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

REPLY BRIEF IN SUPPORT OF CERTIORARI

T. DEAN MALONE
LAW OFFICES OF DEAN MALONE, P.C.
900 Jackson Street
Suite 730
Dallas, TX 75202

BRUCE K. THOMAS
LAW OFFICE OF BRUCE K. THOMAS
12900 Preston Road
Suite 590
Dallas, TX 75230

CATHERINE E. STETSON
Counsel of Record
WILLIAM E. HAVEMANN
MICHAEL J. WEST
SIMON CHIN
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THIS COURT SHOULD GRANT REVIEW ON THE APPEALABILITY QUESTION 3

II. THIS COURT SHOULD GRANT REVIEW ON THE SCOPE-OF-IMMUNITY QUESTION 9

III. THE QUESTIONS PRESENTED ARE RECURRING AND IMPORTANT 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES:

Abelesz v. *Magyar Nemzeti Bank*,
692 F.3d 661 (7th Cir. 2012) 6

Alto v. *Black*,
738 F.3d 1111 (9th Cir. 2013) 6

Ashcroft v. *Iqbal*,
556 U.S. 662 (2009)..3, 8, 11

Behrens v. *Pelletier*,
516 U.S. 299 (1996)... 7, 10

Boulos v. *Wilson*,
834 F.2d 504 (5th Cir. 1987) 8

Crawford-El v. *Britton*,
523 U.S. 574 (1998)... 11

District of Columbia v. *Trump*,
959 F.3d 126 (4th Cir. 2020) (en banc) 9, 10, 11

Dyer v. *Rabon*,
212 F. App'x 714 (10th Cir. 2006) 6

In re Flint Water Cases,
960 F.3d 820 (6th Cir. 2020) 9

Johnson v. *Jones*,
515 U.S. 304 (1995)..2, 8, 12

Khorrami v. *Rolince*,
539 F.3d 782 (7th Cir. 2008) 4, 6, 8, 12

Lowe v. *Town of Fairland*,
143 F.3d 1378 (10th Cir. 1998) 6

Lugo v. *Alvarado*,
819 F.2d 5 (1st Cir. 1987)..................................... 10

TABLE OF AUTHORITIES—Continued

Page(s)

Miller v. *Gammie*,
335 F.3d 889 (9th Cir. 2003) (en banc) 4, 7

Mitchell v. *Forsyth*,
472 U.S. 511 (1985).. 7

Myers v. *City of Centerville*,
41 F.4th 746 (6th Cir. 2022).................................... 4

Owen v. *City of Independence*,
445 U.S. 622 (1980).. 11

Process & Indus. Devs. Ltd. v. *Fed. Republic of Nigeria*,
962 F.3d 576 (D.C. Cir. 2020).................................. 4

Ramirez v. *Guadarrama*,
3 F.4th 129 (5th Cir. 2021)...................................... 3

Valiente v. *Rivera*,
966 F.2d 21 (1st Cir. 1992)...................................... 4

Workman v. *Jordan*,
958 F.2d 332 (10th Cir. 1992) 4

RULE:

U.S. Dist. Ct., E.D. Tex., Gen. Order 22-08
(Nov. 7, 2022).. 12, 13

IN THE

Supreme Court of the United States

No. 22-959

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

---

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

This petition implicates two circuit splits on recurring and important questions of qualified immunity that call out for this Court's review. Respondents effectively concede both splits, and nothing in their brief undermines the need for this Court's review.

First, Respondents acknowledge a split on the question whether an order deferring ruling on a qualified-

immunity-based motion to dismiss is immediately appealable, even if the order rests on the need for factual development. As Respondents concede, such an order is *not* immediately appealable in three circuits, but *is* immediately appealable in at least six others, including the Fifth Circuit below.

Respondents argue that this case does not implicate the split, maintaining that the District Court's order effectively denied them immunity by subjecting them to the burdens of litigation. Wrong: When it set an expedited briefing schedule to address immunity, the District Court "stayed" "all party discovery" "as to any defendant who asserts qualified immunity." Pet. App. 44a. Respondents insist that the court did not defer its ruling to address any fact issue, but the deferral's entire purpose was to "determine whether the plaintiff's pleadings assert facts" that overcome immunity. Pet. App. 32a-33a (quotation marks omitted).

