No. _____

In the
Supreme Court of the United States

FIRST FLOOR LIVING, LLC,
Petitioner,

v.

CITY OF CLEVELAND, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As a matter of course, litigants regularly file lawsuits without having access to all the information that may be necessary to prove their case. If litigants always possessed such information, the procedures and methods that our justice system has developed would be far more limited than they has come to be. And while, to date, there has been no written mandate on the subject, it is generally presumed that a litigant will be afforded some opportunity to review and discover information in the possession of other parties that have potentially aggrieved the litigant, except those cases where the litigant clearly does not have a valid claim to begin with (i.e. where a case is successfully challenged by a Rule 12 motion to dismiss).

The ultimate question underlying this petition, then, is whether litigants, should, as a right be able to utilize early-stage discovery, or whether the trial courts can unilaterally prevent litigants from discovering any such information, or to verify and test information presented to them.

Formally stated, the question presented by this petition is thus:

I. Whether a trial court may enter summary judgment—other than on purely legal grounds—against a party when the court has not allowed that party to discover information possessed by the movant.

PARTIES TO THE PROCEEDINGS BELOW

First Floor Living, LLC (Appellant in Sixth Circuit Case No. 2-3216), presents this Petition as the sole petitioner. First Floor Living was the Appellant before the Sixth Circuit, and the Plaintiff before the United States District Court for the Northern District of Ohio.

Lush Designs, LLC (Appellant in Sixth Circuit Case No. 22-3217) accompanied First Floor Living as a Plaintiff before the United States District Court for the Northern District of Ohio, and as an Appellant before the Sixth Circuit. Lush Designs, LLC does not join First Floor Living in this Petition.

Respondents were the Appellees before the Sixth Circuit, and the Defendants before the United States District Court for the Northern District of Ohio. Respondents are: the City of Cleveland, Cuyahoga County Land Reutilization Corporation, Laster LLC (in Case No. 22-3216) and Baumann Enterprises (in Case No. 22-3217).

CORPORATE DISCLOSURE STATEMENT

Petitioner First Floor Living LLC is owned by a single individual member; no part of First Floor Living's equity is owned by another company. First Floor Living LLC is not publicly traded, and no publicly held company owns 10% or more of First Floor Living's equity.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit:

- *First Floor Living, et al v. City of Cleveland*, et al., No. 1:21-cv-00018 (NDOH), order issued February 7, 2022
- *First Floor Living, et al v. City of Cleveland*, et al., Nos. 22-3216/3217 (6th Cir.), opinion issued September 28, 2023, rehearing denied November 7, 2023

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, First Floor Living LLC, brings this Petition to request that this Court review and resolve the significant issues arising from the Sixth Circuit's decision below, including the now-evident split among the circuits and the departure from precedent on the issue presented.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the District Court, issued September 28, 2023, and is reproduced at App. 1-27. The opinion of the Sixth Circuit has not been assigned a reporter citation.

The Opinion and Order of the United States District Court for the Northern District of Ohio, granting Respondents' Motions for Summary Judgment, is reported at 584 F. Supp.3d 476 and reproduced at App. 28-50.

JURISDICTION

This Petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit, issued on September 28, 2023. The Sixth Circuit denied rehearing of that appeal on November 7, 2023.

This Court has jurisdiction to review cases from any United States Court of Appeals by writ of certiorari, which shall be granted upon the petition of any party to any civil case, after rendition of judgment, under 28 U.S.C. § 1254(1).

STATUTES & RULES INVOLVED

This case does not involve any statutory provisions or other items enumerated in Rule 14(f). However, Petitioner has included the text of the Federal Rule of Civil Procedure 56 at App. 62-64 for this Court's convenience.

STATEMENT OF THE CASE

A. First Floor's Purchase & Loss of the Property.

First Floor Living, LLC ("First Floor"), as an entity with laudable goals, set out to invest in and rehabilitate real estate in the City of Cleveland (the "City")—a city with a known aging stock of homes—in a manner that would allow residents to live entirely on the "first floor" of the homes. This would allow the residents, as they age to stay in their homes without downsizing or relocating. (App. 3). First Floor wanted to provide homes in which older homeowners could feasibly remain housed for the rest of their lives.

First Floor therefore began investing in appropriate properties in which it could begin creating these homes and to generally further that purpose. On March 14, 2018, First Floor specifically acquired the property located at 4400 Warner Road in Cleveland (the "Warner Property")[1], and intended to

[1] The Full Address of the Warner Property is 4400 Warner Road, Cleveland, Ohio 44105

rehabilitate the property to support First Floor's internal operations.[2] (App. 31-32).

Unbeknownst to First Floor, the City had condemned the Warner Property in 2009—nearly a decade before First Floor learned of the Warner Property. (Condemnation Notice, R. 33-2, PageID 284-88). In the interim, and before being purchased by First Floor, the Warner Property passed through multiple other owners; First Floor in fact ultimately purchased the Warner Property from the Cuyahoga County Land Reutilization Corporation (the local "Land Bank"). (App. 31-32).

Soon after procuring the Warner Property, First Floor began investing time, money, and resources in developing and rehabilitating the property. (App. 32). During this time—from the date of purchase until late 2020, First Floor was unaware that the City had assessed any issues with the Warner Property. Indeed, First Floor never received any notice from the City regarding the Warner Property, let alone notice that the building was condemned or slated to be demolished. (App. 7). Further, during the first four years of First Floor's ownership, the Warner Property never received a citation for any housing or building violations. (Opposition to Summary Judgment, R. 48, PageID 493).

