No. 24-387

IN THE
SUPREME COURT OF THE UNITED STATES

Malikah Asante-Chioke,
Petitioner,
v.
Nicholas Dowdle, *et al.*,
Respondents.

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

BRIEF FOR AMICI CURIAE PUBLIC ACCOUNTABILITY AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Public Accountability is a nonpartisan, nonprofit organization that promotes access to civil justice for people harmed by the government. As part of its mission, Public Accountability has developed deep expertise in the area

[1] Rule 37 statement: All parties were timely notified that this brief would be filed. No part of this brief was authored by any party's counsel, and no person or entity other than amici funded its preparation or submission.

of qualified immunity and related doctrines—especially its interaction with the collateral-order doctrine. Public Accountability uses its expertise to help individuals, to inform lawmakers, to educate the public, and—through briefs like this one—to advise the courts. Because this petition raises the scope of the collateral-order doctrine in qualified-immunity cases, Public Accountability offers a perspective that will help inform the Court's decision.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Amici write because the Fifth Circuit's decision would exacerbate qualified immunity's every pathology. Qualified immunity is bad enough: It prevents individuals from vindicating their constitutional rights, erodes the accountability of government officials, and lacks basis in law. Combined with the collateral-order doctrine, it lets government officials fleece plaintiffs with repeated appeals. But extending these doctrines, as the Fifth Circuit did, to assert interlocutory appellate jurisdiction over routine discovery orders—and over appeals from pendent parties, to boot—stretches the rule of law beyond recognition. A growing chorus of voices from across the ideological spectrum has been asking the Court to

reconsider qualified immunity wholesale. At minimum, the Court should grant certiorari here to correct the Fifth Circuit's gratuitously government-friendly wrong turn.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision below was obviously wrong and merits summary reversal. More broadly, though, this case shows why the Court should reconsider the collateral-order and qualified-immunity doctrines—and especially their intersection, which has spawned no end of confusion and mischief in the lower courts.

1. The collateral-order doctrine was probably a mistake. Title 28 U.S.C. § 1291 gives the federal courts of appeals jurisdiction to review "final decisions" of the district courts. The collateral-order doctrine, often euphemized as a "practical construction" of that rule, labels some non-final orders "final" for the sake of allowing an immediate appeal. The Court has set forth three elements for an order to qualify as collateral: It must be "conclusive"; it must resolve an important issue "completely separate" from the merits; and it must be "effectively unreviewable" after a final judgment.

These elements are not always followed rigorously. In qualified-immunity cases, for instance, the basic merits question of whether the plaintiff states a claim can be considered "collateral." At base, the collateral-order doctrine is a policy decision, a choice by the judiciary that some rights are too important to leave to district courts. And that choice contradicts Congress's clear commands. Congress decided that in the main, courts of appeals

should review only final judgments; that only a few, specific interlocutory orders, like injunctions, should be eligible for immediate review; that interlocutory review could otherwise be had on a case-by-case basis by agreement of the district court and court of appeals; and that this Court could make more classes of orders eligible for interlocutory review through *rulemaking*—not by judicial fiat.

The collateral-order doctrine disregards all that. It is a product of New Deal-era "freewheeling judicial policymaking." Even if it had some merit at the time, it is obsolete today. And—as this case shows—its continued existence leads lower courts into temptation. The Court should take this opportunity to deliver them from error. It should strictly limit the collateral-order doctrine to the facts of prior cases—or better yet, overrule it altogether.

2. Qualified immunity was definitely a mistake. The Court purportedly based it on state common-law immunities, reasoning that Congress had not explicitly displaced them when it enacted 42 U.S.C. § 1983. Recent scholarship has shown that Congress *did* in fact explicitly abrogate state-law immunities with Section 1983, but the relevant clause was mistakenly omitted from the Revised Statutes of 1874. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023). So qualified immunity owes its existence to a scrivener's error.

