No. 23-1178

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September 13, 2024

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INTRODUCTION

One need only look past the surface of Respondent's opposition to see that the issue presented here is of far greater significance than the manner in which Respondent has attempted to frame it: Petitioner requests on that this Court hold that Petitioner should have been afforded *additional* discovery, but that this Court review the case and ultimately hold that Petitioner should have been allowed to conduct *any* discovery.

In all cases that are not properly dismissed by other appropriate vehicles (such as a Ruel 12 motion), restricting a litigant from obtaining crucial discovery, especially when most of the discoverable information lies in the opposing party's possession, and then summarily dismissing the case, will not only allow parties to abuse the narrow procedural purpose of summary judgment but will also generally undermine the integrity of our justice system. This is particularly evident in fact-intensive cases like this one. *See, e.g., Keene Group Inc., v. City of Cincinnati, Ohio*, 998 F.3d 306, 311 (6th Cir. 2021) (explaining that, in the context of a § 1983 claim for demolition of a property without due process, determining whether notice is properly given under the Due Process Clause is a fact-intensive inquiry that requires an analysis of "all the circumstances").

Petitioner thus requests that this Court look past Respondent's arguments and self-serving rendition of the question presented by Petitioner. [1]

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

As an initial matter, Petitioner must correct certain factual positions taken by Respondent in its Brief in Opposition, as these positions tend to downplay the gravity of the issue that Petitioner is requested this Court review.

First, Respondent claims that Respondent "made substantial productions as initial disclosures under Rule 26(a)(1)". Br. Opp'n p. i. However, this is simply not true. In fact, Respondent's produced just a few pages of written disclosures that did not include *any* documentation, the entirety of which is reproduced in the Supplemental Appendix to this Reply, and only pointed to those limited documents submitted by Respondent with Respondent's Answer. (See S.App. 2– 4). Of course, these disclosures were made in compliance with Rule 26 of the Federal Rules of Civil Procedure, which allows parties to disclose copies of documents in their possession or otherwise "a description by category and location" of all documents the disclosing party has in its possession custody or control. Fed. R. Civ. P. 26(a)(1)(A)(ii). This is often the

[1] For the purposes of this Reply Brief, "Respondent" refers to Respondent City of Cleveland; Petitioner acknowledges that Baumann Enterprises Inc. is not a relevant party to Petitioner's claims and is only named by virtue of the companion case that was joined with Petitioner's case below.

case with Rule 26 disclosures; parties will identify and describe documents, and will not actually produce them until later in the discovery stage.

Petitioner, therefore, reasonably did not complain about the lack of documentation at this stage, because the District Court had explained that it would only "defer" discovery and that the parties would later discuss what discovery would be needed to proceed. (See App. 66). When the time came to discuss that discovery, however, the District Court did not actually discuss the discovery, and merely ordered Petitioner to file a Rule 56(d) motion. (See S.App. 6).

Moreover, Petitioner certainly does not concede that it already possessed much of the information needed to prove its claims. The crux of Petitioner's initial petition and all arguments made by Petitioner in the underlying cases clearly demonstrate that Petitioner has made no such concession and is seeking relief from this Court because Petitioner was prevented from obtaining any information.[2] Indeed,

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[2] While Respondent cites to a singly sentence out of all the documentation submitted to the courts below to state that "First Floor conceded that much of the information lie[d] in the possession of the Plaintiffs", the quotation is clearly an unfortunate typography error. The entirety of the sentence to which Respondent cites reads as follows: "While much of the information regarding the merits of Plaintiff's claims indeed did lie in the possession of Plaintiffs, it is precisely for this reason that Plaintiffs should be allowed to engage in substantive discovery prior to responding to Defendants Motions—Plaintiffs have not had an opportunity to test or verify the basis, reliability, or validity of the information or actions allegedly taken by Defendants in their respective capacities." A quick reading of the surrounding sentences and the statement in the context, one can easily see that the pertinent part of this sentence should have

why would Petitioner intentionally concede such a fact when the entire burden to provide notice before demolishing a building, and therefore all documentation about the extent of those efforts, lies with the City of Cleveland?