The Fifth Circuit's approach is irreconcilable with this Court's precedent. As this Court stressed in the summary-judgment context in *Johnson* v. *Jones*, 515 U.S. 304 (1995), interlocutory qualified-immunity orders are appealable only if they conclusively resolve a question of law. The same reasoning compels the same conclusion in the motion-to-dismiss context, but the panel treated the order here as appealable even though it *resolved nothing at all*. No case illustrates the irrationality of the Fifth Circuit's rule better than this one, where the District Court's everyday docket-management order spawned an appeal that has delayed this case by years.

Second, the circuits are split on whether defendants who assert qualified immunity must be exempted from discovery as fact witnesses regarding claims for

which they are not defendants and for which immunity is not a defense. The Fourth, Sixth, and Ninth Circuits have rejected the Fifth Circuit's approach, as Respondents barely attempt to dispute. And while Respondents claim the split does not warrant review, the split has significant implications in the common situation where a plaintiff alleges some claims that are subject to qualified immunity and others that are not.

On the merits, the panel's rule is indefensible. Respondents do not explain how the rule comports with this Court's admonition that qualified immunity is a right to immunity *from certain claims*, not from litigation in general. Instead, Respondents defend the rule based on a misreading of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), which had no reason to address the question.

The petition should be granted.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW ON THE APPEALABILITY QUESTION.

The panel held that an order that defers ruling on qualified immunity pending fact development is immediately appealable "because a defendant's entitlement to qualified immunity must be determined 'at the earliest possible stage of the litigation.'" Pet. App. 5a (quoting *Ramirez* v. *Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (per curiam)). That holding exacerbates an entrenched circuit split and conflicts with this Court's precedent.

1. Respondents concede the split. Six circuits hold that an order deferring a ruling on immunity at the motion-to-dismiss stage is always immediately appealable, even when the order does not resolve the

right to immunity. As Respondents agree, *see* Opp. 6-7, in addition to the Fifth Circuit, the Second, Third, Fourth, Eighth, and Eleventh Circuits always allow appeals of orders deferring ruling on immunity.[1]

Respondents also agree that, in three circuits, orders deferring a ruling on immunity are not appealable where they do not resolve the right to immunity and instead turn on the need for factual development. Opp. 12-19. Respondents concede that the Seventh Circuit lacks "appellate jurisdiction" where a "defendant's qualified immunity defense 'depends entirely on facts that have not yet been explored.'" Opp. 17 (quoting *Khorrami* v. *Rolince*, 539 F.3d 782, 787 (7th Cir. 2008)). Respondents concede that the Ninth Circuit lacks "jurisdiction to review a district court order" deferring a ruling on immunity given the need for "factual development." Opp. 14-15 (citing *Miller* v. *Gammie*, 335 F.3d 889, 894-895 (9th Cir. 2003) (en banc)). And Respondents concede that orders deferring a qualified-immunity ruling in the Tenth Circuit are "not immediately appealable" where the "analysis depends upon a disputed issue of fact." Opp. 13-14 (citing *Workman* v. *Jordan*, 958 F.2d 332, 336 (10th Cir. 1992)).

---

[1] Respondents err in arguing that the First, Sixth, and D.C. Circuits have weighed in. Opp. 6-7. In Respondents' cited cases, the order effectively rejected immunity, making the order appealable. *See, e.g.*, *Myers* v. *City of Centerville*, 41 F.4th 746, 756 (6th Cir. 2022) (order "unlocked discovery without answering the threshold immunity question" (quotation marks omitted)); *Valiente* v. *Rivera*, 966 F.2d 21, 22 (1st Cir. 1992) (per curiam) (similar); *Process & Indus. Devs. Ltd.* v. *Fed. Republic of Nigeria*, 962 F.3d 576, 581 (D.C. Cir. 2020) (similar). Even if these cases count toward the split, however, they deepen it and highlight the need for certiorari.