First Floor learned that the Warner Property was subject to condemnation and demolition on a Sunday morning in August of 2020, when a neighbor notified First Floor's owner that someone had brought an

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[2] First Floor had likewise purchased other properties that would ultimately comprise the actual "first-floor-living" properties; those properties were not at issue in the matters below.

excavator to the property and had begun tearing down the building. (*Id*.; *see also* Affidavit of David Bond, R. 48-1, ¶ 11, PageID 508–9). First Floor's owner promptly appeared at the Warner Property and immediately attempted to contact City officials in an effort to prevent the demolition. Unfortunately, First Floor was unable to stop the demolition. (App. 7, 32-33).

It was not until after the Warner Property had been demolished that First Floor learned (1) the City had condemned the Warner Property long before First Floor's purchase, and (2) the City did not decide to actually proceed to demolish the Warner Property until July of 2020, when the City issued a permit to Appellee, Laster LLC, ("Laster") to finally demolish the Warner Building. (Opposition to Summary Judgment, R. 48, PageID 494).

In January 2021, First Floor filed suit against the City, Laster, and the Land Bank (collectively, "Defendants") in the United States District Court for the Northern District of Ohio. (App. 7-8). In its amended complaint, First Floor alleged, among other (now-irrelevant)[3] claims, that the Defendants demolished the Warner Property in violation of First

[3] Initially, along with its Section 1983 claims, First Floor also lodged claims under the Fifth Amendment Takings Clause, as well as state-law tort claims. During the briefing process before the District Court, First Floor conceded its Fifth Amendment claims, and the District Court therefore dismissed the balance of First Floor's state-law claims after it determined that it was not required to exercise supplemental jurisdiction over the state-law claims. For purposes of this Petition, First Floor therefore focuses on its Section 1983 claim as the operative claim. (*Id*. at PageID 702).

Floor's due process protections because First Floor never received notice, let alone an opportunity to be heard, that the City had slated the Warner Property for demolition. (*Id.*).[4]

B. Underlying Legal Principles.

To provide the clearest picture of the of the case, it is also necessary to elucidate the legal principles underlying the claims lodged by First Floor against the City of Cleveland.

Stated succinctly: municipalities like the City of Cleveland must comply with due process before they may deprive a property owner of their property by, for example, demolishing the property. *See, e.g., Keene Grp. Inc. v. City of Cincinnati*, 998 F.3d 306 (6th Cir. 2021).

Due Process generally requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" before the government may take property." *Id.* at 311 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950).

Such efforts must be "significant" efforts, designed to inform property owners that their properties are subject to demolition. *Id.* And,

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[4] In the initial and amended complaint, First Floor filed the lawsuit along co-plaintiff Lush Designs, LLC, who complained of a similar demolition-without-due-process. The complaint thus included claims Lodged by Lush Designs against Baumann Enterprises (as the contractor responsible for demolishing Lush Designs' building). Lush Designs does not join First Floor in this Petition, and First Floor therefore does not further reference Lush Designs' claims against Baumann Enterprises or Baumann Enterprises' involvement in the matter.

importantly, the inquiry must look at "all the circumstances" and necessarily requires a court to conduct a review of the factual circumstances involved. *Id.* (noting that "[t]he **facts** here are very different than those that were dispositive in [the other case]" and further delving into the nuances of the city's actions).

C. The Lawsuit Without Discovery & Prompt Summary Judgment.

Following First Floor's initiation of the lawsuit, the District Court scheduled and held its initial case management conference, in which the parties discussed the status and structure of the initial stages of the case. (App. 59). As a result of the discussions held at the conference, the District Court ordered Defendants to "file motions for summary judgment directed to threshold legal issues that may require some factual support beyond the pleading", and further stayed discovery while it awaited those motions. (App. 59-61).

The District Court further ordered the parties to reconvene at a status conference on August 17, 2021, and specifically noted that "**at the August 17th telephone status conference, the parties and the Court will discuss what limited discovery is necessary for First Floor to respond to the motions**". (App. 61). The Court further ordered that it "**defers more fulsome discovery and dispositive motions on other issues until resolution of the forthcoming motions**". (*Id.*).

In compliance with the District Court's schedule, Defendants filed their answers around May 19, 2021, and subsequently filed their Motions for Summary

Judgment starting on July 29, 2021 (City of Cleveland Mot. Summ. J., R. 33; Baumann Mot. Summ. J., R. 35; Land Bank Mot. Summ. J., R. 36; Laster Mot. Summ. J., R. 37). Also in compliance with the Scheduling and Procedural Order, neither party propounded discovery requests in the interim.

Then, on August 17, 2021, the parties attended the status conference that had been specifically scheduled to "discuss what limited discovery is necessary" after the parties submitted dispositive motions. At that status conference, however, the parties ultimately only discussed "a schedule related to the pending motions", during which "Plaintiffs indicated that some discovery may be necessary". (App. 51-52). Indeed, First Floor stated that it desired to proceed with gathering the discovery items that it anticipated requesting from Defendants, but no additional discussions about such discovery were held. Rather, the District Court directed First Floor to file a motion requesting such discovery pursuant to Federal Rule of Civil Procedure 56(d). (App. 8-9.). First Floor did so on September 14, 2021. (Mot. for Rule 56(d) Disc., R. 41, PageID 441–50).

In its Rule 56(d) motion, First Floor requested additional time to obtain a number of specific items necessary to respond to Defendants' dispositive motions and that would only exist in the Defendants' possession. (App. 8-9). First Floor sought particularly relevant items including the Defendants' internal communications and documentation evidencing the process by which Defendants determine to demolish certain properties and provide sufficient notice of such demolition, both generally and specifically relating to the Warner Property, as well as the

identity of individuals responsible for such processes as they pertain to the Warner Property, and the deposition of such individuals. (*Id*.). While First Floor did also request discovery on some other, more general items, First Floor had no opportunity to conduct any discovery and therefore anticipated some ability to do so. On October 12, 2021, the District Court denied First Floor's 56(d) motion, stating that First Floor had not met its burden of raising sufficiently particular facts demonstrating their need for discovery. (App. 53-58). The parties therefore briefed the motions for summary judgment, without the benefit of obtaining **any** discovery (*See generally* Records 33 through 58).

