precedent.

Petitioner's assessment of this Court's relevant precedent is mistaken because she: (1) disregards distinctions between orders on motions for summary judgment based on disputes of fact and orders on motions to dismiss based on purely legal issues; and (2)

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[10] *See, e.g.*, *Iqbal*, 556 U.S. at 672-75 (determining whether a complaint pleads facts to establish a violation of clearly established law is not a question of fact); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (determining whether the plaintiff has asserted a violation of a clearly established constitutional right is a purely legal question).

misrepresents the Fifth Circuit's opinion in *Carswell*. Pet. at 20-26.

Petitioner relies primarily on *Johnson*, 515 U.S. at 307, 313-17, which addressed the appealability of a summary judgment order denying qualified immunity due to a genuine issue of material fact. *Id*. at 313. In *Iqbal*, this Court rejected the precise arguments Petitioner makes[11] when it explained why *Johnson* does not apply to orders on motions to dismiss,[12] noting that "[t]he concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings." *Iqbal*, 566 U.S. at 674. Instead, under *Mitchell* and *Cohen*, an order denying qualified immunity which turns on an issue of law is immediately appealable because qualified immunity is an entitlement not to face burdens of litigation. *Id*. at 671-72 (citing *Mitchell*, 472 U.S. at 526-30 and *Cohen*, 337 U.S. at 546). The *Iqbal* court concluded that "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here." *Id*. at 674-75;[13] *see also Plumhoff v. Rickard*, 572 U.S. 765, 772-73 (2014) (appellate jurisdiction exists to determine the legal question of whether official's conduct violated clearly

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[11] Pet. at 21, 23-24.

[12] *Iqbal*, 566 U.S. at 673-75.

[13] Petitioner's attempt to distinguish *Iqbal* on this point is meritless as she disregards the portions of *Iqbal* that address interlocutory appellate jurisdiction. *Cf. Iqbal*, 566 U.S. at 673-75; Pet. at 25-26 (citing *Iqbal*, 566 U.S. at 675-86).

established law); *Siegert*, 500 U.S. at 232 (determining whether the plaintiff has asserted a violation of a clearly established constitutional right is a purely legal question).

In *Carswell*, the Fifth Circuit properly applied this same reasoning to an order which summarily denied the individual Defendants' motions to dismiss while refusing to engage substantively with their assertions of qualified immunity. Pet. App. 5a-6a, 8a-9a, 44a-45a. Inasmuch as the district court denied Defendants' motions to dismiss based on qualified immunity,[14] the Fifth Circuit's holding arose directly from *Mitchell* and *Iqbal*. Insofar as the district court refused to decide Defendants' entitlement to qualified immunity in connection with their motions to dismiss,[15] the Fifth Circuit's holding arose directly from this Court's reasoning in *Mitchell* and *Pearson*. Pet. App. 9a ("The rule is that 'a defendant's entitlement to qualified immunity should be determined at the earliest possible stage of the litigation'—full stop.") (quoting *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (per curiam), citing *Mitchell*, 472 U.S. at 526-27); *see also Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) ("we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation) (citing *Mitchell*, 472 U.S. at 526); Pet. App. 10a-11a (citing *Mitchell*, 472 U.S. at 526 and *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009)).

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[14] Pet. App. 2a, 3a, 44a.

[15] Pet. App. 6a, 11a.

In her attempt to bring this case within the ambit of *Johnson*, Petitioner misrepresents the Fifth Circuit's *Carswell* opinion. Petitioner mistakenly contends that the district court's order recognizes that further factual development is necessary to ascertain the availability of qualified immunity and that the district judge did not order discovery. Pet. at 22, 25. In reality, the district court did not find that Defendants' entitlement to qualified immunity turned on any question of fact, nor did the court indicate any need for factual development to enable it to evaluate the Defendants' assertions of qualified immunity. Without even attempting to determine whether Petitioner pled sufficiently to defeat each Defendant's entitlement to qualified immunity, the district court subjected Defendants to significant litigation burdens, including answering Petitioner's 162-paragraph complaint and participating in broad-ranging discovery on Petitioner's related claim against their employer.[16] *Supra* at 2-3; Pet. App. 44a-45a. This directly violates the "driving force" behind qualified immunity—resolution of insubstantial claims prior to discovery. *Pearson*, 555 U.S. at 231-32 ("we have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery . . . Accordingly, 'we repeatedly have stressed the importance of resolving immunity questions at the

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[16] Indeed, Petitioner noticed depositions of all individual Defendants, and the district court refused to stay such discovery. Pet. App. 4a-5a.

earliest possible stage in litigation.' ") (quoting *Anderson*, 483 U.S. at 640, n.2 and *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)); Pet. App. 10a-11a.