Next, and perhaps most tellingly, Respondent, following effectively the logic used in the opinions below, uses contradictory logic throughout its opposition. Indeed, Respondent notes in its opposition that during the underlying proceedings Petitioner "could not" answer whether Respondent gave sufficient notice under Due Process and "provided no reason to doubt" that Respondent followed its routine practice of posting and sending demolition notices. Br. Opp'n p. 2. Respondent was essentially echoing the District Court's decision granting Respondent's motion for summary judgment, in which the District Court noted that "[Petitioner] point[s] to no evidence in the face of an established routine practice that the posting did not occur." (See Appendix to Petitioner's Petition for Writ of Certiorari (hereinafter "App."), p 49). These statements go to the very heart of Petitioner's argument: *of course,* Petitioner was unable to provide evidence to contradict Respondent. Petitioner was prevented from gathering any information whatsoever, whether that be documentation, evidence, or otherwise, that *could have* provided a reason to doubt Respondent's evidence, or to establish that the posting did not occur.

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read "while much of the information regarding the merits of Plaintiff's claims did lie *in the possession of Defendants*" not *in the possession of Plaintiffs*. (D. Ct. Dkt. 41-1).

Respondent also makes much ado about Petitioner's Rule 56 Motion also being too "speculative." However, as Petitioner highlighted in its initial petition: it would be nearly impossible for a movant to identify documents with any specificity without knowing whether such documents may or may not exist to begin with. How can one know whether further discovery is too speculative if the initial discovery is non-existent? The scenario is the clearest legal catch-22: if a party is not afforded discovery, they cannot know what may or may not exist generally in order to make specific requests for such documents in the first place. And even so, Petitioner did specifically request the ability to take the depositions of persons who purported to post notices that never appeared to petitioner—just as the plaintiff did in case law cited by Respondent. This presents an exceptionally complicated and burdensome hurdle for parties faced with early-stage dispositive motions, as Petitioner was here.

Finally, Respondent also glosses over the dissent issued by Judge Nalbandian of the Sixth Circuit, effectively ignoring the most relevant portions of the opinion that do, in fact, support Petitioner's request to review this matter. Judge Nalbandian rightfully noted that the district court essentially assumed without question that Respondent followed its routine practice of posting condemnation notices at a subject property, even though "the district court didn't credit [Respondent's] proffered 'disjointed handwritten notes on what appears to be a post-it note' as evidence that [Respondent] posted a notice on the property in 2020." (See App. p. 24). Judge Nalbandian also discussed other possible applications of the pertinent

law, but ultimately was only left with questions, largely because the parties never engaged in discovery. (See App. p. 24-25). Indeed, the dissenting Judge stated very clearly and very specifically that "It's clear that First Floor could have benefitted from some discovery on this issue." (App. P. 27).

Respondent's statement of the case, therefore, attempts to make this case seem far more narrow and inconsequential than is actually the case and diverts attention from the actual issue present here: whether a plaintiff must be afforded the opportunity to perform *some* discovery when they have presented a cognizable claim to a court of law. This question is of *incredible* importance not just to this case but to all litigants who avail themselves of our justice system.

REASONS IN ADDITIONAL SUPPORT OF THE PETITION

As with the statement of the case, if one looks even slightly past the surface of Respondent's arguments in opposition to the petition, one can see that this is, in fact, a case of exceptional importance, a case in which precedent was not only incorrectly applied, and a case that highlights the variety of results reached by courts across the United States when faced with this issue.

I. The Decision Below *Was* Incorrect and Failed to Correctly Apply This Court's Precedent.

Respondent first argues that the decisions below were consistent with this Court's precedent. A correct reading of the cases, however, only further demonstrates the need for this Court to grant the petition here and to resolve the important question at hand.

