No. 23-1178

In the
Supreme Court of the United States

FIRST FLOOR LIVING, LLC,
Petitioner,

v.

CITY OF CLEVELAND, OHIO, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF CLEVELAND

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioner First Floor Living LLC provided the following question presented:

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.

Respondent City of Cleveland objects. *See* Sup. Ct. R. 15. The proposed question presented implies that no discovery took place. That is not true. Cleveland made substantial productions as initial disclosures under Rule 26(a)(1). And First Floor conceded below that it had much the information it needed, and mostly wanted to test the authenticity of these produced documents. The proposed question presented also assumes that First Floor could have made a sufficient showing under Rule 56(d) to create a genuine dispute of material fact on the pending motion for summary judgment. Again, this is not true.

For these reasons, Respondent City of Cleveland objects to the proposed question presented by First Floor, and provides an alternative question presented:

Did the Sixth Circuit correctly find that the District Court did not abuse its discretion in denying Petitioner's Rule 56(d) motion and granting Respondent City of Cleveland's summary judgment motion because (1) Petitioner failed to make a

reasonably particularized showing of why it needed additional discovery or the material facts it had hoped to uncover, and (2) the requested discovery would not have changed the outcome of the district court's ruling?

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INTRODUCTION

Respondent City of Cleveland has pockets of blighted homes. A blighted home causes problems related to public health, property values, crime, and more. It is a public nuisance. Cleveland, like other cities, requires an owner to remediate the problem property or face demolition. Cleveland identified the Warner Road Property as a public nuisance to be remediated or demolished. But before taking action, it provided notice to the then-owner. This included posting a notice on the property and sending a notice by certified mail.

Even though the Warner Road Property was slated for demolition, Petitioner First Floor Living LLC bought it. So Cleveland took several more steps, as it does for every new owner. First, it sent a notice by certified mail to the Warner Road Property and to First Floor. Second, it posted the notice on the property given its routine practice of doing so. Third, it searched its records for permits or other indicia that the property was being improved in an effort to avoid demolition.

With the notices out and no permits on record (and no response from First Floor), the Warner Road Property was demolished. Cleveland relied on these efforts to show that it satisfied the notice requirement of the Due Process Clause on summary judgment.

First Floor then moved for more discovery under Fed. R. Civ. P. 56(d). But it failed to identify how additional discovery would help. In fact, First Floor

conceded that "much of the information . . . lie[d] in the possession of Plaintiffs." First Floor instead sought to review Cleveland's "electronic file information and metadata" related to Cleveland's evidence, among other things. First Floor failed to explain how this additional discovery could overcome Cleveland's notice efforts.

The district court found, and the court of appeals agreed, that First Floor's proposed discovery could not answer whether there was sufficient notice under the Due Process Clause. That is because Cleveland's initial notice on the previous owner, perhaps alone, but especially combined with Cleveland's additional steps to notify First Floor, were sufficient and undisputed.

The petition concedes that Cleveland satisfied the Due Process Clause. First Floor instead presents a much narrower question: whether the district court properly exercised its discretion under Fed. R. Civ. P. 56(d). It did. That is because the proposed discovery was irrelevant and speculative; and First Floor had failed to show how the proposed discovery would change the outcome of the case. And important here, this Court and all the circuits agree that a trial court may deny a Rule 56(d) motion if a party fails to identify the specific discovery sought and how that discovery is essential. Because the lower court decision was correct, and there is no circuit split, First Floor's petition should be denied.

First Floor argues that this Court should intervene to resolve a Rule 56(d) circuit split. But the difference,

if any, goes to whether a party must formally move for relief and attach a declaration, or if something less is required. Yet First Floor moved and filed a declaration. So even if there is a split, this case cannot resolve it because First Floor took the most formal approach. Therefore, the petition should be denied.

The other Rule 10 factors also favor denying the petition. First, there is nothing important to the public about the demolition of the Warner Road Property. Second, Rule 56(d) motions are fact-specific inquiries under the abuse of discretion standard, meaning there would be no precedential value from this Court's involvement. And third, even though this Court is not involved in error correction, First Floor still cannot say how the additional discovery would change the outcome here.

For these reasons, the petition should be denied.