2. Respondents offer two reasons why this case does not implicate the split. Neither withstands scrutiny.

First, Respondents contend the District Court "did not defer ruling on the individual Defendants' motions to dismiss" and instead "summarily denied" their motions and denied them the "benefits of qualified immunity." Opp. 1-4; *see* Opp. 6.

This distorts the record. The scheduling order denied Respondents' motion to dismiss "*without prejudice*." Pet. App. 44a (emphasis added). The court made clear that the motion "remains pending." Pet. App. 30a n.2. The court directed any Respondent who had not already done so to file an answer "asserting qualified immunity" so that the court could address immunity expeditiously. Pet. App. 44a. In the meantime, the court "stayed" "all party discovery" "as to any defendant who asserts qualified immunity." *Id*. The court merely directed the parties to "confer regarding whether discovery is needed for the Court to assess the assertion of qualified immunity." *Id.*

Respondents are wrong to contend this docket-management measure "effectively denie[d]" them the benefits of immunity. Opp. 6. The court did not subject Respondents to *any* burden beyond conferring with plaintiffs and filing an answer invoking immunity. Indeed, the court stayed discovery based on its recognition that "[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery." Pet. App. 33a (quotation marks omitted).

Respondents insist that the order burdened them by requiring them "to pursue qualified immunity only through motions for summary judgment." Opp. 4-5. In fact, the court held that if Respondents "believe QI can be *resolved based on the pleadings*," they may seek

judgment "on that basis," Pet. App. 36a (emphasis added)—and may do so by filing, with leave from the court, a "motion to dismiss[ ] or motion for judgment on the pleadings," Pet. App. 45a.

Because the court's docket-management measure did not deny Respondents the benefits of immunity, every case Respondents cite to disclaim the split is inapposite. Respondents, for example, cite cases where courts prematurely subjected defendants to discovery, thus effectively rejecting immunity. *See, e.g.*, *Dyer* v. *Rabon*, 212 F. App'x 714 (10th Cir. 2006) (order "set discovery"). Other cases did not defer ruling on qualified immunity, but instead involved denials of motions to dismiss that are undisputedly appealable. *See Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 668 (7th Cir. 2012) (distinguishing *Khorrami* "because the district court here actually ruled on the defendants' motions to dismiss"); *Lowe* v. *Town of Fairland*, 143 F.3d 1378, 1380 (10th Cir. 1998). And one case did not address appealability at all, instead finding "no reason to reach" the question. *See Alto* v. *Black*, 738 F.3d 1111, 1130-31 (9th Cir. 2013).

Second, Respondents claim this case does not implicate the split because the order did not "suggest that the Defendants' entitlement to qualified immunity turns on any fact question." Opp. 1.

That is wrong. The court required Respondents to file an answer to "determine whether the plaintiff's pleadings assert *facts* which, if true, would overcome the defense of qualified immunity." Pet. App. 32a-33a (emphasis added and quotation marks omitted). The court acknowledged it could order discovery only if it "remain[ed] unable to rule on the immunity defense

without further clarification of the facts." *Id.* (quotation marks omitted). The order's entire purpose was to permit any necessary factual development before ruling on immunity.

Respondents, moreover, ignore the *reason* why deferrals for further factual development are unappealable. As the Ninth Circuit explained, "orders deferring a ruling on immunity for a limited time" to ascertain facts are unappealable "because they are not orders that deny the claimed existence of immunity." *Miller*, 335 F.3d at 894. The same logic applies to the scheduling order here, which cannot credibly be characterized as denying Respondents' immunity.

3. Respondents cannot defend the panel's decision on the merits. The collateral-order doctrine permits interlocutory appeal of orders only if "they finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review" and "independent of the cause itself." *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996) (quotation marks omitted). An order denying qualified immunity is immediately appealable only "to the extent that it turns on an issue of law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985).

Respondents do not attempt to argue that the District Court's order satisfies this rule. The order does not resolve any question of law; it merely defers a ruling on immunity pending assessment of the facts. The order does not finally determine *any* claim of right; it does not subject Respondents to discovery or any other litigation burden regarding claims for which immunity is a defense. And the order does not deny review on any claim; it contemplates that immunity may still "be resolved based on the pleadings." Pet. App. 36a.

