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 U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICI CURIAE BRIEF OF ERWIN CHEMERINSKY AND DAVID RUDOVSKY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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Amici submit this brief to highlight the institutional concerns raised by the Fifth Circuit's

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amici curiae* or their counsel, made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel for *amici curiae* timely notified all counsel of record of the intention to file this brief.

expansion of the collateral order doctrine to discovery orders in qualified immunity cases. *Amici* seek to inform the Court of the departure by the decision below from deep-rooted principles of federal appellate procedure and of the risks of such an approach to the efficient administration of justice.

SUMMARY OF ARGUMENT

This Court has applied well-established principles that set the narrow limits of appellate jurisdiction over interlocutory appeals in federal court, from orders denying a motion to quash a subpoena and orders disqualifying counsel, to decisions refusing to enforce a settlement agreement and disclosure orders overruling an assertion of attorney-client privilege.

In so doing, the Court has been clear that to serve the final judgment rule's ultimate purpose—the efficient administration of justice and the healthy functioning of the legal system—the appealability determination is made for an entire category of orders, not through balancing factual considerations in any particular case. This is sound rule-making: jurisdictional rules should be clear so all parties know when they can appeal, and so appellate courts can quickly dispose of cases. Any approach that requires a fact-bound and "individualized jurisdictional inquiry" would have a severe impact "on the judicial system's overall capacity to administer justice." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978). Yet this is precisely the approach the Fifth Circuit took in the decision below, departing from established principles and the approach in most other circuits.

The Fifth Circuit held that in a Section 1983 case, where the district court has properly denied a motion to dismiss based on the qualified immunity defense, the court of appeals has jurisdiction under the collateral order doctrine over an appeal from a subsequent discovery order that does not limit the scope of discovery to issues concerning qualified immunity. *Asante-Chioke v. Dowdle*, 103 F.4th 1126, 1128-31 (5th Cir. 2024) (Pet. App. 5a-11a). Here, the complaint alleges that the defendant police officers encountered petitioner's father in mental distress and shot at him when he did not drop his gun. Defendants fired thirty-six rounds at petitioner's father, including impermissible shots as he lay on the ground, incapacitated and disarmed. Pet. App. 3a. The district court denied defendants' motion to dismiss on a qualified immunity defense, because continued shooting of an incapacitated victim is a clear violation of constitutional rights. *See* Pet. App. 10a (citing *Roque v. Harvel*, 993 F.3d 325, 336-39 (5th Cir. 2021)). Defendants concede that ruling was correct. Pet. at 7-8. The order on appeal is the district court's subsequent order, following denial of the motion to dismiss, denying defendants' request to limit discovery to qualified immunity issues.

Even though discovery orders are generally not appealable under the collateral order doctrine, the Fifth Circuit held that it can exercise appellate jurisdiction over discovery orders in qualified immunity cases to the extent the order permits discovery beyond what is "narrowly tailored" to facts relevant to the immunity defense. Pet. App. 11a. In exercising appellate jurisdiction over non-final discovery orders, the court below created a special

jurisdictional rule for discovery orders in qualified immunity cases, different from the rule for all other cases. The Fifth Circuit's decision deepens the existing circuit split over the appealability of discovery orders in qualified immunity cases.

The petition should be granted because federal courts need guidance on applying the collateral order doctrine to discovery orders in qualified immunity cases. The issue below recurs frequently in qualified immunity cases, and this case is a suitable vehicle to resolve the question presented. Long-standing principles compel reversal of the decision below. The Fifth Circuit erred in failing to apply the general well-accepted rules for appellate jurisdiction, instead inviting serial appeals of discovery issues in qualified immunity cases. The inherently discretionary and fact-intensive inquiry to determine whether a discovery order is sufficiently "narrowly tailored" is inappropriate for appellate review. Moreover, granting defendants the asymmetric right to immediately appeal such orders would distort the law of qualified immunity and create inordinate delays. It would also have systemic impacts on district judges' ability to supervise the matters before them by disrupting the appropriate division of functions between appellate and trial courts.

Following the Fifth Circuit's approach, discovery orders in qualified immunity cases would be a unique exception to the ordinary rule that there is no appellate jurisdiction to review such orders. Under the current circuit split, a plaintiff's ability to litigate his or her case differs dramatically by accident of geography, where in certain circuits (the Fifth and Tenth) defendants are afforded the ability as of right,

through piecemeal discovery disputes, to arrest the progress of litigation to enforce civil rights. Such a lopsided and unpredictable jurisdictional rule sits outside established principles of federal jurisdiction and is both legally incoherent and impractical.