STATEMENT OF THE CASE

Cleveland authorized the demolition of a blighted and condemned property. On summary judgment, it showed that it gave notice multiple ways beforehand. In response, First Floor conceded that "much of the information . . . lie[d] in the possession of Plaintiffs," yet moved for more unspecified discovery under Rule 56(d). The district court denied the motion and granted summary judgment to Cleveland. The Sixth Circuit affirmed. Because this Court and the circuit courts agree that a trial court properly denies a request for speculative or irrelevant discovery, First Floor's petition should be denied.

A. District Court Proceedings

This suit is about the demolition of a blighted house. Following the 2008 financial crisis, state leaders identified Cleveland and Cuyahoga County as particularly hard hit. The Ohio General Assembly created the first modern land bank to tackle blight and the effects of rapid depopulation. *See Cleveland Hous. Renewal Project v. Deutsche Bank Tr. Co.*, 606 F. Supp. 2d 698, 715 (N.D. Ohio 2009) (noting that the legislature initially only allowed counties with more than 1.2 million people to create land banks, i.e., Cuyahoga County), *vacated*, 621 F.3d 554 (6th Cir. 2010). Northeast Ohio is still tackling the public nuisance caused by blighted and vacant homes.

The Complaint was filed by two companies, including First Floor. First Floor sued Cleveland alleging, among other things, that the Warner Road Property was demolished in violation of the Due Process Clause. *See* D. Ct. Dkt. 1. First Floor also named the Cuyahoga County Land Bank and those that carried out the demolition. *See* Pet. App-29. Cleveland answered and brought counterclaims for the cost of demolition. *See* D. Ct. Dkt. 27. Cleveland's answer included its entire file related to the Warner Road Property. The Parties exchanged initial disclosures, where again Cleveland provided its records.

Cleveland, eight months after the Complaint was filed, moved for summary judgment. Cleveland showed that in 2016 demolition notices were posted at property and mailed and received by the then-owner,

the State of Ohio. D. Ct. Dkt. 33-4, 33-5. This served as notice to all future owners under state law. *See* R.C. 3103.09(k)(2). Still, when the Warner Road Property was purchased by First Floor, Cleveland sent notices to the property and to First Floor. *See* App-49. Cleveland also demonstrated that it has the routine practice of posting the notice before demolition. So it posted the notices to the Warner Road Property, just like it did in 2016. *See id.* Finally, Cleveland searched for permits recorded by First Floor that would have allowed it to improve the property to avoid demolition. *See* Pet. App-52. Finding none, and given the above efforts, Cleveland argued on summary judgment that it provided sufficient notice under the Due Process Clause.

In response, First Floor and the second company moved under Fed. R. Civ. P. 56(d) to conduct more discovery. *See* D. Ct. Dkt. 41. They initially conceded that "much of the information regarding the merits of Plaintiff's [sic] claims indeed did lie in the possession of Plaintiffs." *See* D. Ct. Dkt. 41-1. The companies then failed to identify the discovery sought for each property. But they collectively described seven areas of potential investigation. D. Ct. Dkt. 41, PageID # 448. This ranged from metadata about the evidence provided by Cleveland to identifying the individuals who sent the specific notices. *See id.* But none of the discovery could dispute that: (1) the Warner Road Property notices were delivered in 2016 by mail and posting, (2) mailings were again sent to the Warner Road Property and First Floor, (3) no permits were filed to allow for remediation, and (4) Cleveland's practice of posting notices.

The district court considered the Rule 56(d) motion. *See* Pet. App-58. The district court identified the five-part test used by the Sixth Circuit to test the motion. *See* Pet. App-62. The court then found that, given the specific evidence of notice efforts provided by Cleveland, it would be a waste of resources for the plaintiffs to "explore" the "notice regime generally." *Id.* The district court then denied the motion, and later granted summary judgment to Cleveland and other defendants as to the Due Process Clause and remaining federal claims. Pet. App-28.

B. Court of Appeals Proceedings

On appeal, First Floor and the second company argued that the district court erred by denying the Rule 56(d) motion and granting the defendants' motion for summary judgment. *See* App-4. First Floor initially acknowledged a Rule 56(d) decision is reviewed using the abuse of discretion standard. *See* First Floor C.A. Brief 12. First Floor then argued that, as a rule, a district abuses its discretion when no discovery at all is allowed. *Id.* It then described the discovery sought. This ranged from communications between the defendants to more discovery on Cleveland's routine practice of issuing notices. *Id* at 15.