On February 7, 2022, the District Court issued an Opinion and Order granting Defendants motions for summary judgment on First Floor's Counts I and II. (*See generally* App. 28-50) In its Opinion and Order, the District Court overruled First Floor's objection to the City's reliance on contradicting evidence to establish that the City posted condemnation notice at the Warner Property in compliance with the City's due process obligations. (App. 38-40). Over First Floor's objections, the District Court permitted and considered evidence that it posted notices of condemnation as a routine practice in approximately 12,000 demolitions since 2006. (App. 40). First Floor objected to the admission of this routine practice evidence in support of the City's Motion for Summary Judgment because this evidence directly contradicted other evidence offered by the City, which demonstrated a genuine issue of material fact as to whether the City provided First Floor with notice. (App. 38-39). Indeed, as noted by the District Court,

the only evidence of notice to First Floor that the City offered consisted of "disjointed handwritten notes on what appears to be a post-it note". (App. 38). The City was unable to provide the identity of the note's author or a picture of the notice posted at the Warner Property, despite arguing that it was routine practice to do so. (*Id*.) The District Court concluded that because the note was "sketchy, at best", it would be disregarded. (App. 46). Therefore, the District Court only weighed the remaining evidence offered by the City, including evidence of its routine notice practices, against the lack of evidence First Floor was able to present when deciding the motion for summary judgment.

The District Court acknowledged that, based on a record unsupported by any discovery, whether First Floor received sufficient notice was a "close call", and that in reality "perhaps it [the City] did not" provide notice in this instance. (App. 46). Nonetheless, the District Court concluded that the City upheld its obligation to provide notice consistent with due process, determined that there was "no genuine dispute of fact" on this point, and granted summary judgment. (App. 48).

Finally, given its decision that the notices were sufficient under due process, the District Court declined to exercise supplemental jurisdiction over First Floor's remaining state law claims (Counts III, IV, and V). (App. 50).

D. Appeal to the Sixth Circuit

On appeal to the United States Court of Appeals for the Sixth Circuit, a divided panel affirmed the

District Court's decision to grant the early summary judgment. (App. 4).

At appeal, First Floor argued that (I) the grant of summary judgment was premature both because the District Court had afforded First Floor with **no** opportunity for discovery (an act that the Sixth Circuit's own precedent seemed to indicate was virtually always an abuse of discretion), and because it was resultantly improper to deny First Floor's Rule 56(d) motion, and (II) the grant of summary judgment was error (Appellant Br. R. 38, PageID 7).

The majority opinion, authored by Judge Siler and joined by Judge Gilman, affirmed the District Court's grant of summary judgment, reasoning that the District Court had not erred by denying First Floor's Rule 56(d) motion. (App. 4). After citing the general factors that a court must review when determining if the District Court abused its discretion, the opinion further explained that such review "is an ill-fitting test 'when the parties have no opportunity for discovery,' and we have generally held that, in the absence of any discovery, 'denying the Rule 56[(d)] motion and ruling on a summary judgment motion is an abuse of discretion." (App. 12).

The opinion then goes on to review the requests made in First Floor's Rule 56 motion, including requests to review documents related to the City's practices and to review the City's internal communications, which First Floor specifically desired to review in order to "ensure the veracity of [Defendants'] evidence". (App. 14).

Yet still, even in light of the principles cited by the Sixth Circuit and the acknowledgement that First

Floor simply desired to ensure that the evidence set forth by the City was accurate, the opinion ultimately concludes that the Rule 56 motion (1) did not request information that was relevant to the issue of whether First Floor received notice, and (2) that otherwise the information would not have changed the outcome of the District Court's ruling. (App. 15).

Judge Nalbandian, dissenting in part[5], explained that First Floor indeed should have been entitled to obtain some discovery. (App. 24-27). Looking specifically at the actual nuances of the evidence submitted by the City, Judge Nalbandian reasoned, in essence, that First Floor would have benefited from some discovery when faced with the "disjointed" evidence submitted by the City. (App. 24, 27).

Indeed, Judge Nalbandian first notes that the City's initial attempts to notify First Floor—attempts that clearly failed—would have been insufficient. (App. 25). Moving to the other attempts, Judge Nalbandian questioned whether the notice provided to a prior owner in 2016—two years before First Floor purchased the property", noting that "notice given to one party is not always imputed to another party", and further noting that there seemed to be a "genuine dispute" as to whether Cleveland actually posted any notice on the Property after that, such that "First Floor could have benefited from some discovery on this issue. For example, First Floor requested

[5] Judge Nalbandian only dissented with respect to the decision as it applied to First Floor. Judge Nalbandian's decision concurred with the majority's opinion as it applied to Lush Designs, First Floor's co-plaintiff who does not join First Floor in this Petition.

depositions of the individuals involved in posting notices. If a city official tasked with posting the notice on the Warner Road Property admitted he meant to do so, but didn't, that would be material.". (App. 25-27).

As a result, the dissent concludes succinctly by stating "I believe the district court abused its discretion in denying First Floor any opportunity for discovery on the Warner Road Property". (App. 27).