Indeed, the facts of the main case upon which Respondent relies—*First Nat. Bank of Ariz. v. Cities Serv. Co.*—actually *support* Petitioner's argument when read correctly. While this Court ultimately did hold that summary judgment was properly granted after the plaintiff-petitioner's Rule 56(f) motion was denied, it did so only after the plaintiff-petitioner had been afforded a prior opportunity to perform some discovery. *See* 391 U.S. 253 (1968). After the *First National Bank* plaintiff filed its lawsuit, the defendants requested the trial court allow the defendants to postpone answering the complaint until the plaintiff-petitioner's deposition was taken. The court, in the meantime, also stayed the plaintiff from

conducting discovery. *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968). Defendant-respondent then moved for summary judgment while plaintiff's discovery was stayed. *Id*. The trial court then stayed the motion for summary judgment and permitted the plaintiff to depose a representative of the defendant pursuant to Rule 56(f). *Id* at 254. After the plaintiff filed an amended complaint, the trial judge denied the defense motions for summary judgment and granted the plaintiff-petitioner an opportunity to take depositions of three more defendant representatives and to gather paper discovery pursuant to Rule 56(f). *Id*. at 254-55. Only after the plaintiff was afforded this initial round of discovery did the trial court grant the defense motions for summary judgment, noting that any further discovery requested by the plaintiff-petitioner was purely speculative and amounted to a "fishing expedition." *Id.* at 255. Notably, in Respondent's summary of this case, Respondent recognizes that the plaintiff- petitioner was seeking *additional* discovery. Br. Opp'n p. 9.

This Court seems to acknowledge in the *First National Bank* opinion that, even in the context of Rule 56(d) (formerly Rule 56(f)), the Rule and the motions it affords are intended to allow the party facing summary judgment with an opportunity to gather at least *some* discovery in order to stand a chance against a motion for summary judgment, given the detail with which this Court evaluated the discovery in which the *First National Bank* plaintiff-petitioner did actually engage.

Not only, then, are the circumstances present in *First National Bank* distinguishable from the case presented by Petitioner; it can be fairly said that the

precedent of this Court permits—and even tacitly suggests, even though it does not yet specifically mandate—the denial, or at least postponement, of a motion for summary judgment when the party facing summary judgment has not been afforded the ability to engage in any discovery. It stands to reason, then, that any decision, such as the Sixth Circuit's decision below, preventing parties from obtaining any discovery before their claims are summarily dismissed, runs afoul of the purposes and rules outlining the discovery process and the precedent of this Court.

II. A Circuit Split *Does* Exist that Necessarily Requires Clarification by this Court.

Next, Respondent posits that there is not, in fact, a split among the circuits on the issues presented by Petitioner. However, the cases cited by Respondent in support of this position are not actually relevant here, as the litigants in virtually all of the cases cited by Respondent *were actually afforded* an opportunity to engage in some discovery. Of course, it is worth noting again that Petitioner has not requested only this Court resolve a circuit split about "how much discovery is allowed" before a Rule 56(d) motion maybe denied, or whether litigants must submit a Rule 56(d) motion at all. Br. Opp'n p. 11. Rather, Petitioner primarily requests this Court to determine whether courts must allow parties to conduct *any* discovery before entering Summary Judgment, an issue that Petitioner strenuously argues must be answered in the affirmative.

The cases cited by Respondent support *only* Respondent's incorrect presentation of the issue (that