The Court has never grappled with the implications of Section 1983's original text for qualified immunity—or for the other immunity doctrines it has read into Section

1983. But members of the Court past and present have criticized the modern state of qualified immunity. Justice Thomas has repeatedly called for it to be overruled. Judges in nearly every federal court of appeals and many district courts have voiced similar criticisms. At minimum, the Court should take Professor Baude's advice and "stop expanding the legal error." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 88 (2018).

3. Allowing interlocutory appeals of qualified-immunity denials dramatically expanded "the legal error." Denials of qualified immunity are not "conclusive": Courts often revisit the issue after denying it on the pleadings. Nor is qualified immunity "completely separate" from the merits: It *incorporates* the merits question of whether the officer violated a constitutional right. Nor is a denial of qualified immunity "effectively unreviewable" after final judgment: If a court of appeals concludes that the right the officer violated wasn't clearly established, it can vacate any damages award and grant the officer relief.

The Court sidestepped these problems in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), by positing that qualified immunity is not just a defense against liability but a right "not to be forced to litigate." But that could be said of any prerogative enforceable by pretrial dismissal, so courts wrestled for years with the question of how to distinguish a right against litigation from an ordinary defense. In the end, the Court gave up and admitted that it was just a policy choice—if a defense is important

enough in the Court's view, then it's a right against litigation.

That style of reasoning is out of step with today's jurisprudence, which prizes Congress's policy choices over the judiciary's. This disconnect is all the more glaring when it comes to qualified immunity, which Congress expressly foreclosed in the text it enacted. Given qualified immunity's questionable origins, it seems doubtful that it should be given the primacy of a right against litigation.

And shoehorning qualified immunity into the collateral-order doctrine has had corrosive downstream effects. It signaled to the courts of appeals that they *should* breathe down the necks of district courts managing Section 1983 litigation. Taking the message to heart, the courts of appeals have distended the collateral-order doctrine even further, reviewing all sorts of interlocutory orders as long as defendants tack on a rump immunity claim. The Court should end this jurisdictional free-for-all and overrule *Mitchell*.

4. The Fifth Circuit's decision showcases the chaos *Mitchell* spawned. The rule that routine discovery orders do not qualify for collateral-order treatment has long been settled. So has the rule that there is no such thing as pendent-party interlocutory appellate jurisdiction. The Fifth Circuit disregarded both. Left uncorrected, this freewheeling approach to jurisdiction will undermine and perhaps unravel the final-judgment rule in that circuit. The firm guidance of summary reversal—familiar to the Court in this setting—is the right response.

ARGUMENT

1. The collateral-order doctrine was probably a mistake.

When Roman law introduced appellate review, it permitted litigants to appeal from interlocutory as well as final orders. Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 540–541 (1932). The Romans soon found this liberality "burdensome" and scrapped it. *Ibid.* By the time of Justinian, "practically all" interlocutory appeals were forbidden. *Id.* at 541 n.7 (quoting William W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 665 (1921)).

At common law, the same rule prevailed: "[N]o writ of error could be brought except on a final judgment." *McLish* v. *Roff*, 141 U.S. 661, 665 (1891) (citing 2 Matthew Bacon, *A New Abridgment of the Law*, Error (A.2) 191 (1st ed. 1736)). Across the Atlantic, the First Congress enacted this "well settled and ancient rule" into American law with the Judiciary Act of 1789. *Ibid.*; *Cunningham* v. *Hamilton Cnty.*, 527 U.S. 198, 203 (1999). Today, it is known as the "final judgment rule." *Cunningham*, 527 U.S. at 203. It can be found at 28 U.S.C. § 1291, which vests the courts of appeals with jurisdiction to review "final decisions" of the district courts.

Until 1949, this Court's decisions reflected the statute's text. But then, in *Cohen* v. *Beneficial Industrial Loan Corp.*, this Court introduced the collateral-order doctrine, under which some orders that are not final are nonetheless labeled "final" for the sake of allowing an

immediate appeal. 337 U.S. 541, 546–547 (1949); *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 116 (2009) (opinion of Thomas, J.). The Court touted the collateral-order doctrine as a "practical rather than a technical construction" of Section 1291, *Cohen*, 337 U.S. at 546, but some commentators have questioned whether it is "a legitimate interpretation of the narrow statutory language." Michael E. Solimine & Christine O. Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review*, 41 Wm. & Mary L. Rev. 1531, 1549 (2000). Others have termed it a "fiction." Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539, 608 (1998).