REASONS FOR GRANTING THE PETITION

Our courts' pursuit of the truth, when called upon to resolve disputes among all those who are rightfully before the courts is arguably the most essential function of our justice system and must therefore necessarily be given great consideration. Indeed, this Court has long held that the ability to "separate truth from falsity" is such an important function of our courts that ""those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge."" *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (citing 1 Harper James § 5.22, p. 424).

Unfortunately, the U.S. circuit courts vary widely on how much, if any, discovery courts must afford to parties during pending litigation before the trial court may grant summary judgment against that party. This divide has not only led to myriad inconsistency among both the circuit and district courts, but in many cases will significantly hinder the ability of the United States justice system to fairly resolve disputes, as well as hinder the trust that the public is able to place in our courts to do so.

Moreover, even despite the split among the circuits, the Sixth Circuit's decision below—on an important question of federal procedure—presents its own conflict on a question of great importance to the public administration of justice.

This Court should therefore grant this Petition, and endeavor to resolve the inconsistency as well as the departure from precedent.

I. This Court Should Resolve the Circuit Split Over Whether Courts Must Allow Parties To Conduct Discovery Before A Court May Grant Summary Judgment.

In 1986, this Court decided two cases that the circuits still generally view as the authority on summary judgment procedure: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In pertinent part, this Court explained in *Anderson* that a non-movant is obligated to present affirmative evidence in opposition to a motion for summary judgment, as long as the moving party has had a "full opportunity to conduct discovery" so that the party is able to gather such affirmative evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). This Court then explained similarly, in *Celotex* while analyzing the requirements for granting summary judgment pursuant to Federal Rule of Civil Procedure 56(c) that the plain language of the Rule mandates the entry of summary judgment if supported by the record and "after adequate time for discovery". *Celotex*, 477 U.S. at 317 (1986).

These principles, espoused by this Court, illustrate a principle of fairness that is central to the

American judicial system and that has been followed by a majority of federal courts of appeal—parties generally should be afforded the opportunity to prove their case, such that an entry of summary judgment before a non-moving party is given any opportunity to gather relevant information held exclusively by the moving party is fundamentally unfair.

Subsequent to *Andersen* and *Celotex*, each of the circuits have, to some extent, reviewed the particular question at issue in this case—whether litigants must be allowed to conduct **some** discovery before summary judgment may be granted. In most of these decisions, the circuits look *Andreson* and *Celotex* and the principles cited above in arriving at their ultimate conclusion. Despite the seeming agreement that these cases provide the backbone for the decision, however, the Circuits vary widely in their ultimate interpretation and application of the stated principles.

First, eight of the circuit courts of appeal have generally required trial courts to afford parties with at least **some meaningful opportunity** to conduct discovery before summary judgment may be entered. However, among these eight circuits, the courts have taken three different approaches that vary in their leniency and therefore vary widely in their ultimate results.

Three more circuits, then, **do not** require trial courts (at least not as a generally stated rule) to afford parties with discovery. While these circuits still generally recognize Rule 56(d) and allow parties to avail themselves of that procedure, they also believe that there is no hard and fast entitlement to discovery.

And finally, as for the last circuit and the circuit from which this Petition arises: the Sixth Circuit has now issued conflicting opinions that take both stances.

A. The First Eight: Courts Must Allow Some Discovery Before Entering Summary Judgment.

These first eight circuits, generally citing to this Court's summary judgment decisions in *Anderson*, *Celotex* and *Matsushita*, hold that district courts must afford litigants **some** opportunity to conduct discovery before the court may enter summary judgment. *See Bane v. Spencer*, 393 F.2d 108 (1st Cir. 1968); *Elliott v. Cartagena*, No. 22-255 (2d Cir. Oct. 17, 2023); *McCray v. Md. Dep't of Transp.*, 741 F.3d 480 (4th Cir. 2014); *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229 (6th Cir. 1994); *Dobbins v. Craycraft*, 423 F. App'x 550 (6th Cir. 2011); *Illinois St. Employees U., Coun. 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972); *Texas Partners v. Conrock Co.*, 685 F.2d 1116 (9th Cir. 1982); *Snook v. Trust Co. of Ga. Bank of Savannah*, 859 F.2d 865 (11th Cir. 1988); *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988).

However, within these circuits, the decisions fall into three different groups. First, five of the circuits take a more permissive approach and often hold that **some** discovery is required, regardless of the procedural posture of the case. Second, two more circuits generally state that courts should generally afford litigants some discovery, but also require

litigants to submit a motion under Rule 56(d)[6] to bring the need for discovery to the court's attention. And finally, on circuit has not stated a clear rule regarding whether a court **must** allow discovery, but it has also does seem to favor permitting some discovery generally.

It is also worth noting, however, that these first eight circuits, regardless of the camp into which they fall, often do require the parties to bring the necessary discovery to the court's attention, to some extent—whether by motion or by discussion at conference. The essence of the divide among these first eight lies in the deference to discovery that courts in the various circuits must give when the trial court is presented with a motion or summary judgment before **any** discovery has commenced.

1. The Five Permissive Circuits. The first group of circuits—the Third, Fourth, Ninth, Eleventh, and D.C. Circuits—implement the most permissive rule: courts in these circuits generally may not enter summary judgment against a party without allowing that party to engage in some discovery, regardless of whether the party has filed a formal motion under Rule 56(d). So long as the party brings the need for discovery to the Court's attention in some manner, the court should permit such discovery.

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[6] Rule 56(d) was previously styled as Federal Rule of Civil Procedure 56(f); despite the change in moniker the circuits continue to interpret them identically and indeed look to past decisions on Rule 56(f) to interpret Rule 56(d). As such, First Floor will generally refer to a motion under either historical provision as a Rule 56(d) motion throughout this Petition.