The Fifth Circuit's decision that the district court's order refusing to address the Defendants' assertions of qualified immunity made in their motions to dismiss is appealable accords with precedent from this Court and all circuit courts. The Court should deny review of Petitioner's first Question Presented.

3. Petitioner's Second Question Presented.

Petitioner asks this Court to decide "[w]hether 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." Pet. at i.

A. The Fifth Circuit's Holding on Discovery Aligns with Relevant Precedent.

The Court should not expend its limited resources in reviewing the *Carswell* decision because the Fifth Circuit's holding on discovery aligns with long-established precedent from this Court as well as cases from all circuit courts of appeals.

i. This Court's Relevant Precedent.

In 1982, this Court explained that, when qualified immunity is at issue, discovery should not be allowed

until the threshold question of whether the relevant law was clearly established at the time of the event has been resolved. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In 1985, this Court declared that "[u]nless 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.

In 1987, this Court, emphasizing that "qualified immunity questions should be resolved at the earliest possible stage of the litigation," remanded a case with instructions that the lower court first determine the threshold immunity question, noting that, if the actions the plaintiffs allege the officer to have taken are actions that a reasonable officer could have believed lawful, then the officer "is entitled to dismissal prior to discovery." *Anderson*, 483 U.S. at 646, n.6. This Court noted that, should a plaintiff overcome the threshold immunity question, discovery may be necessary before a court could resolve a motion for summary judgment asserting qualified immunity, but "any such discovery should be tailored specifically to the question of [the defendant's] qualified immunity." *Id*.

In 1991, this Court further developed its holding in *Harlow* concerning threshold immunity questions that need to be addressed before any discovery takes place, explaining that a "necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time

the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232. Deciding this "purely legal question permits courts expeditiously to weed out suits which fail the test" without subjecting officials to the burdens of litigation. *Id*.

In 1998, this Court reiterated its holding that district courts should resolve threshold qualified immunity questions before permitting discovery and that, to do so, "the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law." *Crawford-El*, 523 U.S. at 598 (citing *Harlow*, 457 U.S. at 818). Before resolving the threshold immunity question, and "prior to permitting any discovery at all," a district court may require a plaintiff to file a reply under FED. R. CIV. P. 7(a) because this option places no burden on the defendant-official. *Id*. If the plaintiff's action survives these initial hurdles, "the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense . . . since that defense should be resolved as early as possible." *Id*. at 598, 600 (citing *Anderson*, 483 U.S. at 646, n.6).

In 2009, despite acknowledging that the precise factual basis for plaintiffs' claims may be hard to identify when qualified immunity is asserted at the pleading stage,[17] this Court stressed that "the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against

[17] *Pearson*, 555 U.S. at 238–39.

government officials will be resolved prior to discovery." *Pearson*, 555 U.S. at 231 (quoting *Anderson*, 483 U.S. at 640, n.2) (cleaned up).

Also in 2009, this Court once again stated that the "basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 556 U.S. at 685 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring)). This Court expressly rejected the proposition that an appellate court could properly instruct a district court to "cabin discovery in such way as to preserve [officials'] defense of qualified immunity as much as possible in anticipation of a summary judgment motion," noting that "[o]ur 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 684-85 (citation omitted). This 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.

Id. at 685-86. Because the plaintiff's complaint was deficient, he was "not entitled to discovery, cabined or otherwise." *Id*. at 686.[18]

ii. *Carswell*'s Discovery Holding Follows This Precedent.