In theory, the doctrine comprises three "stringent" elements: A collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (quotation marks omitted, alterations in original). In practice, the Court's application of these elements has been less than consistent:

- **Conclusiveness.** In a series of immunity cases, this Court held that a denial of immunity was conclusive because it *conclusively allowed litigation to continue*. *See*, *e.g.*, *Helstoski* v. *Meanor*, 442 U.S. 500, 506–507 (1979) (legislative immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982) (absolute immunity); *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985) (qualified immunity). Of course,

that is true for *any* order that rejects a "meritorious pretrial claim for dismissal." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988). And yet in other cases, the Court declared orders that truly were conclusive—orders that sounded the "death knell" for litigation, like denial of class certification—"inherently tentative." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 & n.11 (1978); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 871–872 (1994).

- **Separateness.** The separateness requirement began life as "separable from" the merits. *Cohen*, 337 U.S. at 546. When the collateral-order doctrine needed reining in, it ascended to "completely separate" from the merits. *Coopers*, 437 U.S. at 468. Then, to accommodate qualified immunity, it sunk to merely "conceptually distinct" from—that is, not identical to—the merits. *Mitchell*, 472 U.S. at 527–528. Eventually it receded entirely: In qualified-immunity cases, at least, collateral-order review embraces deciding the merits. *Ashcroft v. Iqbal*, 556 U.S. 662, 672–673 (2009). The frequent appearance of qualified immunity in these inconsistencies will be a theme.

- **Unreviewability.** *Cohen*'s third requirement is also its most inscrutable. What makes an order "effectively unreviewable"? For decades, the Court lurched "from definition to definition" as it tried to balance the long-term goal of orderly judicial administration against its immediate desire to

> decide an issue it thought especially important. *See* Anderson, 46 Drake L. Rev. at 609. Eventually the Court gave in and declared that "unreviewable" just meant that delaying review would imperil "some particular value of a high order." *Will*, 546 U.S. at 352; *see also Digital Equipment*, 511 U.S. at 878–879. In other words, it's a policy decision.

In truth, all the *Cohen* factors are just fig leaves for judicial policymaking. The late Justice Scalia was candid about this. When a party aggrieved by an interlocutory order must await final judgment before seeking review, he explained, that is because "the law does not deem the [asserted] right *important enough* to be vindicated by . . . interlocutory appeal." *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring). Of course, by "the law" he meant "the Court."

Cohen was a New Deal-era decision. This Court has since come to disparage "freewheeling judicial policymaking." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022); *see also*, *e.g.*, *Pereida* v. *Wilkinson*, 592 U.S. 224, 241 (2021). "Only [Congress's] policy choice," it has declared, "embodied in the terms of the law Congress adopted, commands this Court's respect." *Pereida*, 592 U.S. at 242. So too here. Congress has made several policy choices about when to permit an appeal, and those choices "warrant[] the Judiciary's full respect." *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995); *see also Mohawk*, 558 U.S. at 114–115, 119 (opinion of Thomas, J.).

First, of course, there is the final-judgment rule. 28 U.S.C. § 1291. It embodies Congress's policy decision that in the mine run of routine orders that can arise during litigation, the value of "avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals" outweighs the cost of postponing review. *Cunningham*, 527 U.S. at 203–204 (quotation marks and alteration omitted).

Second, there is Congress's policy decision that *some* classes of orders *do* merit interlocutory review. *E.g.*, 28 U.S.C. § 1292(a) (injunctions, orders appointing receivers, and certain orders in admiralty cases); 28 U.S.C. § 158(a) (certain bankruptcy orders); 9 U.S.C. § 16(a) (certain orders related to arbitration). These are specific, well-defined exceptions. Adding to them by judicial decree "amount[s] to legislation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012) (quotation marks omitted).