ARGUMENT

I. Review in this case is important to clarify that appellate jurisdiction over interlocutory appeals in qualified immunity cases extends only to "purely legal issues", not fact-related disputes such as discovery orders.

While clear general principles govern appellate jurisdiction over interlocutory appeals in federal court, there is a need for guidance from this Court on applying these principles to discovery orders in qualified immunity cases.

The courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States". 28 U.S.C. § 1291. This Court has "carved out a narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order doctrine." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). Under the collateral order doctrine, a party may immediately appeal a non-final order if it "fall[s] in that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Discovery orders fall far outside these "stringent conditions". *Midland Asphalt Corp.*, 489 U.S. at 799 (quoting *Flanagan v. United States*, 465 U.S. 259, 270 (1984)).

A. Rights of appeal cannot depend on the facts of a particular case and must be determined for entire categories of orders.

In applying the final judgment rule in a variety of contexts, this Court has developed clear principles that govern the boundaries of appellate jurisdiction over interlocutory orders. Chief among these is that the court of appeals "of course decide[s] appealability for categories of orders rather than individual orders" and does not "in each individual case engage in ad hoc balancing to decide issues of appealability." *Johnson v. Jones*, 515 U.S. 304, 315 (1995). This categorical approach provides predictability on when appellate jurisdiction is available. As the objective of the final judgment rule is "to achieve the effective conduct of litigation", its narrow exception must operate to the same end. *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). As such, "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957).

To maintain the clear, narrow boundaries of the collateral order doctrine, this Court "has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal". *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985). Because such an "individualized jurisdictional

inquiry" would create uncertainty, *Coopers & Lybrand*, 437 U.S. at 473, "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (internal quotation omitted). This Court's decisions contain "frequent admonitions [] that availability of collateral order appeal must be determined at a higher level of generality", *id.* at 876-77, and have "consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral". *Cunningham v. Hamilton Cnty, Ohio*, 527 U.S. 198, 206 (1999).

Under the Fifth Circuit's rule, each post-motion-to-dismiss discovery order in a qualified immunity case would require the court of appeals to assess the breadth of the order to decide whether it was "sufficiently collateral" to confer jurisdiction. This determination is inherently fact-bound and at odds with the principles that limit appellate jurisdiction to interlocutory appeals that resolve issues of law.

B. Interlocutory appeals in qualified immunity cases should be subject to these same well-established principles of appellate jurisdiction.

The Fifth Circuit held that it had jurisdiction to "review an order under the collateral order doctrine that exceeds the requisite 'narrowly tailored' scope." Pet. App. 11a. The court did *not* hold—nor could it have held, consistent with this Court's case law—that it had appellate jurisdiction to review all post-

pleading discovery orders in a qualified immunity case. Rather, the Fifth Circuit authorizes appellate jurisdiction under the collateral order doctrine on the specific facts of the case.

The Fifth Circuit's fact-bound approach is inconsistent with this Court's precedents. An assessment whether the discovery order is "sufficiently narrowly tailored" necessarily involves "considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action". *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (internal quotation omitted). The Fifth Circuit's approach is almost entirely factual, as is evident in the opinion below. *See* Pet. App. 10a ("But there were multiple alleged shooters from at least two different law enforcement agencies, thirty-six rounds fired, and a dispute as to whether a single defendant (Dowdle) used deadly force after Asante-Chioke became incapacitated. On the present record, it is not known whether Dowdle fired any shots; how many if so; and when, in relation to Asante-Chioke's actions and death. Through limited discovery, this information may well be discernable.").

This Court's guidance is needed to confirm that the collateral order doctrine does not extend to discovery orders in qualified immunity cases. This jurisdictional limit is consistent with the recognized touchstone justifying interlocutory appeals in qualified immunity cases, namely the *legal* nature of the issue on appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("[A] district court's denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*, is an appealable 'final decision' within the

meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." (emphasis added)).

"'[I]mmunity appeals ... interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law.'" *Johnson v. Jones*, 515 U.S. 304, 317 (1995) (citations omitted). Accordingly, this Court has held that a party "cannot immediately appeal … [a] fact-related district court determination". *Id.* at 307, 319-20 (holding that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial").

