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 IN OPPOSITION

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QUESTION PRESENTED

"One of the purposes" of qualified immunity "is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.'" *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)). Thus, where a complaint alleges only "actions that a reasonable officer could have believed lawful," a defendant "is entitled to dismissal prior to discovery." *Id.* And where dismissal based on qualified immunity is improper at the motion-to-dismiss stage, "discovery should be tailored specifically to the question of [a defendant's] qualified immunity" so qualified-immunity issues can be resolved at summary judgment. *Id.* The question presented is:

> Whether—under *Anderson*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and their progeny—a state official may immediately appeal a district court order that (a) refuses to dismiss a complaint on qualified-immunity grounds and (b) refuses to tailor discovery to the question of qualified immunity so that it may be resolved at summary judgment.

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Qualified immunity is important "to society as a whole," which is why "the Court often corrects lower courts" when they fail to apply qualified-immunity protections properly. *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) (citation omitted). Claims against public officers "frequently run against the innocent as well as the guilty," creating "social costs," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Because "[o]ne of the purposes" of qualified immunity "is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government,'" "qualified immunity questions should be resolved at the earliest possible stage of a litigation." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (quoting *Harlow*, 457 U.S. at 817). Thus, where a complaint alleges only "actions that a reasonable officer could have believed lawful," a defendant "is entitled to dismissal prior to discovery." *Id.* And where dismissal based on qualified immunity is improper at the motion-to-dismiss stage, "discovery should be tailored specifically to the question of [a defendant's] qualified immunity" so qualified-immunity issues can be resolved at summary judgment. *Id.*

This case addresses what happens when a district court fails to adhere to these basic principles. In *Mitchell v. Forsyth*, 472 U.S. 511, 526–30 (1985), and its progeny, this Court has repeatedly held that inter-

locutory orders denying the benefits of qualified immunity—protection from the "costs of trial" and "the burdens of broad-reaching discovery"—satisfy the collateral-order doctrine and thus may be immediately appealed. That is what the Fifth Circuit held below. The district court declined to dismiss Petitioner's complaint on qualified-immunity grounds and also refused to tailor discovery so that qualified immunity can be resolved at summary judgment. So Respondents appealed—and the Fifth Circuit correctly determined that it had jurisdiction to correct the district court's error, which, if unremedied, would deny the basic benefit of the qualified-immunity defense.

This issue is not cert-worthy. In fact, Petitioner omits that this Court recently saw—and deemed unworthy of certiorari—the same arguments in *Carswell v. Camp*, No. 22-959 (U.S.). Nothing has changed. Citing the same cases the *Carswell* petitioner cited, Petitioner imagines a circuit split with the First, Fourth, and Sixth Circuits by misreading a handful of cases from those circuits and overlooking their other cases. For decades, these circuits—along with nearly every other circuit—have exercised jurisdiction over orders (or refusals to rule) that have the practical effect of denying qualified immunity. *See, e.g.*, *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc) (jurisdiction over an interlocutory appeal where "[t]he district court's refusal to consider the [qualified-immunity] question subjected [defendant] to further pretrial procedures, and so effectively denied him qualified immunity"); *Torres v. Puerto Rico*, 485 F.3d 5, 9 (1st Cir. 2007) (jurisdiction over an interlocutory appeal of a "case-management order" "to the extent the appeal raises immunity defenses"); *Myers v. City of*

Centerville, 41 F.4th 746, 756 (6th Cir. 2022) (jurisdiction where, "in punting a decision on qualified immunity, the district court effectively denied it" by "unlock[ing] discovery"). The Fifth Circuit did the same thing in the decision below. *See* Pet.11a (jurisdiction where "the district court's failure to limit discovery was tantamount to the denial of qualified immunity"); *see also Carswell v. Camp*, 54 F.4th 307, 310–11 (5th Cir. 2022) (jurisdiction "over the scheduling order" where "the district court refused to rule on qualified immunity at the earliest possible stage of the litigation" and "denied [defendants] the benefits of the qualified immunity defense" (citations and quotation marks omitted)), *cert. denied*, 144 S. Ct. 73 (2023). Petitioner's asserted circuit split thus crumbles under scrutiny.

So too does Petitioner's assertion that the decision below will spark a deluge of new appeals raising "discovery disputes of every shape and kind (*e.g.*, each set of interrogatories, every deposition notice, and potentially any question asked at a deposition)." Pet.17. By Petitioner's own telling, the Fifth and Tenth Circuits have applied the reasoning below *since the 1980s*. Where is the flood of mine-run discovery disputes in interlocutory postures on appeal? The reality is that no such flood exists—and that underscores that the issue presented is not exceptionally important.