Third, there is the discretionary appeal statute, 28 U.S.C. § 1292(b), which allows interlocutory appeals case-by-case. *Swint*, 514 U.S. at 46–47. It embodies Congress's policy decision to permit one-off interlocutory appeals for cases that raise "serious legal questions taking [them] out of the ordinary run"—but only if they get past a "two-tiered" gatekeeping mechanism under which both the district court and the court of appeals must agree that the order merits interlocutory review. *Digital Equipment*, 511 U.S. at 883; *Swint*, 514 U.S. at 47. In other words, Congress anticipated that some decisions might be too "important" for review to await final judgment, but

it chose a more fine-grained device than "the blunt, categorical instrument of § 1291 collateral order appeal." *Digital Equipment*, 511 U.S. at 883; *cf. Lauro Lines*, 490 U.S. at 502–503 (Scalia, J., concurring).

Last and most important, Congress *did* expressly empower the judiciary to declare some types of orders eligible for interlocutory review—but only *this* Court, and only by *rulemaking*. 28 U.S.C. § 1292(e); 28 U.S.C. § 2072(c). That is a policy decision about trust—who Congress trusts to make those decisions, and what processes it trusts to generate good decisions. *See Swint*, 514 U.S. at 48 (explaining that judicial rulemaking requires bench-bar meetings open to the public and submission of any proposed rule to Congress before the rule takes effect). Congress made that decision *in response to* the doctrinal chaos of case-by-case accretion under *Cohen*. *Mohawk*, 558 U.S. at 115 (opinion of Thomas, J.). This Court has observed that Congress's policy decision "warrants the Judiciary's full respect"—but that understates the case. *Cf. Swint*, 514 U.S. at 48. If Congress's grant of rulemaking power doesn't overrule *Cohen*, at minimum it limits *Cohen* and its progeny to their facts. *See Mohawk*, 558 U.S. at 115 (opinion of Thomas, J.).

The collateral-order doctrine may once have served a purpose. Narrowly construed and strictly policed, it may have supplied a salutary amendment to the final-judgment rule; perhaps Congress might even have ratified it. History took a different course. Every time Congress has visited the issue of appellate jurisdiction, it has rejected

the collateral-order doctrine. And Congress's power in this realm is plenary—so the Court should follow suit.

2. Qualified immunity was definitely a mistake.

Qualified immunity arose out of a literal mistake—a scrivener's error. In *Pierson* v. *Ray*, this Court held that 42 U.S.C. § 1983 incorporated the Mississippi common-law defense of "good faith and probable cause." 386 U.S. 547, 556–557 (1967). It based its reasoning on the canon that statutes in derogation of the common law should be strictly construed. "[W]e presume," the Court explained, "that Congress would have specifically so provided had it wished to abolish [common-law immunities]." *Id.* at 555; *see also Filarsky* v. *Delia*, 566 U.S. 377, 383–384 (2012) (reaffirming qualified immunity's common-law basis).

The problems with this reasoning are many. First, if qualified immunity comes from "the background of tort liability," it should apply only to constitutional violations analogous to "false arrest and imprisonment"—but in fact it applies to all executive action. *Compare Pierson*, 386 U.S. at 556–557, *with Scheuer* v. *Rhodes*, 416 U.S. 232, 247–248 (1974); *see* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 53 (2018). Second, the good-faith defense on which it was based depends on the officer's *subjective* state of mind—as "good faith" might suggest—but the Court has turned qualified immunity into an *objective* inquiry into the content of "clearly established law." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Third, the anti-derogation canon that *Pierson* purported to apply—a "relic" of the courts' historical

hostility to statutory law, Scalia & Garner 318—is an especially tenuous basis for importing immunity into Section 1983, a broad remedial statute enacted by the Reconstruction Congress to "interpose the federal courts between the States and the people." *See Mitchum* v. *Foster*, 407 U.S. 225, 238–242 (1972).

But beyond all that, *Pierson*'s premise is just wrong. Congress *did* "specifically . . . provide[]" that Section 1983 would abrogate common-law immunities. *Cf. Pierson*, 386 U.S. at 555. As enacted, Section 1983 included a crucial clause that its codified form omits:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871). With the italicized words, "the 1871 Congress created liability for state actors who violate federal law, *notwithstanding* any state law to the contrary." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L.