If a denial of summary judgment on factual grounds is not immediately appealable, as this Court held in *Johnson*, a discovery order cannot be either. In qualified immunity cases, "typically, the [legal] issue [is] whether the federal right allegedly infringed was 'clearly established.'" *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (citations omitted). Immediate appellate review of *that* question furthers the purpose of the qualified immunity defense, but interlocutory appeals of discovery orders do not.

II. The Fifth Circuit's decision deepens a circuit conflict.

A. The Fifth Circuit relied on cases where the district court avoided ruling on a motion to dismiss to grant itself jurisdiction to review post-motion-to-dismiss discovery orders.

Not only is the decision below inconsistent with this Court's general principles governing interlocutory appeals, it also reached its result based on prior Fifth Circuit cases that arose in a critically different procedural context. The cases on which the court below relied are all cases permitting discovery *prior* to a ruling on a motion to dismiss. Pet. App. 5a-10a (citing *Lion Boulos v. Wilson*, 834 F.2d 504, 506 (5th Cir. 1987); *Backe v. LeBlanc*, 691 F.3d 645, 647 (5th Cir. 2012); *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014); *Carswell v. Camp*, 54 F.4th 307, 310 (5th Cir. 2022)). The purpose of limited discovery in those decisions was *to enable* the court to rule on the qualified immunity defense at the motion to dismiss stage. *Backe*, 691 F.3d at 648 ("[I]f the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts *needed to rule on the immunity claim*.'" (quoting *Lion Boulos,* 834 F.2d at 507-08) (emphasis added))). Here, by distinct contrast, the district court was able to rule, and did rule, on the immunity claim. Defendants did not appeal the denial of their motion to dismiss, and the Fifth Circuit *agreed* with the district court's decision on the motion to dismiss. Pet. App. 10a.

Furthermore, the district court's discovery order does not constitute a "final rejection" of the defendant's claimed right to qualified immunity "where denial of immediate review would render impossible any review whatsoever", because the defendants can re-assert qualified immunity at the summary judgment stage. *Firestone Tire & Rubber Co.*, 449 U.S. at 376 (internal quotation omitted); *see also Behrens*, 516 U.S. at 307 ("*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity *at either* the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal." (emphasis added)).

Once the district court rules on (and, here, denies) the motion to dismiss on qualified immunity grounds, the court has discretion to order discovery as broadly as it would over any other defendant. *See* Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 Wash. & Lee L. Rev. 3, 39 (1998) ("[O]nce a district court has properly determined that discovery should proceed, the civil rights lawsuit resembles the ordinary lawsuit."). There is no distinct litigation process for qualified immunity claims. A defendant *may* move to limit the scope of discovery, and the district court in its discretion *may* grant such a motion if it helps to manage the case efficiently, but there is no entitlement to an interlocutory appeal for the purposes of narrowing discovery.

B. The decision below worsens an existing circuit conflict.

The First and Sixth Circuits have held that they lack jurisdiction to review discovery orders in qualified immunity cases because such orders are not final judgments. *See* Pet. at 10-12 (citing *Lugo v. Alvorado*, 819 F.2d 5, 8 (1st Cir. 1987); *In re Flint Water Cases*, 960 F.3d 820, 830 (6th Cir. 2020)). These decisions are well-reasoned and squarely on point.

The Fourth Circuit has applied the same principles in a case involving presidential immunity. *See* Pet. at 12 (citing *District of Columbia v. Trump*, 959 F.2d 126, 130 (4th Cir. 2020) (en banc)). Similarly, the Ninth Circuit has recently applied the same principle to deny appellate jurisdiction in a case extending *Bivens*, absent a denial of qualified immunity. *See Garraway v. Ciufo*, 113 F.4th 1210, 1220-21 (9th Cir. 2024) (because "there is no right permanently destroyed, or harm irreparably done, simply abbreviating litigation burdensome to government officials does not suffice as justification for *Cohen* treatment."). And the D.C. Circuit has applied the same principle to discovery orders in the context of the denial of sovereign immunity. *See McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995) ("The district court's order denying Iran's motion to dismiss falls within the collateral order doctrine of *Cohen* [] because Iran's sovereign immunity is an immunity from trial. The discovery order does not qualify for such treatment. It is not independently appealable." (internal quotation omitted)).