Of these, the Third Circuit has perhaps been the most permissive. *See Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015) (holding that a party is not required to file a **motion** under Rule 56(d); "simply attaching an appropriate affidavit or declaration to that party's response" is sufficient"); *see also Bracy v. Pfizer Inc.*, No. 18-2217 (3d Cir. Dec. 10, 2020) (noting that "challenges under Rule 56(d) are usually granted "as a matter of course") (citing *St. Surin v. V.I. Daily News, Inc.*, 21 F.3d 1309, 1314 (3d Cir. 1994); *Doe v. Abington Friends School*, 480 F.3d 252 (3d Cir. 2007).

Indeed, in perhaps the clearest articulation of the rationale behind the opinions in these four circuits, The Third Circuit explains:

> As any practicing attorney can attest, federal litigation revolves around the generous and wide-ranging discovery provided by the Federal Rules of Civil Procedure. See FED.R.CIV.P. 26(a)(1) (initial disclosures); 26(a)(2) (disclosure of expert testimony); 26(a)(3) (pretrial disclosures); 30 (oral depositions); 31 (written depositions); 33 (interrogatories); 34 (entry onto land and production of documents and things); 35 (physical and mental examinations); 36 (requests for admission). These mechanisms were made necessary by the revolutionary switch from "fact pleading" to "notice pleading" that was embodied by the modern rules.
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> Rather than endless pleadings "served back and forth ad infinitum until the last issue of

> fact was tracked down and identified through the medium of declarations, bills, pleas, replications, rejoinders, surrejoinders, etc." that had characterized common law litigation, see Abraham Rotwein, *Pleading and Practice Under the New Federal Rules* — A Survey and Comparison, 8 BROOK. L.REV. 188, 195 (1939), modern civil procedure instead "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims," *Swierkiewicz*, 534 U.S. at 512, 122 S.Ct. 992.

Doe, 480 F.3d at 256. As will become the pattern, the Third Circuit then cites this Court's *Celotex* decision, and goes on to ultimately hold that, because the question at issue was a "mixed question of law and fact", the answer depends on "a record sufficient to decide it" and the district court had thus prematurely granted summary judgment.

The D.C. Circuit, a similarly permissive circuit, also requires its trial courts to afford litigants with ample opportunity to conduct discovery, almost as a matter of course. *See, e.g. Americable Int'l., Inc. v. Dept. of Navy*, 129 F.3d 1271 (D.C. Cir. 1997) (explaining that "summary judgment is ordinarily only proper after the plaintiff has been given adequate time for discovery" and ultimately reversing the district court's grant of summary judgment, despite the fact that "summary judgment may well be in order" after such discovery).

Indeed, other circuits have noted as much, explaining that, in the D.C. Circuit, "Rule 56(d) motions 'requesting time for additional discovery

should be granted 'almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence'". *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 865 (7th Cir. 2019) (quoting *Convertino v. United States Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012).

The Fourth Circuit, then, while not quite as permissive as the first two, falls just short. *See McCray v. Md. Dept. of Transp.,* 741 F.3d 480, *see also Goodman v. Diggs,* 986 F.3d 493, 500 (4th Cir. 2021) ("we have not hesitated to vacate a grant of summary judgment before adequate discovery has occurred").

The Fourth Circuit has explained its stance clearly in *McCray v. Md. Dept. of Transp.*, where the plaintiff—who had filed an employment discrimination lawsuit—was faced with a motion for summary judgment "before any meaningful discovery was conducted". 741 F.3d 480, 481. The defendant argued that legislative immunity blocked the lawsuit, but the plaintiff was not yet afforded an opportunity to obtain evidence "integral to her case". *Id.* In response, the plaintiff in *McCray* filed a motion under Rule 56(d), but the district court denied the 56(d) motion and entered summary judgment without permitting any discovery. *Id*.

Citing specifically the principles espoused in *Anderson* and *Celotex* the Fourth Circuit concluded that the district court abused its discretion, largely because "[a] Rule 56(d) motion **must** be granted where the 'non-moving party has not been afforded an opportunity to discover information that is pertinent to its opposition.'" *Id*. at 483-84 (emphasis added). The Fourth Circuit further reiterated that the plaintiff's 56(d) motion "succeeds with ease" because at the time

of the summary judgment motion, the plaintiff "had not had the opportunity to depose [her supervisors] and thus "had no information on how positions were chosen for termination or why other positions were kept", and concluded aptly that "summary judgment without discovery forces the non-moving party into a fencing match without a sword or mask". *Id*. at 483.

And of course, the Eleventh Circuit concurs with the first three. *See WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988); *see also Snook v. Trust Co. of Ga. Bank of Savannah*, 859 F.2d 865 (11th Cir. 1988) ("In this Circuit, a party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in order to invoke the protection of that Rule.").

In an oft-cited case, the Eleventh Circuit highlighted the same "limitations and utility of summary procedure" that this Court illuminated in its holdings in *Anderson*, *Celotex*, and *Matsushita*. *WSB-TV* at 1269. As with most of the cases discussed in this Petition, the *WSB-TV* plaintiff filed suit under 42 U.S.C. § 1983 claiming the defendant deprived plaintiff of their First Amendment freedom of press and quickly issued discovery requests, immediately after which the defendant immediately moved for summary judgment without responding to the plaintiff's discovery requests. *Id.* at 1267. The plaintiff did file a motion under Rule 56(f), but the court denied the plaintiff's 56(f) motion and awarded summary judgment to the defendant. *Id*.