Rev. 201, 235 (2023). In short: State common-law immunities have no place in the interpretation of Section 1983.

Congress never changed its mind about that. It did, however, commission—and in 1874, enact—a compilation of its statutes. Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, Library of Congress Blogs (July 2, 2015).[2] For unknown reasons—probably hostility to Reconstruction, which by 1874 was reaching fever pitch—the Reviser omitted the crucial "notwithstanding" clause of Section 1983.[3] *See* Reinert, 111 Cal. L. Rev. at 237–238. In fact, the Revised Statutes of 1874 contained so many mistakes and omissions that Congress had to publish a new revision just four years later. Will Tress, *Lost Laws: What We Can't Find in the U.S. Code*, 40 Golden Gate U.L. Rev. 129, 135–136 (2010). This time, Congress learned from its mistake and didn't enact the new revision into positive law. *Ibid.* But that left the 1874 revision of Section 1983—the *mistaken* 1874 revision—as the last word on the books. Reinert, 111 Cal. L. Rev. at 237–238.

This Court has never grappled with what Section 1983's original text means for the immunities it has read

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[2] https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/.

[3] For ease of reference, this brief consistently refers to this provision as "Section 1983," even though, formally, the statute that gives Section 1983 legal force today is Section 1979 of the Revised Statutes of 1874.

into the statute.[4] But members of the Court both past and present have criticized the modern state of qualified immunity. Many years ago, Justice Scalia pointed out that the modern doctrine was not "faithful to the common-law immunities that existed when § 1983 was enacted." *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). Justice Kennedy also complained that qualified immunity had "diverged to a substantial degree from the historical standards." *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

More recently, Justice Sotomayor has objected that the Court's recent applications of the doctrine involve "nothing right or just under the law." *Kisela* v. *Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting). And Justice Thomas has repeatedly called for overruling the current doctrine outright, concluding that it "stray[s] from the statutory text" of Section 1983. *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *see also Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J.); *Ziglar* v. *Abbasi*, 582 U.S. 120, 160 (2017) (opinion of Thomas, J.).

Judges in nearly every federal court of appeals have reached similar conclusions. *See, e.g.*, *McKinney* v. *City*

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[4] Several Justices have, in separate or plurality opinions, acknowledged that the Reviser's changes were "not intended to alter the scope" of Section 1983. *E.g.*, *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939) (opinion of Roberts, J.); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 203 n.15 (1970) (Brennan, J., concurring in part and dissenting in part).

of Middletown, 49 F.4th 730, 756 (2d Cir. 2022) (Calabresi, J., dissenting) ("[T]he doctrine of qualified immunity—misbegotten and misguided—should go.").[5] So have scholars and advocacy organizations of every ideological persuasion. Reinert, 111 Cal. L. Rev. at 203 n.1 (collecting sources). The petition in this case doesn't raise the question of whether qualified immunity should be overruled. But it does present an opportunity for the Court to take Professor William Baude's advice: "[S]top expanding the legal error." 106 Cal. L. Rev. at 88.

3. Allowing interlocutory appeals of qualified-immunity denials piles mistake upon mistake.

In 1985, this Court dramatically expanded "the legal error." *Cf. id.* In *Mitchell* v. *Forsyth*, it began allowing interlocutory appeals from denials of qualified immunity. 472 U.S. at 530. Denials of qualified immunity meet *none*

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[5] *See also, e.g.*, *Justiniano* v. *Walker*, 986 F.3d 11, 14–15 & n.1 (1st Cir. 2021) (citing *Jamison* v. *McClendon*, 476 F. Supp. 3d 386, 390–92 (S.D. Miss. 2020)); *Jefferson* v. *Lias*, 21 F.4th 74, 87, 93–94 (3d Cir. 2021) (McKee, J., joined by Restrepo & Fuentes, JJ., concurring); *R.A.* v. *Johnson*, 36 F.4th 537, 547 n.2 (4th Cir. 2022) (Motz, J., concurring); *Tucker* v. *Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring); *Reich* v. *City of Elizabethtown*, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Moore, J., dissenting); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Goffin* v. *Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, J., concurring); *Sampson* v. *Cnty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part); *Cox* v. *Wilson*, 971 F.3d 1159, 1165 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from denial of rehearing en banc); *Schantz* v. *DeLoach*, 2021 WL 4977514, at *12 (11th Cir. 2021) (Jordan, J., concurring).