On the other hand, the Tenth Circuit has held that it has appellate jurisdiction to review discovery orders that do not limit discovery to the qualified immunity defense. *See* Pet. at 12-13. This line of cases in the Tenth Circuit began with *Maxey ex rel. Maxey v. Fulton*, 890 F.2d 279, 283-84 (10th Cir. 1989), which, like the decision below, extended the Fifth Circuit decision in *Lion Boulos*, 834 F.2d 504 (where the district court avoided deciding the motion to dismiss), to a *post*-motion-to-dismiss discovery order, a materially distinct fact pattern. The Tenth and Fifth Circuits therefore have the same erroneous point of departure. Even following this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995), the Tenth Circuit has continued to hold that it has appellate jurisdiction to review discovery orders that are not "narrowly tailored to uncover only those facts needed to rule on the immunity claim". *Garrett v. Stratman*, 254 F.3d 946, 953 (10th Cir. 2001) (quoting *Maxey v. Fulton*, 890 F.2d at 282-83).

Whether a defendant may immediately appeal a discovery order in a qualified immunity case as of right significantly affects how the case will proceed. The availability of immediate appeal should not differ by virtue of the court's location, nor should it depend on an inherently-fact bound assessment of whether the discovery order is sufficiently narrow.

The subject of this circuit split—appellate jurisdiction over the scope of discovery following denial of a motion to dismiss on qualified immunity grounds—is of considerable importance because of how frequently it arises. There is nothing unusual about the procedural history of petitioner's case that would limit application of the Fifth Circuit's decision.

Rather, the issue is a common one in qualified immunity cases. Following a denial of qualified immunity on a motion to dismiss, a defendant who believes he or she has a colorable claim of qualified immunity has every reason to try to limit the scope of discovery and then, if necessary, to contest on appeal any discovery order he or she considers overly broad. This case is therefore an appropriate vehicle for this circuit split. That the question of appellate jurisdiction over discovery orders in qualified immunity cases will continue to arise is further reason for this Court's guidance.

III. The Fifth Circuit's expansion of the collateral order doctrine to discovery orders is an improper usurpation of appellate jurisdiction that undermines the efficient administration of justice.

A. Limiting interlocutory appeals to legal questions provides a bright-line jurisdictional rule that promotes the benefits of the qualified immunity defense.

A clear jurisdictional rule on interlocutory qualified immunity appeals defines and properly limits those appeals to the core question whether the right alleged was clearly established. In furtherance of the final judgment rule's animating objective of "a healthy legal system", *Cobbledick*, 309 U.S. at 326, any exceptions to that rule must be clear to "ensure that litigants know when they can appeal." Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 Ga. L. Rev. 959, 998 (2021). By contrast, the Fifth Circuit's approach

"is a murky rule that creates uncertainty about appellate jurisdiction", which in turn leads to side litigation about the existence of jurisdiction. *Id.* at 998-99; *see also* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 70-72 (1989) (explaining why fact-bound qualified immunity appeals are unsuitable for interlocutory review).

The Fifth Circuit's jurisdictional rule (whether a discovery order meets the "requisite 'narrowly tailored' scope") necessarily involves having the court of appeals review the record and the discovery requests to determine whether the court has jurisdiction to decide the case in the first place. Pet. App. 11a; *see* Lammon, *Assumed Facts and Blatant Contradictions*, 55 Ga. L. Rev. at 998 (such a rule would "require[] that courts do the work and analysis that *Johnson* sought to avoid, all to determine whether they can avoid that work and analysis."). In the decision below, the court of appeals stated that it had reviewed "[p]laintiff's issued discovery requests—which include requests for information and documents not limited to the defense of qualified immunity"—against the factual record to determine whether it had jurisdiction to review plaintiff's discovery requests. Pet. App. 10a. This circular approach to jurisdiction inevitably creates inefficiencies and has no grounding in the rationale for interlocutory appeals from denials of qualified immunity.

"Qualified-immunity appeals exist to protect defendants from the burdens of litigation when the law they allegedly violated was not sufficiently clear.

Immediate review of the pleadings [or discovery orders] does nothing to further that purpose." Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 Mo. L. Rev. 1138, 1166 (2023). Appeals on "neat abstract issues of law" allow appeals courts to decide and announce whether particular conduct violates the Constitution, which in turn supports the ultimate objective of qualified immunity, which is to ensure that government officials have sufficient notice that their actions violate the law. *Johnson,* 515 U.S. at 317; *see* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 Touro L. Rev. 633, 642-49 (2013) (explaining the benefits of decisions on the merits question in qualified immunity cases).