The Fifth Circuit expressly relied on *Iqbal* in prohibiting the district court from permitting any "discovery—'cabined or otherwise'—against immunity-asserting defendants before it has determined plaintiffs have pleaded facts sufficient to overcome the defense." Pet. App. 9a (quoting *Iqbal*, 556 U.S. at 686); *see also* Pet. App. 11a-12a (citing *Iqbal*, 556 U.S. at 685-86). The Fifth Circuit's holding that "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"

[18] It is difficult to follow Petitioner's reasoning insofar as she attempts to distinguish *Iqbal* on the basis that *Iqbal* concerned questions relating to pleading standards in federal court. Pet. at 25-26, 31. Like *Carswell*, *Iqbal* involved a motion to dismiss a complaint for insufficient pleadings made by defendants claiming entitlement to immunity. Pet. App. 3a; *Iqbal*, 556 U.S. at 684-85. *Iqbal* directly addressed the question of whether a lower court could permit discovery if the plaintiffs had not sufficiently pled claims against defendants who asserted their entitlement to immunity. *Iqbal*, 556 U.S. at 684-86. Recognizing 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," *Iqbal* prohibited all discovery from proceeding under such circumstances. *Id*. at 684-85, 686. This holding is directly applicable to, and binding on, the lower courts' analysis in *Carswell*.

arises directly from this Court's holdings stretching back four decades. Pet. App. 9a (emphasis in original); *Iqbal*, 556 U.S. at 686 (permitting no discovery because the complaint was deficient); *Crawford-El*, 523 U.S. at 598 (before permitting discovery, the district court "must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law"); *Anderson*, 483 U.S. at 646, n.6 (if alleged actions are ones which a reasonable officer could have believed lawful, the officer "is entitled to dismissal prior to discovery"); *Mitchell*, 472 U.S. at 526 ("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."); *Harlow*, 457 U.S. at 818 (no discovery until court determines the threshold question of whether the relevant law was clearly established).

The Fifth Circuit further explained that the qualified immunity determination need not be made once-and-for-all at the motion to dismiss stage. If the district court first finds the pleadings are sufficient to overcome this threshold question, the district court should deny the motion to dismiss. At that point, the court may permit discovery narrowly tailored to enable it to determine at the earliest opportunity whether, based on the actual facts, the defendant is entitled to qualified immunity. Pet. App. 7a, 9a-10a. This holding also follows this Court's precedent which recognizes that, once the threshold immunity question has been decided in favor of a plaintiff, limited discovery, tailored

specifically to the question of the defendant's entitlement to qualified immunity, may proceed. *Anderson*, 483 U.S. at 646, n.6; *see also Crawford-El*, 523 U.S. at 598, 600. Permitting narrowly tailored discovery as the second step after a district court finds that a complaint sufficiently pleads a violation of clearly established law against a given defendant serves the purpose of resolving the qualified immunity defense as early as possible. *Crawford-El*, 523 U.S. at 600; *Anderson*, 483 U.S. at 646, n.6. The Fifth Circuit's opinion in *Carswell* complies with this Court's guidance and serves this purpose.

iii. *Carswell* Aligns with Opinions of All Circuit Courts.

In *Carswell*, the district court subjected the individual Defendants to discovery burdens even though the district judge has not yet made an initial threshold determination that Petitioner's complaint plausibly pleads claims against any of the Defendants, including Hunt County. Pet. App. 44a-45a; ROA.313-44; ROA.5-10. For this reason, Petitioner has not yet unlocked the doors to discovery with respect to any claims against any Defendant. *Iqbal*, 556 U.S. at 678-79, 686; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *Mitchell*, 472 U.S. at 526.

Indeed, all circuit courts recognize that this Court prohibits discovery under these circumstances. *A.G. ex rel. Maddox v. v. Elsevier, Inc.*, 732 F.3d 77, 81 (1st Cir. 2013) (inadequate complaint gave plaintiffs no right to