of the collateral-order doctrine's elements. In fact, this Court has countless times denied interlocutory review with reasoning that could be cut and pasted into the qualified-immunity context with minimal changes. Here's one example:

> First, such an order is subject to revision in the District Court. Second, the [qualified-immunity] determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Finally, an order denying [qualified immunity] is subject to effective review after final judgment at the behest of the [defendant].

Coopers, 437 U.S. at 469 (quotation marks, citations, and footnotes omitted); *see also*, *e.g.*, *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799–802 (1989); *Cunningham*, 527 U.S. at 205–206; *Mohawk*, 558 U.S. at 107–112.

Scholars have roundly criticized *Mitchell*. *E.g.*, Anderson, 46 Drake L. Rev. at 569–574; Solimine & Hines, 41 Wm. & Mary L. Rev. at 1572 n.219; Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 Mo. L. Rev. 1137, 1201 (2022) ("*Mitchell* was wrong on the day it was decided."). A cursory examination of its reasoning shows why:

- A collateral order must be "conclusive"; denials of qualified immunity are not. A defendant can assert it on the pleadings, in multiple summary-judgment motions as discovery progresses, in a motion for judgment as a matter of law during trial,

and again at the end of trial. Anderson, 46 Drake L. Rev. at 600–601.

- A collateral order must be "completely separate" from the merits; the leading treatise calls that a "transparent fiction" in the case of qualified immunity. 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3937 (3d ed. West 2024). *Mitchell* itself seemed to recognize as much when it silently watered the test down to "conceptually distinct." *See* 472 U.S. at 527–528. But in a different case *that same Term*, the Court used the "completely separate" test—with no explanation for the inconsistency. *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 436 (1985). And in the end, even "conceptually distinct" turned out to be a fiction. *Compare Mitchell*, 472 U.S. at 528 (explaining that immunity was "conceptually distinct" from the merits because a reviewing court need not "determine whether the plaintiff's allegations actually state a claim"), *with Ashcroft*, 556 U.S. at 672–675, 680 (determining that the plaintiff's allegations did not state a claim).

- A collateral order must be "effectively unreviewable" after final judgment; denials of qualified immunity can readily be reviewed. If the jury awards damages and a court of appeals later concludes that the right the officer violated wasn't clearly established, it can vacate the award of damages and grant the officer relief. Anderson, 46 Drake L. Rev. at 570.

The Court sidestepped these problems by positing that unlike other rights that may be denied during litigation, qualified immunity entitles the officer "not to be forced to *litigate*." *Mitchell*, 472 U.S. at 527 (emphasis added). So a denial of qualified immunity conclusively denies the officer's claim to a right against litigation; if he must await final judgment, appellate review cannot give him back his right against litigation; and whether he has a right against litigation is not the same question as whether he violated a constitutional right. *Id.* at 526–530.

That explanation raised a new problem: What made qualified immunity different from any other right that might be "enforced appropriately by pretrial dismissal"? *Digital Equipment*, 511 U.S. at 873. It couldn't be that the right would be "irretrievably lost" without immediate review—that's also true for, say, class certification or the right to a speedy trial. *Cf. ibid.*; *United States* v. *MacDonald*, 435 U.S. 850, 860–861 (1978). It couldn't be that qualified immunity is an "explicit statutory or constitutional guarantee that trial will not occur"—it's not. *Compare Midland Asphalt*, 489 U.S. at 801 (offering the Double Jeopardy Clause and the Speech or Debate Clause as examples), *with Digital Equipment*, 511 U.S. at 875 (acknowledging that "we would be hard pressed" to call qualified immunity "explicitly guaranteed" by any constitutional or statutory provision (alterations omitted)).