In the summary-judgment context, this Court unanimously held that orders implicating "a fact-related dispute" regarding qualified immunity are not immediately appealable. *Johnson*, 515 U.S. at 307. Interlocutory appeals that do not present discrete legal questions impermissibly force appellate courts "to decide in the context of a less developed record, an issue very similar to the one they may well decide anyway later, on a record that will permit a better decision." *Id.* at 317. The same logic compels the same conclusion at the motion-to-dismiss stage, as this Court recognized when it cited motion-to-dismiss precedent in *Johnson* itself. *Id.* at 308 (citing *Boulos* v. *Wilson*, 834 F.2d 504, 509 (5th Cir. 1987)). "*Johnson* stands 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." *Khorrami*, 539 F.3d at 787.

Respondents' only response is *Iqbal*, but they misread that case. Opp. 21. *Iqbal* held that an order denying immunity at the motion-to-dismiss stage was immediately appealable because it "turned on an issue of law and rejected the defense of qualified immunity." 556 U.S. at 672. The order here neither turned on a question of law nor rejected any qualified-immunity defense. It resolved nothing at all. While *Iqbal* held that "the problem the Court sought to avoid in *Johnson* is not implicated" where a district court "[e]valuat[es] the sufficiency of a complaint," *id.* at 674-675, the District Court here *did not* evaluate the complaint's sufficiency. The order was a routine docket-management measure that did not resolve any question of law.

II. THIS COURT SHOULD GRANT REVIEW ON THE SCOPE-OF-IMMUNITY QUESTION.

This case warrants review for an independent reason. The panel held that qualified immunity protects witnesses from discovery as to claims alleging municipal liability even though the witnesses are not named defendants as to those claims and even though qualified immunity is not a defense to those claims. That holding splits from at least three other circuits, and it is indefensible.

1. The split is indisputable. The Sixth Circuit squarely rejected as "incorrect" the exact position adopted below—that parties "cannot be deposed on *any* matter pending resolution of their qualified-immunity appeal." *In re Flint Water Cases*, 960 F.3d 820, 825 (6th Cir. 2020). Respondents try to distinguish *Flint* on procedural grounds, Opp. 33, but the district court there "carefully sculpted a discovery plan that afforded the state defendants their full entitlement to immunity, while permitting other parties to seek discovery from them as fact witnesses on wholly separate claims." *Flint*, 960 F.3d at 826. That is exactly what the District Court did here.

The Fourth Circuit similarly rejected the argument that "discovery directed at *anyone* in a case in which" a defendant asserts immunity "constitutes a denial of immunity." *District of Columbia* v. *Trump*, 959 F.3d 126, 131 n.4 (4th Cir. 2020) (en banc). Contrary to Respondents' claim, the individual-capacity claims were not dismissed before the district court ordered discovery. Opp. 34. Instead, the court "did not make *any* rulings with respect to the President in his individual capacity," but permitted discovery "directed at

the claims against the President in his official capacity." *Trump*, 959 F.3d at 131 & n.4.

The First Circuit likewise has rejected the argument that an assertion of immunity as to some claims prevents discovery as to claims not subject to immunity. *See Lugo* v. *Alvarado*, 819 F.2d 5, 7 (1st Cir. 1987). Respondents note that *Lugo* arose at summary judgment, Opp. 34, but that posture makes no difference. And *Lugo* was not based "solely" on the defendant's litigation conduct; it rested on the conclusion that "qualified immunity is totally immaterial" to discovery regarding a claim for which immunity is not a defense. 819 F.2d at 7.

Respondents declare that "all circuit courts recognize that this Court prohibits discovery" in the "circumstances" of this case. Opp. 30. But none of Respondents' cases prohibits discovery as to certain witnesses simply because those witnesses have asserted immunity as to *different* claims. Instead, each reaffirms the uncontroversial proposition that plaintiffs cannot obtain discovery from witnesses as to the *same claims* that were insufficiently pled.