It bears noting, moreover, that the Fifth Circuit faithfully and correctly applied this Court's qualified-immunity precedents in the decision below. As explained above, this Court has recognized that any discovery necessary to decide qualified immunity at the

summary-judgment stage must "be tailored specifically to the question of [the defendant's] qualified immunity." *Anderson*, 483 U.S. at 646 n.6. The district court refused to do so. So, the only real question was whether the Fifth Circuit had jurisdiction to correct that error. It did, for all the reasons collateral-order jurisdiction exists under *Mitchell* and its progeny: Without the availability of interlocutory review, the protections of qualified immunity would be irreversibly lost. This is an open-and-shut issue that does not warrant the Court's intervention.

Finally, even if Petitioner were right about everything else, cert denial would remain proper because of the lurking mootness issue in the case. Court-ordered discovery on the qualified-immunity issue would likely be complete before any decision from this Court. Accordingly, it is exceedingly difficult to see how any such decision would benefit Petitioner. Moreover, if she were correct about the sky falling under the decision below, then this Court would have ample future opportunities to address the issue presented in a context where a decision would actually have a practical impact on the litigation.

For all of these reasons, the Court should deny the petition.

STATEMENT OF THE CASE

A. Legal Background

1. Lawsuits against public officials, including law enforcement officers who risk their lives to protect us, "frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but

to society as a whole." *Harlow*, 457 U.S. at 814. These costs include litigation expenses, diversion of time and energy, "deterrence of able citizens from acceptance of public office," and the danger that fear of lawsuits "will dampen the ardor [of officers] . . . in the unflinching discharge of their duties." *Id.* (citation and quotation marks omitted). The doctrine of qualified immunity developed as "the best attainable accommodation" between these costs and the need for "vindication of constitutional guarantees" where there has been an abuse of office. *Id.* Accordingly, damages suits can proceed against officers only if they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Carroll v. Carman*, 574 U.S. 13, 16 (2014) (per curiam).

In the Fourth Amendment context, the "standard is reasonableness." *Sheehan*, 575 U.S. at 612. This assessment is conducted "from the perspective 'of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,'" and accounts "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). "Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *Sheehan*, 575 U.S. at 611 n.3 (quoting *Harlow*, 457 U.S. at 814).

Qualified immunity, however, is not just a "defense to liability"; it is also "an *immunity from suit*."

Mitchell, 472 U.S. at 526. In other words, qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation"—including "the burdens of broad-reaching discovery"—where there was no violation of clearly established law. *Id.* (citation omitted). "For this reason," the Court has "emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation." *Anderson*, 483 U.S. at 646 n.6. Otherwise, the protection from "broad-ranging discovery" is lost. *Id.* (citation omitted); *see Davis v. Scherer*, 468 U.S. 183, 195 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if . . . unjustified lawsuits are quickly terminated.").

This Court has accordingly instructed lower courts to determine whether a defendant is alleged "to have taken actions that a reasonable officer could have believed lawful" and, if so, to reject the claim "prior to discovery." *Anderson*, 483 U.S. at 646 n.6. On the other hand, if the complaint alleges a violation of clearly established law but the defendant claims he took different actions (and those actions are ones "that a reasonable officer could have believed lawful), then discovery may be necessary" before a summary-judgment motion based on qualified immunity "can be resolved." *Id.* Even then, however, "any such discovery should be tailored specifically to the question of . . . qualified immunity." *Id.*

Given the nature of qualified immunity, a "decision denying a Government officer's claim of qualified immunity can fall within the narrow class of appealable orders despite 'the absence of a final judgment.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 671–72 (2009) (quoting

Mitchell, 472 U.S. at 530). That is because such a decision, when it turns on a legal issue, "[1] 'conclusively determine[s]' that the defendant must bear the burdens of discovery [or trial]; [2] is 'conceptually distinct from the merits of the plaintiff's claim'; and [3] would prove 'effectively unreviewable on appeal from a final judgment.'" *Id.* at 672 (quoting *Mitchell*, 472 U.S. at 527–28). Accordingly, "pretrial orders denying qualified immunity generally fall within the collateral order doctrine." *Plumhoff*, 572 U.S. at 772. And that is true regardless of the stage of litigation. *See Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) ("[A]n 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."). After all, whether a district court decision requires a defendant to "bear the burdens of discovery," *Iqbal*, 556 U.S. at 672, or to stand trial, that decision cannot "be effectively reviewed on appeal from final judgment because by that time the immunity . . . will have been irretrievably lost," *Plumhoff*, 572 U.S. at 772.