Ultimately, the Court concluded that a right enforceable by dismissal was a right to avoid trial if trial would "imperil a substantial public interest." *Will*, 546 U.S. at 352–353. In other words, qualified immunity—as

opposed to other rights, like the right to a speedy trial or the right to counsel of one's choice—is a right to avoid trial because that is the Court's policy choice. *Cf.*, *e.g.*, *MacDonald*, 435 U.S. at 860–861; *Flanagan* v. *United States*, 465 U.S. 259, 267–268 (1984).

The notion that reviewing qualified immunity after trial would imperil a "substantial public interest," *Will*, 546 U.S. at 352–353, is difficult to square with the revelation that Congress didn't intend to allow qualified immunity at all. And even as judicial policymaking, it's a poor policy choice—as the Court ably explained in *Microsoft Corp.* v. *Baker*, 582 U.S. 23 (2017). There, class-action plaintiffs had tried to appeal the denial of class certification by stipulating to voluntary dismissal with prejudice. *Id.* at 27. The Court explained that allowing the appeal would have inflicted a "heavy cost . . . to the judicial system's overall capacity to administer justice." *Id.* at 28 (quotation marks omitted). The Court's reasoning in *Microsoft* applies with at least equal force to *Mitchell* appeals.

Just as in *Microsoft*, *Mitchell* enables defendants to "stop[] and start[] the district court proceedings with repeated interlocutory appeals." *Compare id.* at 37–38, *with Behrens* v. *Pelletier*, 516 U.S. 299, 307 (1996). Just as in *Microsoft*, *Mitchell* appeals are "one-sided[]"—defendants can seek interlocutory review of qualified-immunity denials, but plaintiffs can't cross-appeal qualified-immunity grants. *Compare Microsoft*, 582 U.S. at 41, *with Woods* v. *Smith*, 60 F.3d 1161, 1167 (5th Cir. 1995). Just as in *Microsoft*, *Mitchell* appeals "allow indis-

criminate appellate review of interlocutory orders" and disturb the relationship between trial and appellate courts. *Compare Microsoft*, 582 U.S. at 39, *with*, well, *Asante-Chioke* v. *Dowdle*, 103 F.4th 1126 (5th Cir. 2024).

And just as in *Microsoft*, the better way to enable immediate review of qualified-immunity decisions is through rulemaking. 582 U.S. at 40–42. Rulemaking is the right venue for policy decisions, such as what "similarities or differences there are between plaintiffs and defendants in this context"; whether appeal should be by right or discretionary; whether defendants should get multiple interlocutory appeals or have to elect just one; and whether and to what extent an interlocutory appeal stays proceedings in the district court. *See id.* at 30–32, 38 & n.9, 42 (quotation marks omitted); *cf.*, *e.g.*, Fed. R. Civ. P. 23(f) (implementing such decisions for class-certification orders by rule). Rulemaking, as this Court has recognized, "facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114.

Using the collateral-order doctrine, on the other hand, has had a less than salutary effect. Shoehorning qualified-immunity denials into *Cohen*'s narrow parameters stretched the collateral-order doctrine "beyond the limits dictated by its internal logic," kindling an explosion of "purely procedural litigation." *See Ashcroft*, 556 U.S. at 672; Judicial Conference of the United States, *Report of the Federal Courts Study Committee* 95 (1990).[6] It

[6] The Judicial Conference noted that the law of finality under Section 1291 "strikes many observers as unsatisfactory in several respects" and recommended that Congress delegate rulemaking authority to

resulted in a category of orders that sometimes are and sometimes are not immediately appealable, depending on "the extent [to which they] turn[] on an issue of law." *Mitchell*, 472 U.S. at 530; *Johnson* v. *Jones*, 515 U.S. 304, 307 (1995). And it has led to boundless mission creep as the courts of appeals have interpreted *Mitchell*—combined with the "pride of place" qualified-immunity cases have on the Court's docket—as a signal to halt civil-rights cases at the earliest possible point. *See* Baude, 106 Cal. L. Rev. at 48, 82–88; Lammon, 87 Mo. L. Rev. at 1177–1187 (detailing how defendants and lower courts have tacked all sorts of ancillary issues onto *Mitchell* appeals, including evidence admissibility, municipal claims, *Heck* issues, state-law claims, and more).