As for the grant of summary judgment, First Floor argued that the earlier (and undisputed) posting to a prior owner was insufficient under the Due Process Clause. *Id.* at 19. But First Floor provided no reason to doubt that Cleveland had a policy and practice of posting and sending notices. *See id.* First Floor also

failed to address Cleveland's search for permits. *See id.*

The court of appeals affirmed the district court on both issues. As to Rule 56(d), the court first observed that a district court may deny a Rule 56(d) motion, even if there is no discovery conducted by the nonmoving party. Pet. App-13. This includes instances where the motion is supported by conclusory statements or would not have changed the outcome of the case.

The court then closely reviewed the proposed discovery. First, the court considered First Floor's desire for internal communications. The court explained that these communications had no bearing on Cleveland's Due Process Clause obligation to provide notice. Pet. App-14. Then the court turned to First Floor's other proposed discovery, such as to confirm that there were no other "wrongful actions" by Cleveland. *Id.* The court found this was too speculative. *Id.* The court then concluded that First Floor's requested discovery was "irrelevant" to the issue of "whether they received adequate notice" and "would not have changed the outcome of the district court's ruling." *Id.*

As for the merits, the court held that Cleveland's undisputed notice by mail and posting on the Warner Road Property before being purchased by First Floor satisfied the Due Process Clause's notice requirement. Pet. App-20. And as for Cleveland's sent but undelivered mail to the Warren Road Property and First Floor, the court concluded that it was the last in

a series of efforts by Cleveland to provide notice. Pet. App-21. These efforts, especially when combined with Cleveland's practice of sending and posting notice to new owners, and First Floor's lack of permits to improve the property, showed that Cleveland provided sufficient notice. Pet. App-22.

While the court affirmed, Judge Nalbandian issued a dissent. Judge Nalbandian questioned (but did not answer) whether too much time had passed between the 2016 posting and the demolition. Pet. App-25. He also gave credence to a declaration by someone who lived around the corner from the Warner Road Property and failed to see a posted notice driving by. Pet App-26. Therefore, he would have returned the case to the district court.

First Floor's petition for certiorari followed.

REASONS FOR DENYING THE PETITION

Because under this Court's precedent—and in every circuit—a Rule 56(d) motion is properly denied if a party seeks speculative or irrelevant discovery, the petition should be denied.

I. The decision below was correct and consistent with this Court's precedent.

The court of appeal's decision is consistent with this Court's cases. Rule 56(d) requires a nonmovant to show, for "specified reasons," that it cannot present facts "essential" to justify its opposition. Fed. R. Civ. P. 56(d). This Court recognized long ago that Rule 56(d), then 56(f), requires more than speculation about what might be discovered by a nonmovant—especially if not essential to disposing the case. In *First Nat. Bank of Ariz.* In *First National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 294 (1968), for example, this Court upheld a trial court's decision to limit discovery when the party already had the required evidence that disposed of the claims. *Id.* The petitioner's "speculation" as to what additional discovery would yield could not justify more discovery, especially when that speculation is "not very persuasive speculation at that . . . ." *Id.*

Here, the court of appeals found that it was within the trial court's discretion to disallow additional discovery. As the court explained, First Floor's wish list, which included internal communications, metadata, and evidence of wrongful actions, did not go to the issue of adequate notice, and would not have

changed the outcome of the case. Pet. App-14. This is particularly true given the evidence of notice: (1) posting notice in 2016; (2) mailing notice in 2016; (3) mailing notice in 2020 to the Warner Road Property and First Floor; and (4) reviewing records to ensure that First Floor did not obtain a permit as required to avoid demolition. Pet. App-19-20. This is in addition to the other evidence presented by Cleveland, including the routine practice of posting notice on the property before demotion. Pet. App-22. For these reasons, just as in *First National Bank of Arizona*, the trial court found that additional speculative discovery was unnecessary here.