2. In accordance with this Court's precedents, circuit courts have exercised jurisdiction over interlocutory appeals raising qualified-immunity issues for decades. They have decided not only interlocutory appeals from explicit qualified-immunity denials, but also appeals from a district court's implicit denial of (or refusal to adjudicate) a qualified-immunity defense—"even a refusal couched as a case-management order." *Torres*, 485 F.3d at 9; *see, e.g.*, *Ford v. Moore*, 237 F.3d 156, 161 (2d Cir. 2001) ("There is no doubt that we have appellate jurisdiction on this interlocutory appeal to consider the denial of the defense of qualified immunity to the extent that the defense turns on an

issue of law, even though the District Court did not explicitly consider the defense." (citing *Mitchell,* 472 U.S. 511, and *Musso v. Hourigan,* 836 F.2d 736, 741 (2d Cir. 1988)); *Oliver v. Roquet*, 858 F.3d 180, 188 (3d Cir. 2017) (explaining that the Third Circuit has "joined numerous other Courts of Appeals in holding that a district court's 'implicit denial of the Appellants' immunity claims is sufficient to confer appellate jurisdiction'" (quoting *Wright v. Montgomery County*, 215 F.3d 367, 370, 374 (3d Cir. 2000))); *Jenkins*, 119 F.3d at 1159 (concluding that the Fourth Circuit had jurisdiction over an interlocutory appeal where "[t]he district court's refusal to consider the question subjected [defendant] to further pretrial procedures, and so effectively denied him qualified immunity"); *Carswell*, 54 F.4th at 310 ("[The Fifth Circuit] ha[s] jurisdiction over the scheduling order here because the district court refused to rule on qualified immunity 'at the earliest possible stage of the litigation.'" (quoting *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (per curiam))); *Myers*, 41 F.4th at 756 ("[A] non-decision on a timely assertion of qualified immunity is still a decision—it's a denial—and is thus immediately appealable [to the Sixth Circuit]."); *Payne v. Britten*, 749 F.3d 697, 701 (8th Cir. 2014) ("Our court, therefore, has jurisdiction over interlocutory appeals arising not only from a district court's reasoned denial of qualified immunity, but also from a district court's failure or refusal to rule on qualified immunity."); *Lowe v. Town of Fairland*, 143 F.3d 1378, 1380 (10th Cir. 1998) (concluding there is appellate jurisdiction "[r]egardless of whether a district court merely postpones its ruling or simply does not rule on the qualified immunity defense"); *Howe v. City of Enterprise*,

861 F.3d 1300, 1302 (11th Cir. 2017) (per curiam) (concluding the district court effectively denied qualified immunity by "reserv[ing] ruling on the defendants' claims to immunity" and directing parties to "confer and develop a proposed discovery plan").

Likewise, the courts of appeals have recognized that appellate jurisdiction exists to decide appeals from discovery orders that have denied a defendant "the benefits of the qualified immunity defense." *Wicks v. Miss. State Emp. Servs.*, 41 F.3d 991, 994 (5th Cir. 1995); *see, e.g.*, *Maxey by Maxey v. Fulton*, 890 F.2d 279, 283–84 (10th Cir. 1989) (concluding it has "jurisdiction over this appeal because of the impermissible infringement on [defendant's] immunity interest in freedom from overly broad discovery," reversing "the denial of the protective order," and remanding "with directions to limit discovery to the qualified immunity issue"); *Lewis v. City of Ft. Collins*, 903 F.2d 752, 754 (10th Cir. 1990) (concluding that there is jurisdiction where "the order of the district court does not limit discovery to the resolution of the qualified immunity issue" and "defendants have been denied their entitlement to be free from the burden of overbroad discovery"); *Liberty Mut. Ins. Co. v. La. Dep't of Ins.*, 62 F.3d 115, 117 (5th Cir. 1995) ("[T]he discovery order became appealable when it implicitly denied the ratemakers' claim to qualified immunity."); *Gaines v. Davis*, 928 F.2d 705, 705–06 (5th Cir. 1991) (per curiam) (reversing district court's "overly broad" order that did "not limit the scope of the depositions to an inquiry about facts which, if proven, would defeat [defendants'] claim of qualified immunity"). And the circuits have similarly concluded that they have jurisdiction to consider discovery orders that effectively deny other

immunity claims. *See Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 280 (D.C. Cir. 2014) ("A district court's grant of discovery against an absolutely immune defendant is sufficiently conclusive to qualify for collateral review."); *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 203, 206 (2d Cir. 2012) (finding jurisdiction to review a "decision granting discovery" where Argentina claimed the order "would infringe on its sovereign immunity"), *aff'd sub nom. Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014); *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 790 (7th Cir. 2011) ("Because the district court's general-asset discovery order effectively rejected Iran's claim of attachment immunity under § 1609, we have jurisdiction to review it under the collateral-order doctrine."); *Wuterich v. Murtha*, 562 F.3d 375, 378, 381–82 (D.C. Cir. 2009) (concluding it had jurisdiction to consider district court's denial of "certification pending discovery" that "effectively denied" immunity under the Westfall Act).