discovery) (citing *Iqbal*, 556 U.S. at 680-81); *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 564 (2d Cir. 2016) (no discovery when complaint failed to state a plausible claim) (citing *Iqbal*, 556 U.S. at 678); *Bush v. Dep't of Human Servs.*, 642 Fed. App'x 84, 85 (3d Cir. 2016) (per curiam) (same) (citing *Iqbal*, 556 U.S. at 686); *Martin v. Duffy*, 977 F.3d 294, 301 (4th Cir. 2020) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.") (quoting *Iqbal*, 556 U.S. at 678-79); *Doe v. Robertson*, 751 F.3d 383, 393 (5th Cir. 2014) (inadequate complaint gave plaintiffs no right to discovery) (citing *Iqbal*, 556 U.S. at 678-79); *Estate of Barney v. PNC Bank, Nat. Ass'n*, 714 F.3d 920, 929 (6th Cir. 2013) ("under *Iqbal*, a complaint cannot survive a motion to dismiss—and plaintiffs cannot get discovery—unless the complaint shows that the defendant's wrongdoing is plausible"); *see also Patterson v. Novartis Pharm. Corp.*, 451 Fed. App'x 495, 498 (6th Cir. 2011) ("The Supreme Court's decisions in *Twombly* and *Iqbal* do not permit a plaintiff to proceed past the pleading stage and take discovery in order to cure a defect in a complaint . . . The language of *Iqbal*, 'not entitled to discovery,' is binding on the lower federal courts.") (citing *Iqbal*, 129 S. Ct. at 1950) (additional citation omitted); *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (district courts must consider the sufficiency of the complaint before putting the defendant to the expense of discovery or burdening a defense of immunity) (citing *Twombly*, 550 U.S. at 558-59 and *Iqbal*, 129 S. Ct. at 1953-54); *Kulkay v. Roy*, 847 F.3d 637, 646 (8th Cir. 2017) (no discovery when complaint failed to state

a plausible claim) (citing *Mitchell*, 472 U.S. at 526, *Iqbal*, 556 U.S. at 678-79, and *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)); *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1177 (9th Cir. 2021) ("Our case law does not permit plaintiffs to rely on anticipated discovery to satisfy Rules 8 and 12(b)(6); rather, pleadings must assert well-pleaded factual allegations to advance to discovery.") (relying on *Iqbal*, 556 U.S. at 678-79, and *Twombly*, 550 U.S. at 559); *Waller v. City and County of Denver*, 932 F.3d 1277, 1291 (10th Cir. 2019) (permitting no discovery when plaintiff failed to plead a plausible municipal claim) (citing *Iqbal*, 556 U.S. at 678-79); *Carter v. DeKalb County, Ga.*, 521 Fed. App'x 725, 728 (11th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678-79 for the proposition that " 'the doors of discovery' do not unlock 'for a plaintiff armed with nothing more than conclusions' " and *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) for the proposition that "discovery *follows* 'the filing of a well-pleaded complaint. It is not a device to enable the plaintiff to make a case when his complaint has failed to state a claim.' ") (emphasis in original); *Ambellu v. Re'ese Adbarat Debre Selam Kidist Mariam Ethiopian Orthodox Tewhado Religion Church*, No. 19-7124, 2020 WL 873574, *1 (D.C. Cir. Feb. 14, 2020) (no discovery when plaintiff failed to state a claim of a violation of federal law) (citing *Iqbal*, 556 U.S. at 678-79).

Because *Carswell*'s holding on discovery comports with precedent from this Court and aligns with cases from all circuit courts of appeals, the Court should not

grant review of this case to address Petitioner's second Question Presented.

B. No Circuit Court Split Justifies This Court's Review of This Issue.

Petitioner relies solely on cases which are distinguishable from the circumstances at issue in this case. For this reason, Petitioner has not identified a conflict among the circuit courts which would justify this Court's review.

In re Flint Water Cases, 960 F.3d 820 (6th Cir. 2020) (Pet. at 27-28) is distinguishable because, unlike the case at bar, in *In re Flint Water Cases*: (1) the district court first found that the plaintiffs had sufficiently pled claims against the individual Defendants to defeat their entitlement to qualified immunity; (2) the Sixth Circuit did not even acknowledge this Court's holding in *Iqbal*, 556 U.S. at 685-86; and (3) the appellate court repeatedly emphasized that it was permitting discovery only on "wholly separate" or "entirely separate" claims. *In re Flint Water Cases*, 960 F.3d at 824-27. By contrast, in *Carswell*, Petitioner's only claim that was not subject to the individual Defendants' assertions of qualified immunity is her *Monell*[19] claim asserting municipal liability for an allegedly unconstitutional failure to provide medical treatment. Pet. App. 117a-142a. This claim is not separate from Petitioner's claims against the qualified immunity-asserting Defendants. To the contrary, this

[19] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

claim overlaps significantly with Petitioner's claims against the individual Defendants.[20]

Petitioner's reliance on *District of Columbia v. Trump*, 959 F.3d 126, 129, 131 n.4 (4th Cir. 2020) (en banc) is without merit because, unlike the case at bar, in *Trump*: (1) the plaintiff dismissed all individual capacity claims against the immunity-seeking defendants; and (2) the district court found the plaintiff's official capacity claims were sufficiently pled. *Id*. at 130, n.2. Additionally, the portion of the opinion on which Petitioner relies is dicta. *Id*. at 131, n.4.