2. Respondents barely attempt to defend the panel's holding. Respondents do not address *Behrens*, 516 U.S. at 312, which clarifies that qualified immunity "is a right to immunity *from certain claims*, not from litigation in general." Nor do Respondents address the fact that "suspension of discovery" in these circumstances "only delays the case unnecessarily, because sooner or later the parties will have the right to engage in discovery" as to claims for which qualified immunity is unavailable. *Lugo*, 819 F.2d at 7.

Respondents again rely on *Iqbal*. Opp. 27-28. But, as the Fourth Circuit held in rejecting an identical argument, *Iqbal* addressed the separate question "whether tight control of the discovery process can cure an insufficiently pled complaint that had improperly survived a motion to dismiss." *Trump*, 959 F.3d at 131 n.4. *Iqbal* did not suggest that discovery must be stayed against fact witnesses who assert immunity as to different claims.

Respondents maintain that the *Monell* claim here "is not separate" from the individual claims for which Respondents have invoked immunity because municipal liability "overlaps significantly" with the individual claims. Opp. 33-34. Respondents support that assertion with a footnote that mangles the municipal-liability standard. Respondents' assertion that municipal-liability plaintiffs must establish a violation of "clearly established constitutional rights," Opp. 34 n.20, is false. Plaintiffs need not show a violation of clearly established law to show that a municipality itself violated the constitution. *See Owen* v. *City of Independence*, 445 U.S. 622, 651 n.33 (1980). And Respondents do not dispute that courts have "broad discretion to tailor discovery narrowly," *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998), and thereby protect a defendant's qualified-immunity defense during discovery regarding claims for which immunity is unavailable.

III. THE QUESTIONS PRESENTED ARE RECURRING AND IMPORTANT.

By requiring district courts to resolve qualified immunity "at the earliest possible stage of the litigation" regardless of the need for factual development, and by making these orders immediately appealable, Pet.

App. 5a (quotation marks omitted), the Fifth Circuit's approach invites the "inconvenience and costs of piecemeal review" this Court has warned against. *Johnson*, 515 U.S. at 315 (quotation marks omitted). The result will be "delay, add[ed] costs[,] and diminish[ed] coherence." *Id.* at 309. And because the Fifth Circuit prohibits district courts from proceeding during an interlocutory appeal *even as to claims for which immunity is unavailable*, its approach freezes entire cases and risks allowing evidence to become stale or disappear. This case exemplifies the problem; Respondents' appeal of a scheduling order has caused years of delay.

Respondents observe that "[p]laintiffs who choose to pursue claims against government officials necessarily" invite such delay. Opp. 35-36. But Carswell's son did not "choose" to have his constitutional rights violated. And courts already possess the tools "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." *Khorrami*, 539 F.3d at 787.

Respondents contend that this case is "a poor vehicle" because Carswell had "pre-suit access to a broad array of information" and failed to submit a complaint tailored to Respondents' liking. Opp. 36-37. Carswell's access to limited information has no bearing on the District Court's deferral, nor does it diminish Carswell's right to pursue discovery as to *Monell* claims for which qualified immunity is not a defense.

Respondents do not dispute the recurring nature of the panel's error, which is now embedded in at least one district court's local rules. *See* Pet. 33-34 (citing U.S. Dist. Ct., E.D. Tex., Gen. Order 22-08 (Nov. 7,

2022)). And this case is only the most recent example of the Fifth Circuit's corrosive approach to qualified immunity, which bends ordinary procedural rules to give officials every conceivable litigation advantage, converting a limited immunity for good-faith errors into an immunity that is effectively absolute.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the decision reversed.

Respectfully submitted,

T. DEAN MALONE
LAW OFFICES OF DEAN MALONE, P.C.
900 Jackson Street
Suite 730
Dallas, TX 75202

BRUCE K. THOMAS
LAW OFFICE OF BRUCE K. THOMAS
12900 Preston Road
Suite 590
Dallas, TX 75230

CATHERINE E. STETSON
Counsel of Record
WILLIAM E. HAVEMANN
MICHAEL J. WEST
SIMON CHIN
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

July 12, 2023