Using rulemaking instead of case-by-case accretion would avoid all these pitfalls. It would allow for rules that are more flexible, more clear, and more doctrinally stable. And perhaps more importantly, it would avoid "subordinat[ing] what [Congress said] to what the Court thinks is a good idea." *Mohawk*, 558 U.S. at 119 (opinion of Thomas, J.).

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When the Court decided *Mitchell* v. *Forsyth* in 1985, Congress had not yet enacted the Judicial Improvements

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this Court to replace doctrines like "'practical finality' and especially the 'collateral order' rule." *Ibid.* The Conference didn't call *Mitchell* out by name. Given the timing, however—more than four decades after *Cohen*, but only five years after *Mitchell*—the implication seems hard to miss.

Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089 (codified at 28 U.S.C. § 2072(c)), or the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506 (codified at 28 U.S.C. § 1292(e)), both of which granted this Court rulemaking power over interlocutory appeals. Nor was it common knowledge in 1985 that Congress had intended not to incorporate but to abrogate state common-law immunities for Section 1983 claims. *See* Reinert, 111 Cal. L. Rev. at 204–208. Today, however, it is clear that both qualified immunity and the collateral-order doctrine stand in the way of Congress's expressed policy choices. The Court should dismantle both, and there's no better place to start than the doctrine that compounds the one mistake with the other: *Mitchell* v. *Forsyth*.

4. As this case shows, these mistakes have spawned a jurisdictional free-for-all.

The officer defendants here did not appeal the district court's denial of qualified immunity. Pet. 7–8. Instead, they appealed only a routine discovery order. The Fifth Circuit nevertheless asserted not only jurisdiction over the discovery order, but also pendent-party jurisdiction over an officer with no qualified-immunity defense. *Compare* Pet. App. 3a (explaining that Col. Davis faced only state-law claims), *with* Pet. App. 11a n.1 (granting Davis relief anyway). Its decision showcases the jurisdictional disarray *Mitchell* wrought. *Cf.* Lammon, 87 Mo. L. Rev. at 1177–1187. If nothing else, the Court should grant certiorari here and reverse on these narrow points to return

order to the lower courts' exercise of interlocutory jurisdiction in qualified-immunity cases.

The rule that routine discovery orders are not "final" within the meaning of Section 1291 has long been "settled." *Mohawk*, 558 U.S. at 108 (quoting 15B Charles Alan Wright et al., *Federal Practice & Procedure* § 3914.23, p.123 (2d ed. 1992)). So has the rule that the collateral-order doctrine does not permit review of "pendent" claims that are not themselves collateral orders. *Abney* v. *United States*, 431 U.S. 651, 663 (1977); *MacDonald*, 435 U.S. at 857 n.6. More recently, the Court has emphatically rejected the notion of "pendent *party* appellate jurisdiction." *Swint*, 514 U.S. at 48 n.6, 51. Any other rule, the Court explained, would "encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 49–50.

The Fifth Circuit once acknowledged this. In *McKee* v. *City of Rockwall*, it refused to find "so strange an animal as 'pendent party interlocutory appellate jurisdiction.'" 877 F.2d 409, 413 (5th Cir. 1989). Since then, its understanding has evidently "drift[ed] away" from this Court's instructions. *Swint*, 514 U.S. at 45. The Court should summarily reverse—as it often does, in qualified-immunity cases—to remind the lower courts that the answer to whether such a strange animal exists is a "firm 'No.'" *Id.* at 41. If there is to be further expansion of interlocutory appeals, it must "come from rulemaking, . . . not judicial decisions in particular controversies or inventive litigation ploys." *See Microsoft*, 582 U.S. at 39.

CONCLUSION

For all these reasons, and for those described by the Petitioner, this Court should grant the petition.

Respectfully submitted.

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