First Floor argues that this Court's decisions in *Celotex* and *Anderson* required its proposed discovery of metadata and other exploration. Pet. 13. Not so. Starting with *Celotex v. Catrett*, 477 U.S. 317 (1986), this Court did not undermine Rule 56(d)'s requirement that a party must explain why more discovery is needed as to specific facts. *Celotex* instead held that when a party moves for summary judgment and explains that the opposing party cannot meet "an essential element of her case"—as Cleveland did here—summary judgment is required. 477 U.S. at 322-323. This disposes of "factually unsupported claims . . . ." *Id.* at 323-324.

While *Celotex* did address concerns about a premature motion for summary judgment, this Court invoked Rule 56(d) as the proper method to evaluate additional discovery. That is what happened here. First Floor moved under Rule 56(d)but conceded that it had "much of the information needed," and failed to

specifically identify anything else. *See* D. Ct. Dkt. 41-1.

Similarly, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court specifically acknowledged that materiality is a key inquiry at the summary judgment stage. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* As for Rule 56(d), this Court footnoted that this subsection allows a nonmovant to discover information that is "essential" to his claim. *Id.*, n.5. What the *Anderson* court did not hold is that discovery of non-essential evidence is required before summary judgment is entered.

Because this Court, in *First National Bank of Arizona*, *Celotex*, and *Andersen*, never required a trial court grant a Rule 56(d) motion when the discovery sought is speculative or irrelevant, the decision below was correct and followed this Court's precedent.

II. There is no relevant Rule 56(d) circuit split.

First Floor urges this Court resolve a circuit split about how much discovery is allowed before denying a Rule 56(d) motion. Pet. 14. But the circuits agree that Rule 56(d) does not require speculative or irrelevant discovery. The only split identified by First Floor, if any, is whether litigants must "submit a motion under Rule 56(d)," which is a non-issue here. *See* Pet. 16.

The circuits agree that a trial court properly denies a Rule 56(d) motion if speculative or irrelevant information is sought, which was the case here. *See, e.g.*, *President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 77 F.4th 33, 41 (1st Cir. 2023) (upholding denied Rule 56(d) motion when "any evidence . . . would have been irrelevant"); *In re Dana Corp.*, 574 F.3d 129, 148–49 (2d Cir. 2009) ("court plainly has discretion" to reject a request for discovery if the "evidence sought would be cumulative" or "if the request is based only on speculation as to what potentially could be discovered") (citations and quotations omitted); *In re Taylor*, 548 F. App'x 822, 825 (3d Cir. 2013) ("Where information sought is not relevant to the court's inquiry, a Rule 56(d) motion for discovery may be denied"); *Pisano v. Strach*, 743 F.3d 927, 931 (4th Cir. 2014) ("a court may deny a Rule 56(d) motion when the information sought would not by itself create a genuine issue of material fact sufficient for the nonmovant to survive summary judgment"); *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 423 (5th Cir. 2016) ("this court has found no abuse of discretion where the party filing the Rule 56(d) motion has failed to identify sufficiently specific or material evidence to affect a summary judgment ruling."); *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 225 (6th Cir. 2015) (sought discovery was "legally irrelevant"); *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 864–65 (7th Cir. 2019) ("a court need not delay decision on a summary judgment motion to allow time for discovery on an obviously meritless claim or defense"); *Marlow v. City of Clarendon*, 78 F.4th 410, 417 (8th Cir. 2023) ("Marlow did not explain how the evidence he sought

was relevant to rebut the defendants' showing of the absence of a genuine issue of fact.") (cleaned up); *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms*, Inc., 874 F.3d 604, 620 (9th Cir. 2017) ("Because this fact was not relevant—let alone 'essential'—to the issues raised by Midbrook's motion for summary judgment, the district court did not abuse its discretion" in denying Rule 56(d) motion); *Adams v. C3 Pipeline Constr. Inc.*, 30 F.4th 943, 969 (10th Cir. 2021) ("counsel's Rule 56(d) affidavit failed to state with specificity how discovery would yield probable facts that would rebut the summary judgment motion") (cleaned up); *Compere v. Nusret Miami, LLC*, 28 F.4th 1180, 1189 (11th Cir. 2022) ("Patel's purported testimony would have made no difference," effectively upholding trial court's denial of Rule 56(d) motion); *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 531 (D.C. Cir. 2019) (upholding denial of Rule 56(d) motion).