The Eleventh Circuit reversed this decision, relying clearly on the language from this Court's decisions explaining "that summary judgment may only be decided upon **an adequate record**". *Id*. at

1269-70. Thus, because the plaintiff had been afforded no discovery, the entry of summary judgment prior to any discovery was improper. *Id.*

Finally, as the last of these first five permissive circuits, The Ninth Circuit, much as the circuits above, has explained that "the Supreme Court has restated the rule as requiring, rather than merely permitting discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Metabolife Intern. v. Wornick* 264 F.3d 832, 846 (9th Cir. 2003); *see also Burlington v. Assiniboine*, Sioux Tribes, 323 F.3d 767 (9th Cir. 2003) (quoting *Metabolife* and citing *Anderson* to reiterate the point that the circuit views the Supreme Court as "requiring" discovery).

2. The Two Circuits That Explicitly Require a Rule 56 Motion. Two more circuits—the Second and Tenth—also generally hold that courts should allow parties to engage in some discovery, as do the initial five circuits. These circuits specifically implement one additional requirement, however: parties must submit a properly stated motion under Rule 56(d) to inform the trial court that such discovery is necessary and the parties must strictly to adhere to the confines of Rule 56(d).

Even among these two circuits, there is yet another divide. The Second Circuit tends to liberally grant Rule 56(d) motions where no discovery has been exchanged, even while requiring Rule 56(d) motions be submitted. *See, e.g. Elliott v. Cartagena*, 84 F.4th 481 (2d Cir. 2023) (overturning the district court's grant of summary judgment and denial of a Rule 56 motion where no discovery was afforded and even where the Rule 56 motion sought information that

may exist); *see also Berger v. United States*, 87 F.3d 60, 65 (2d Cir. 1996) ("we cannot concluded that the parties already had a fully adequate opportunity for discovery" where the district ordered the parties "to stay all discovery until there is a final determination on [the] motion for partial summary judgment") (citing *Anderson*, 477 U.S. at 250 n.5) (internal quotations omitted); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

The Tenth Circuit, on the other hand, generally reviews Rule 56(d) motions far more strictly, regardless of the status of discovery, even while having generally stated in the past that "discovery is strongly favored before summary judgment is granted". *See, e.g. Bryant v. O'Connor*, 848 F.2d 1064 (10th Cir. 1988) (upholding the denial of a Rule 56 motion and grant of summary judgment).

The *Elliott* plaintiff in the Second Circuit, for example, filed a copyright lawsuit, after which the defendants quickly filed a motion for summary judgment—after the parties had participated in just a couple of initial conferences with the district court. *Elliott,* No. 84 F.4th at 486-487. The district court, after denying the plaintiff's request to engage in discovery pursuant to Rule 56(d), granted the defendants' motion. *Id.*

The Second Circuit reversed, noting that "Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery", *Id.* At 493. As with the Tenth Circuit, then, the Second Circuit also explained that "a party resisting summary judgment on [this ground] must submit an affidavit pursuant to [Rule 56(d)]", but went on to hold specifically that the

facts sought by that plaintiff's motion "could" demonstrate a genuine dispute of material fact, despite the fact that the district court had held the motion was just "mere speculation" *Id.* at *23-24. Importantly, the Second Circuit astutely recognized that "[P]laintiff cannot be faulted for failing to advise the district court precisely what information he might learn during discovery given that the facts sought were exclusively within defendants' possession and that he had no previous opportunity to develop the record through discovery." *Id.* at *24 (quoting *Miller v. Wolpoff &Abramson, L.L.P.*, 321 F.3d 292 (2d Cir. 2003)).

On the other hand, the Tenth Circuit in *Adams v. C3 Pipeline Constr.*, while reiterating those principles that generally follow from this Court's seminal opinions on the subject, ultimately upholds the district court's grant of summary judgment and denial of the Rule 56(d) motion because the appellant did not specify probably facts that the discovery could yield or that would have been material, without much discussion as to the effect that the items' possession being in the "exclusive control of the opposing part" had on the case. 30 F.4th 943 (10th Cir. 2021). The Tenth Circuit specifically explains that "[it] expect[s] Rule 56(d) motions to be robust" but also that "sufficient time for discovery is especially important when relevant facts are exclusively in the control of the opposing party." *Id.* at 968 (quoting *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081 (10th Cir. 1985). In short, the *Adams* decision is illustrative as to how strict the Tenth Circuit views the issue.

3. The Circuit That Favors Discovery, But Has Not Articulated A Clear Rule. The final circuit in the first eight—the First Circuit—has not articulated its stance on the subject as clearly as the others.[7] The First Circuit has, on a few occasions, stated its opinion that parties must be "afforded a fair chance" to obtain information, but the circuit simply applies this rule on a case-by-case basis. *See, e.g. Velez v. Awning Windows, Inc.*, 375 F.3d 35, 39 (1st Cir. 2004). And as with the other circuits, it certainly acknowledges that a party must notify the court that it requires discovery to some extent, but stops short of requiring a motion under Rule 56(d) as do other circuits. *Id.*

The First Circuit explained for itself, in *Emigrant Residential LLC v. Pinti*, that "[w]e do not gainsay that a district court has wide discretion both in the adjudication of Rule 56(d) motions and in the management of discovery". 37 F.4th 717, 727 (2022). Thus, where the district court "stayed all discovery at the inception of the case" and granted summary judgment even though the party confronted with a summary judgment motion "timely and suitably" filed a Rule 56(d) motion, the circuit reversed that grant of summary judgment. *Id.*; *see also Bissereth v. United States*, Civil Action 21-cv-11068-ADB, at *12 (D. Mass. July 6, 2023) (citing *Velez v. Awning Windows*, Inc., 375 F.3d 35, 39 (1st Cir. 2004) to explain that where "no discovery has yet been taken in this case, the Court will not enter summary judgment on behalf

[7] It is worth noting, however, that there is a dearth of case law in this circuit on the subject—most cases involve matters in which the parties were in fact able to engage in **some** discovery.

of the plaintiff unless it is exceedingly clear that there are no genuine issues of material fact").