a Rule 56(d) motion is properly denied where it only seeks additional and speculative or irrelevant information); the litigants in each and every one of the cases cited by Respondent were afforded *some* opportunity to conduct discovery before a Rule 56(d) motion was filed and subsequently denied. *See, e.g., President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 77 F.4th 33, 41 (1st Cir. 2023) ("In the case at hand, [plaintiff-appellant] sought *supplemental* discovery…") (emphasis added); *In re Dana Corp.*, 574 F.3d 129, 149 (2d Cir. 2009) ("[Appellant] had taken 18 depositions…[appellee] had responded to interrogatories and two notices to produce…and [appellant] made a request for *additional* discovery")(emphasis added); *In re Taylor*, 548 F. App'x 822, 825 (3d Cir. 2013) (affirming denial of Rule 56(d) motion where the motion for summary judgment effectively rested on a legal issue and where the 56(d) movant had engaged in other underlying legal matters in which evidence was discussed and admitted); *Pisano v. Strach*, 743 F.3d 927, 932 (4th Cir. 2014) (acknowledging, in upholding a denial of discovery, where "the question before [the court was] principally one of law" and also acknowledging that the record contained a number of pieces of evidence already and that the "Plaintiffs do not appear to dispute this record evidence; they simply want more."); *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 415 (5th Cir. 2016) ("Plaintiffs…contend that the district court erred in not granting their motion for *additional* discovery.")(emphasis added); *Smith v. OSF Healthcare Sys.*, 933 F.3d. 859, 860 (7th Cir. 2019) (finding trial court abused its discretion and reversed denial of 56(d) where discovery had not been

completed and acknowledging that "plaintiff was pursuing discovery" when the motion was filed); *Marlow v. City of Clarendon*, 78 F.4th 410, 416 (8th Cir. 2023) (addressing "[plaintiff's] argument that the district court erred in denying his motion to stay summary judgment for *additional* discovery.") (emphasis added); *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 617 (9th Cir. 2017) ("In any case, we need not decide whether it would violate fundamental fairness to deny a party the opportunity to take *any* pretrial discovery, because here, [movant] was afforded *some* pretrial discovery") (emphasis in original); *Compere v. Nusret Miami, LLC*, 28 F.4th 1180, 1189 n.15 (11th Cir. 2022) (affirming denial of Rule 56(d) motion where movants already received written discovery responses and document production).

The parties involved in each of these cases were in fact given the exact opportunity Petitioner argues it should have been afforded here and the reason that Petitioner seeks review of this matter. Petitioner's request and the cases highlighted by Petitioner in the original petition, however, bear an entirely different posture: Petitioner specifically highlighted and collected only those cases in which litigants were *entirely prevented* from engaging in discovery, which this is where the split and confusion among the courts actually lie. If anything, then, these cases further support the notion that precedent *was* misapplied here, because the decisions cited by Respondent recognize, at least tacitly, that litigants should be given *some* opportunity to conduct discovery before summary judgment may be entered against them.

III. This Case Presents an Issue of Exceptional Importance that Requires Clarification by this Court.

The arguments posited by Respondent miss the forest for the trees and attempt only to make this matter appear inconsequential, while misreading—if not misconstruing—the actual circumstances the occurred below and the confusing case law on the subject.

To most who are familiar with the justice system, it is probably hard to fathom a scenario in which a litigant is faced with a fact-intensive case, brings cognizable claims that are not dismissed on procedural grounds, and then is simply told that it is not allowed to obtain information about the wrongs it perceives occurred, especially in a system that has been designed and improved over the years to seek the truth. To then say, after being told that the party cannot engage in discovery, to say that the party did not "present evidence" or "provide enough information" is a substantial injustice, and to downplay that injustice at this stage can only be describe as a miscarriage of justice.

This is also the precise reason that this case is in fact the perfect vehicle for this issue. Petitioner was *entirely* prevented from performing discovery and was then admonished by the courts below for Petitioner's failure to provide evidence in support of Petitioner's arguments or in rebuttal of the opposing parties' arguments, all while attempting to pursue a *very* fact-intensive inquiry under 42 U.S.C. § 1983. *See Keene Group Inc., v. City of Cincinnati, Ohio*, 998 F.3d 306, 311 (6th Cir. 2021). There is no suggestion that

Petitioner caused any delay or neglect, or that initial discovery efforts were insufficient, because *there was no discovery*. Petitioner was simply prevented from engaging in discovery, when Petitioner clearly needed discovery to get to the truth of the matter before the court.