The interlocutory appeal in this case has nothing to do with the legal question whether certain conduct violates clearly established federal law. Indeed, the critical point is that the Fifth Circuit *affirmed* the district court's analysis of the legal question: "the defense of qualified immunity turns on whether Dowdle continued using deadly force by firing shots at Asante-Chioke after he became incapacitated. The district court was correct in recognizing that to have continued shooting is a clear violation under this circuit precedent." Pet. App. 10a.

In this context, interlocutory appeal from a discovery order is inappropriate. As shown below, defendants may raise a qualified immunity defense on summary judgment if the record, in the light most favorable to plaintiff, shows no violation of a clearly established right. Immediate appeal of disputes concerning the *factual basis* of qualified immunity, such as the discovery order at issue here, does not

serve any of the purposes that justify qualified-immunity appeals.

Discovery orders are particularly ill-suited for interlocutory appeals. "Indeed, the considerations underlying the rule against review of interlocutory orders apply with particular force in the discovery context because that process has a special potential for spawning rulings that aggrieved parties would seek to appeal." *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 119 (4th Cir. 1994) (Wilkinson, J.). Such appeals offer little benefit where "'almost all interlocutory appeals from discovery orders would end in affirmance' because 'the district court possesses discretion, and review is deferential'". *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110 (2009) (quoting *Reise v. Board of Regents,* 957 F.2d 293, 295 (7th Cir. 1992) (Easterbrook, J.)).

B. The Fifth Circuit's decision inserts the courts of appeals in case management decisions properly left to the district court's discretion.

Another factor in applying the collateral order doctrine is "maintaining the appropriate relationship" between trial and appellate courts. *Coopers & Lybrand*, 437 U.S. at 476 (internal quotation omitted). Limiting interlocutory appeals to a "neat abstract issue[] of law" ("whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions"), rather than fact-bound discovery disputes requiring review of an incomplete record, respects the "comparative expertise of trial and appellate courts," as well as the

"wise use of appellate resources". *Johnson*, 515 U.S. at 312, 316-17 (internal quotation omitted).

Allowing interlocutory appeal of discovery orders will disrupt the careful division of functions within the federal judicial system. The "special expertise and experience of appellate courts" lies not in case management, but rather in "assessing the relative force of ... applications of legal norms". *Johnson*, 515 U.S. at 309 (quoting *Pierce v. Underwood*, 487 U.S. 552, 584 (White, J., concurring in part and dissenting in part)). The issue here—the appropriate scope of the discovery order—"is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters." *Johnson*, 515 U.S. at 316. "Implicit in § 1291 is Congress' judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985). "Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system." *Firestone Tire & Rubber Co.*, 449 U.S. at 374.

C. The collateral order doctrine should not be distorted by allowing asymmetric appeals, available only to defendants.

There is no need to stretch the limits of the collateral order doctrine to protect the qualified

immunity defense. W]hen raised, the immunity is a powerful defense" and that "overall, courts of appeals find that qualified immunity is appropriate far more often than they find that the defense should be denied." Alexander A. Reinert, *Asymmetric Review of Qualified Immunity Appeals*, 20 J. Empirical Legal Stud. 4, 8, 21 (2023). The qualified immunity defense also operates to screen out claims prior to any filing. Research shows "that lawyers often take qualified immunity into account at the case-screening stage and indeed may in some cases avoid litigation in which qualified immunity is even a potential issue." Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477 (2011).

The Fifth Circuit's approach, if not reversed, will have distorting effects on the law of qualified immunity. A ruling by the district court on the merits of whether conduct complies with the Constitution and federal law allows an appeal by the losing party (whether plaintiff or defendant) on the legal issue presented. That is a bilateral right. In contrast, allowing interlocutory review of discovery orders that are too broad is one-sided and confers an additional right on defendants only. Such "one-sidedness" has "reinforce[d]" this Court's decision not to expand the collateral order doctrine to non-final decisions in other contexts and also weighs against unwarranted expansion here. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 41-42 (2017) (quoting *Coopers & Lybrand*, 437 U.S. at 476); *see also* Michael Avery, David Rudovsky, Karen Blum & Jennifer Laurin, *Police Misconduct: Law and Litigation*, § 3:23 (3d ed. 2020, Nov. 2023 update) ("The interlocutory appellate process affords defendants a mechanism which easily

can be abused, resulting in serious prejudice to legitimate claims.").

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that this Court grant the petition for writ of certiorari.

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Respectfully submitted,

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