B. The Next Three: Courts Need Not Allow Discovery Before Summary Judgment.

The remaining circuits (except for the Sixth Circuit)—the Fifth, Seventh, and Eighth—**do not** require their trial courts to allow discovery before the court may enter summary judgment. While each of these circuits do generally acknowledge Rule 56(d), and allow parties to request discovery where the parties think necessary, they generally review these motions strictly and strictly require parties to file such motions (an appeal will fail if such a motion is not filed). Each of these circuits has also stated in clear that regardless of when a motion for summary judgment is filed.

The Fifth Circuit, for example, has specifically held that "Rule 56 does not require that any discovery take place before summary judgment can be granted" *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). In affirming the grant of summary judgment in the district court, the circuit further explains that "a plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited", though "Rule 56[(d)] is [the party's] remedy". *Id.*

The Seventh Circuit has held similarly, stating "Rule 56 does not require that discovery take place in all cases before summary judgment can be granted. *See* Fed.R.Civ.P. 56. In fact, this Court has noted that 'the fact that discovery is not complete — indeed has not begun—need not defeat [a motion for summary judgment].'" *Waterloo Furniture Components, Ltd. v.*

Haworth, Inc., 467 F.3d 641, 649 (7th Cir. 2006). Even where the plaintiff had submitted a Rule 56(f) motion along with an affidavit in support, "the mere fact that the district court granted [the] summary judgment motion prior to allowing any discovery" was "irrelevant", and the Seventh affirmed the decision without much further discussion about the details of the information that the plaintiff sought. *Id.*

Finally, the Eighth Circuit—last of the three no-guarantee circuits—has arrived at the same conclusion. As with its counterparts, the Eighth District has held, in certain terms, that "Rule 56 "does not require trial courts to allow parties to conduct discovery before entering summary judgment". *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 793 F.3d 822 (8th Cir. 2015); *see also Duffy v. Wolle*, 123 F.3d 1026, 1040 (8th Cir. 1997) (quoting *U.S. v. Light*, 766 F.2d 394 (1985). In each of *Anzaldua* and *Duffy*, then, the Eighth Circuit unsurprisingly held that the courts had properly granted summary judgment against the parties despite the fact that no discovery had been exchanged, and further held that the parties had not properly showed that they should be able to obtain such discovery.

C. The Last One: The Sixth Circuit Has Now Held Both That A Court Must Allow And That A Court Need Not Allow Discovery.

The Sixth Circuit Court of Appeals, particularly after its decision in the matter presented in this Petition, presents no exception to the inconsistent approach that has been applied in these cases across the Circuits.

Indeed, the Sixth Circuit had previously held that, an entry of summary judgment, almost as a matter of course, absent *any* opportunity for discovery, is improper. *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231 (6th Cir. 1994) (emphasis in original). The Sixth Circuit's opinion in *White's Landing* involved little discussion, and seemed to presuppose that a grant of summary judgment prior to allowing discovery was, *per se*, an abuse of discretion—without actually saying as much.

The plaintiffs in *White's Landing*, the Sixth Circuit's seminal case on the subject for some time, were commercial fishermen who brought suit challenging the enactment of certain amendments to the commercial fishing laws that significantly restricted their business. *Id.* at 230. Shortly after the plaintiffs filed a motion requesting leave to amend their complaint, the plaintiffs served their first discovery requests upon the defendants. *Id.* The defendants shortly thereafter notified the district court that they intended to file a motion for summary judgment, and the district court in turn stayed all discovery. *Id.* at 230-31. The plaintiffs filed their amended complaint, to which the defendants quickly responded with a motion for summary judgment. *Id.* Because discovery was still stayed, the plaintiffs filed a motion under Rule 56(f) of the Federal Rules of Civil Procedure seeking additional time to gather discovery in order to respond to the motion for summary judgment. *Id.* The district court denied the 56(f) motion and entered summary judgment for the defendants, stating that there was no need for further discovery. *Id.*

Faced with the appeal of that summary judgment, the Sixth Circuit's issued a tellingly brief opinion in which it quickly concluded that it could not affirm a grant of summary judgment where no discovery had been permitted. *Id*. at 232. Indeed, the Sixth Circuit explicitly acknowledged that **even though the plaintiffs faced a high hurdle to prevail on their claims, summary judgment should not have been entered until the plaintiffs were afforded some opportunity for discovery.** *Id*. at 231. Importantly, the Sixth Circuit in *White's Landing* expressed the concern that is at the heart of First Floor's petition—while granting a motion under Rule 56 of the Federal Rules of Civil Procedure may be beneficial when it allows courts to speedily discard meritless claims, the benefits of this procedure are "undermined" when it is "employed in a manner that offends concepts of fundamental fairness". *Id*. Relying on *Anderson* and *Celotex* as have many of the other circuits, the Sixth Circuit went on to say that a case such as *White's Landing*, where summary judgment is granted absent any opportunity for discovery, amounts to a fundamentally unfair misuse of summary judgment. *Id*.

Notably, the Sixth Circuit's decision in *White's Landing* did not hinge on an analysis of the probative value of the plaintiffs' Rule 56 motion. Rather, the Sixth Circuit's opinion solely focused on the manifest injustice that results from a premature entry of summary judgment and unconditionally concluded that entering summary judgment without affording *any* opportunity for discovery is improper. *Id*. at 232 (emphasis in original).