Lugo v. Alvarado, 819 F.2d 5, 5-8 (1st Cir. 1987) is also distinguishable from *Carswell* because *Lugo*: (1) predates this Court's holding on discovery in *Iqbal*; (2) involved assertions of qualified immunity made in motions for summary judgment, not motions to dismiss based on the pleadings; and (3) involved defendants' request to stay discovery only after the defendants had conducted significant discovery, a circumstance the

[20] To establish the municipal liability claim, Petitioner must show that a county employee violated the detainee's clearly established constitutional rights with subjective deliberate indifference, the violation resulted from a county policy or custom adopted or maintained with objective deliberate indifference, and a direct causal link exists between the municipal policy and the alleged constitutional deprivation. *E.g.*, *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997) (en banc); *Flores v. County of Hardeman*, 124 F.3d 736, 738 (5th Cir. 1997). To establish a claim against each individual Defendant, Petitioner must show that the individual acted with subjective deliberate indifference to the detainee's clearly established constitutional rights. *E.g.*, *Scott*, 114 F.3d at 54; *Gibbs v. Grimmette*, 254 F.3d 545, 548 (5th Cir. 2001); *Hare v. City of Corinth*, 74 F.3d 633, 647-48 (5th Cir. 1996).

appellate court characterized as "bordering on bad faith abuse of the processes of both the district court and this court." *Id*. at 7-8.

Finally, Petitioner's reliance on district court opinions is inapposite. Pet. at 29. Primarily unreported decisions of a few scattered district courts do not establish a question of sufficient importance to merit this Court's review of the Fifth Circuit's opinion in *Carswell*, which faithfully applies this Court's precedent.

4. Petitioner's Arguments Concerning the Importance of the Questions Presented are Based on Misrepresentations of the *Carswell* Case.

Petitioner's arguments in support of her view of the importance of the Questions Presented in her petition lack merit because they are based on the mistaken contention that *Carswell* presents a situation in which the individual Defendants' entitlement to qualified immunity turns on questions of fact. Pet. at 31-33. To the contrary, because *Carswell* involves assertions of qualified immunity in motions to dismiss, it presents only pure questions of law. *Supra* at n.10 and 25-26; *Siegert*, 500 U.S. at 232.

Petitioner's assertions concerning limitations on discovery when immunity is at issue disregard the simple truth that the plaintiff is the master of her pleadings. Plaintiffs who choose to pursue claims

against government officials necessarily invoke the serious, legitimate, and important concerns about effective government that qualified immunity addresses—avoidance of disruption, harassment, and distraction attendant upon the burdens of litigation. *Iqbal*, 556 U.S. at 685 (noting that "it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed"); *see also*, *e.g.*, *Pearson*, 555 U.S. at 231; *Mitchell*, 472 U.S. at 526 ("*Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible as '[i]nquiries of this kind can be peculiarly disruptive of effective government.' ") (quoting *Harlow*, 457 U.S. at 817).

Petitioner's concerns ring particularly hollow in the case at bar, given her obvious pre-suit access to a broad array of information concerning the underlying incident. Pet. App. 53a-154a. Indeed, Petitioner's lengthy and disorganized regurgitation of information in her complaint created the untenable situation of either: (1) requiring the district court to expend significant effort to determine whether she had pled sufficient factual allegations to defeat each individual Defendant's entitlement to qualified immunity; or (2) requiring all individual Defendants to submit to significant burdens of litigation to answer Petitioner's 162-paragraph complaint. Petitioner's access to this information and her failure to provide a short and plain statement of her claims make this case a poor vehicle

for addressing concerns about discovery in the context of qualified immunity.

Petitioner is mistaken in her contention that two summary reversals of Fifth Circuit qualified immunity decisions which are unrelated to the issues presented in *Carswell*, or to the issues contained in Petitioner's Questions Presented, and two opinions dissenting from this Court's denial of certiorari in two other cases which are also unrelated to these issues, demonstrate any refusal by the Fifth Circuit to heed this Court's directives. Pet. at 35. The Fifth Circuit's opinion in *Carswell* faithfully follows and applies this Court's relevant precedent and accords with cases from all circuit courts. The Court should deny the petition.

CONCLUSION

For all of these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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