First Floor's cited authority agrees that the requested discovery cannot be speculative or irrelevant, even if in that instance the court found that a Rule 56(d) motion should have been granted. *See, e.g.*, *Smith*, 933 F.3d at 864–65; *Goodman v. Diggs*, 986 F.3d 493, 501 (4th Cir. 2021) ("[W]e have held that a court may deny a Rule 56(d) motion 'when the information sought would not by itself create a genuine issue of material fact sufficient for the nonmovant to survive summary judgment.'") (quoting *Hodgin v. UTC Fire & Sec. Ams. Corp.*, 885 F.3d 243, 250 (4th Cir. 2018)) (further citation omitted). There is no dispute about the substance of a Rule 56(d) showing.

Because there is no dispute about the substance of evaluating a motion under Rule 56(d), First Floor points to a potential procedural inconsistency, specifically whether a motion and declaration are required under Rule 56(d). Some circuits may be more stringent about the technicalities of Rule 56(d) than others. *Compare Jones v. Secord*, 684 F.3d 1, 6 (1st Cir. 2012) *with Shelton v. Bledsoe*, 775 F.3d 554, 566 (3d Cir. 2015) ("[A] a formal motion is not required by the Rule."); *Goodman v. Diggs*, 986 F.3d 493, 501 (4th Cir. 2021) ("We have not insisted on an affidavit in technical accordance with Rule 56(d) . . . .") (cleaned up).

But First Floor's proposed procedural conflict, if any, has no bearing here. That is because First Floor moved under Rule 56(d) and included a declaration. *See* D. Ct. Dkt. 41-1. First Floor followed Rule 56(d)'s formalities. Even if there is a circuit split about the particularities of Rule 56(d) procedure, this case cannot resolve it.

Finally, there is no inter-circuit split regarding Rule 56(d) identified by First Floor. First Floor compares decisions in *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231 (6th Cir. 1994) and *Dobbins v. Craycraft*, 423 F. App'x 550, 552 (6th Cir. 2011). But *Dobbins* is an unpublished decision so it cannot create an inter-circuit conflict. And while First Floor argues that *White's Landing* requires granting a Rule 56(d) at the outset of a case no matter what, that is not true. Instead, the majority in that case concluded the claim would be a "high hurdle" given the evidence but fell short of calling the discovery

speculative or irrelevant. *White's Landing*, 29 F.3d at 231. That said, the dissent disagreed. *Id.* at 233 (Enslen, J., dissenting) ("[D]iscovery on this 'fact' was unnecessary as well, because it could not have altered the outcome of the case.").

More recent cases put *White's Landing* in context: no opportunity for discovery may be an abuse of discretion; however, the Sixth Circuit will nonetheless uphold a trial court when the proposed discovery is too vague or would not change the outcome of the case. *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008) (collecting cases, including *White's Landing*).[1] There is therefore no conflict in the Sixth Circuit, a conclusion supported by the court's *en banc* petition denial.

Because all the circuits agree that Rule 56(d) motions must outline proposed specific and relevant discovery, and First Floor made its unsuccessful request by motion supported by a declaration, the petition should be denied.

III. Even if there is a circuit split, this case would be a poor vehicle to address it.

This case does not warrant this Court's review because the court of appeals correctly applied this Court's law and there is no circuit split. But there are still more reasons to deny the petition.

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[1] This rule was further solidified by the 2009 amendment of Rule 56, which clarified that a party may move for summary judgment at any time.

First, this case is a poor vehicle because Rule 56(d) motions are reviewed using the abuse of discretion standard. This deferential review gives the district court the "necessary flexibility" to resolve questions involving "narrow facts" that "utterly resist generalization." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (citation and quotation omitted). And under this standard, testing the sufficiency of a Rule 56(d) motion is "at heart, rooted in factual determinations." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 (2014) (citation and quotations omitted). The fact-specific inquiry required by Rule 56(d) would thus limit the precedential value of any decision by this Court. Therefore, the petition should be denied.

Second, First Floor still has not explained how this additional discovery would impact the underlying summary judgment in Cleveland's favor. Thus, First Floor asks this Court to engage in an "academic" or "intellectually interesting" exercise rather than the "special and important reasons" required by Rule 10. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (citations and quotations omitted). The petition should therefore be denied for this reason too.

For these reasons, this Court should deny the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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