The Sixth Circuit likewise reversed a premature entry of summary judgment in *Dobbins v. Craycraft*, where the non-moving party was unable to conduct any discovery. *Dobbins v. Craycraft*, 423 F. App'x 550 (6th Cir. 2011). In *Dobbins*, the plaintiff filed suit under 42 U.S.C. § 1983, alleging the defendant violated his due process and First Amendment rights. *Id.* at 551. The plaintiff filed his first set of discovery requests shortly after filing the complaint and before the defendant had been served with the complaint and summons. *Id.* at 551-52. The district court stayed all discovery just two weeks after the defendant received service of the summons and complaint, at which point the defendant filed a motion for summary judgment. *Id.* The district court ultimately granted that motion before allowing the parties to engage in any discovery. *Id.*

The Sixth Circuit in *Dobbins* then looked to a five-factor test that it articulated shortly after the *White's Landing* decision to determine whether summary judgment was improper at this stage. *Id.* (citing *Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190 (6th Cir. 1995) ("A number of different factors are applicable to such claims, such as (1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the desired discovery would have changed the ruling below; (3) how long the discovery period had lasted; (4) whether the appellant was dilatory in its discovery efforts; and (5) whether the appellee was responsive to discovery requests."). Applying the test, and also specifically citing *White's Landing*, the Sixth Circuit found that all relevant factors weighed in favor of reversal, noting that the plaintiff was prejudiced by his inability to conduct "at

least some" discovery and thus reversed the entry of summary judgment. *Id.* at 554.

However, and despite the fact that the Sixth Circuit had decided in *White's Landing* and *Dobbins* clearly demonstrating an interest in preserving procedural fairness at the summary judgment stage, the Sixth Circuit reached an entirely different and conflicting conclusion when reviewing First Floor's case.

Indeed, the facts of First Floor's case are so strikingly similar that First Floor directly analogized its case to *White's Landing* in First Floor's Appellate Brief. Regardless, the Sixth Circuit affirmed the district court's entry of summary judgment and dismissal of First Floor's claims without discussing the principles of fundamental fairness upheld in *White's Landing*, and after only briefly mentioning the 5-factor analysis utilized in *Dobbins* that would almost certainly weigh in favor of reversal. And the Sixth Circuit expressly refused to apply the five-factor analysis employed in *Dobbins* in First Floor's case on the basis that such a test is inappropriate in cases **where no discovery has been conducted**. Otherwise, the Sixth Circuit did not explain why First Floor was entitled to some deference in its desire to engage in discovery, and did not provide any reasons as to why the First Floor decision was in line with, or even why the decision intentionally departed from, its previous precedent.

D. The Logical Conclusion: This Court Should Resolve These Inconsistent Approaches.

The Sixth Circuit's inconsistent application of the seemingly unconditional principle of procedural fairness it voiced in *White's Landing*—that "the grant of summary judgment, absent *any* opportunity for discovery is improper"—seems an appropriate example of the unpredictable trend seen in the other circuit courts. It is clear that the Sixth Circuit, along with many other circuit courts, acknowledge a court's obligation to safeguard the procedural protections owed to litigants. And it would also seem that the particular rule applied by the particular circuit ultimately presupposed the ultimate decision—if a party should find itself before a court in an unfavorable circuit, the party should almost expect that the court will determine that the party's requests for discovery are inadequate.

However, it also—and fortunately—seems equally clear that the federal circuit courts are unsure of how to apply this principle in a consistent manner that aligns with the precedent of this Court. These incompatible decisions demonstrate the necessity for this Court to unequivocally answer the question of whether a non-movant is entitled to at least some discovery before summary judgment may be entered against them.

II. The Sixth Circuit's Decision Departed From This Court's Precedent On An Important Question of Federal Procedure.

Aside from the fact that the decision of the Sixth Circuit presented by this Petition has highlighted the disarray among the circuits on similar decisions, it also presents another particularly significant issue: the manner in which the Sixth Circuit arrived at its decision departs from this Court's precedent on a very important procedural question—and sanctions the district court's similar departure—in a way that will have far-reaching consequences in the courts for the foreseeable future.

Indeed, this Court has granted certiorari to review matters where those matters present issues of great public importance, over and above the importance to the parties in the dispute, and where a "real and embarrassing" conflict of opinion exists between the federal courts of appeal. *Layne Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

If left to stand, the Sixth Circuit's decision here will significantly stifle the overarching goal of the judicial system: to fairly resolve disputes on the merits of the case. The interests of the public and the integrity of the judicial system stand to suffer significant damage where circuit courts cannot agree on how much information a party is entitled to gather in order to prove their case and may quickly dismiss claims that require an exchange of discovery.

If the patchwork system of rules governing how much, if any, discovery is required before a court may enter summary judgment is allowed to stand, there will be a wide variety of forums that would produce

varied and inconsistent results. A party could file its case in a trial court located in the Third Circuit, for example, and arrive at a wildly different result than if it filed its case in a trial court located in the Sixth Circuit, simply because one circuit has determined that discovery is more important than the other. For those with more significant time and resources, then, one can certainly see a scenario in which parties will heavily prefer certain of the circuits over others.

Moreover, allowing this scheme to remain will unfairly favor defendants in certain circuits who possess most, if not all, pertinent evidence related to a plaintiff's claims. Indeed, if a plaintiff files suit and is unable to present affirmative evidence beyond a statement of their own recollection but knows that additional evidence will be produced by the defendant during discovery, they may be entitled to relief in one judicial circuit and prevented from pursuing their claim in another.

CONCLUSION

As a result of the split among the circuits and the Sixth Circuit's departure from this Court's precedent on these important procedural matters, this Court should grant the Petition For Writ of Certiorari.

Respectfully submitted,

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