It is therefore crucial that this Court clarify the level of discovery to which a litigant is entitled before their claims may be summarily dismissed.

CONCLUSION

For these reasons, this Court should grant the Petition For Writ of Certiorari.

Respectfully submitted,

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September 13, 2024

SUPPLEMENTAL APPENDIX

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Appendix SA-1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

No. 1:21-cv-00018

FIRST FLOOR LIVING, LLC, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, OHIO, ET AL.

Defendants.

Judge J. Philip Calabrese
Magistrate Judge Thomas M. Parker

Served: May 20, 2021

DEFENDANT CITY OF CLEVELAND'S INITIAL DISCLOSURES

DEFENDANT CITY OF CLEVELAND'S INITIAL DISCLOSURES

Now comes Defendant City of Cleveland (the "City"), by and through undersigned counsel, and makes the following Initial Disclosures pursuant to Federal Rules of Civil Procedure 26(a)(1):

I. Rule 26(a)(1)(A)(i): the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

1. Sheryl Harris, Secretary within the City of Cleveland Building and Housing Department.
2. Thomas Vanover, Chief Building Official for the City of Cleveland Building and Housing Department.

Ms. Harris and Mr. Vanover will provide testimony regarding the notice process and demolition of the subject buildings. The City may call other employees with Knowledge

of the claims in this case and will supplement this list during discovery. Ms. Harris, Mr. Vanover, as well as any other City employee are represented by the undersigned and can be contacted through her office.

The City reserves the right to supplement this list.

II. Rule 26(a)(1)(A)(ii): a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment:

See all exhibits attached to the City's Answer, ECF No. 14.

III. Rule 26(a)(1)(A)(iii): a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered:

See the City's Counterclaim and Third Party Complaint detailing the computation of damages owed to the City.

The City will supplement the billing information throughout discovery.

IV. Rule 26(a)(1)(A)(iv): for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for

payments made to satisfy the judgment.

There is no insurance agreement applicable.

Respectfully submitted,

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Party Plaintiff City of Cleveland

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2021, the foregoing was sent to all parties on May 20th, 2021

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Assistant Director of Law

Attorney for Defendant,
Counterclaimant, and
Third-Party Plaintiff City
of Cleveland

Appendix SA-2

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

No. 1:21-cv-00018

FIRST FLOOR LIVING, LLC, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, OHIO, ET AL.

Defendants.

Judge J. Philip Calabrese
Magistrate Judge Thomas M. Parker

August 17, 2021

MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHENR DISTRICT OF OHIO

Minute Order [non-document]: This civil matter was before the Court for a telephone status conference on Tuesday, August 17, 2021. Justin Stevenson appeared for Plaintiffs and Counterclaim Defendants First Floor Living, LLC, and Lush Designs, LLC; Mr. Stevenson also appeared for Third-Party Defendants Leslie M. Gaskins and David Bond; Nathaniel Hall appeared for Defendant and Counterclaim/Third-Party Plaintiff City of Cleveland; Matthew Baringer appeared for Defendant Laster LLC; Robert Lynch and Robert Pleines appeared for Defendant Baumann Enterprises, Inc.; Alayna Bridgett and Phillip Eckenrode appeared for Defendant Cuyahoga County Land Reutilization Corporation. The Court and parties discussed a schedule related to the pending motions for summary judgment. Plaintiffs indicated that some discovery may be necessary to respond to the motions. Therefore, the Court directed Plaintiffs to respond pursuant to Rule 56(d) as to all the pending motions in a single filing no later than September 7, 2021. The Court also directed Plaintiff to respond to Defendant Laster's motion for leave to supplement as part of the same filing. Defendants shall respond by September 21, 2021. The Court sets a status conference for Wednesday, September 29, 2021 at 3:00. The conference will be conducted via Zoom and the Court's deputy will provide meeting information. Judge J. Philip Calabrese on 8/17/2021. (Y,A) (Entered: 08/17/2021)