Generally, circuit courts take the approach that what matters is not how a district court decision is framed, but what it actually does—namely, whether it denies immunity protections. *See, e.g.*, *Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 582 (D.C. Cir. 2020) ("[A]ppealability turns on what the order at issue does, not what it is called."); *cf. Abbott v. Perez*, 585 U.S. 579, 594 (2018) ("[T]he label attached to an order is not dispositive.").

B. Factual and Procedural Background

1. According to the allegations (taken as true for now), Jabari Asante-Chioke was walking along the

highway around 10 p.m. one night. ECF 22 at 8.[1] He appeared "visibly distressed" and was "carrying in his hands" both "a gun and a knife." ECF 22 at 8. A passerby noticed Asante-Chioke and informed a police officer who was "directing traffic around a nearby construction site." ECF 22 at 8.

Law enforcement officers, including Respondent Nicholas Dowdle, were subsequently dispatched. Pet.14a. The officers approached Asante-Chioke, but "he jogged slowly away from them." Pet.14a. The officers repeatedly yelled at him to stop and to get on the ground. Pet.14a–15a. Asante-Chioke did not do so. Pet.15a. Instead, he raised his hand with a gun "in the direction" of one of the officers. Pet.15a.

The officers then repeatedly fired their weapons at Asante-Chioke, who fell to the ground. Pet.15a. Asante-Chioke was shot 24 times, including shots allegedly fired after he had dropped the gun and was lying on the ground. Pet.2a, 15a. There are no specific allegations regarding which shots Officer Dowdle fired, or what actions he (as opposed to the other officers) took. Pet.10a; *see generally* ECF 22.

2. Asante-Chioke's daughter sued Respondent Dowdle, his supervisor who was not on the scene, Respondent Colonel Lamar Davis, and other defendants, asserting claims individually and on behalf of her father. Pet.3a, 15a. In her amended complaint, she asserted claims under 42 U.S.C. § 1983 for excessive force and unlawful seizure, along with various state law claims, based on the alleged "firing . . . after her

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[1] ECF citations refer to the district court's docket, *Asante-Chioke v. Dowdle*, No. 2:22-cv-04587 (E.D. La.).

father was incapacitated, motionless on the ground." Pet.3a; *see* ECF 22 at 20–29.[2]

Respondents filed a motion to dismiss. Pet.3a, 16a. They argued, in relevant part, that qualified immunity mandated dismissal and, in the alternative, that the district court should limit discovery to qualified-immunity issues so they could "reassert qualified immunity in a summary judgment motion." Pet.3a, 16a, 29a–35a. Respondents highlighted how the amended complaint contained (1) "a vague allegation that some indeterminate number of shots were fired collectively by the Officer Defendants after [Asante-Chioke] was incapacitated," and (2) alleged no "delay between shots fired" but rather described the shooting as a "continuous event in response to the gun being pointed at the officers." ECF 36-1 at 18–19.

On August 31, 2023, the district court denied, in relevant part, Respondents' motion to dismiss based on qualified immunity. Pet.13a. The district court brushed off the amended complaint's failure to specify "how many shots [Officer Dowdle] fired, the time frame of the shots, or whether any shots were specifically fired by him after it was clear from his vantage point" that Asante-Chioke was incapacitated and no longer posed a threat. Pet.34a. The court concluded that the allegations that "four officers" "fired 36 shots" at Asante-Chioke, with some being fired after Asante-Chioke fell to the ground and dropped his gun (with no mention of what happened to the knife), were sufficient to "raise a reasonable expectation that discovery will reveal evidence that Dowdle fired shots after Mr.

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[2] She dropped the unlawful seizure claim in her second amended complaint. *See* ECF No. 83 at 19–27.

Asante-Chioke no longer posed a threat," which—in that court's view—would violate clearly established law "that an officer cannot continue using deadly force after incapacitating a suspect who posed a threat." Pet.32a, 34a–35a. The district court further concluded that it was unnecessary to limit discovery to "only those facts needed to rule on the immunity claim." Pet.35a (citation omitted). The district court thus refused to dismiss the claims based on qualified immunity or—critically here—to limit discovery to qualified-immunity issues so it could resolve qualified immunity on summary judgment before subjecting Respondents to merits discovery. Pet.35a.

3. On appeal, the Fifth Circuit vacated the district court's order in a unanimous opinion authored by Judge Engelhardt and joined by Judges King and Ho. Pet.1a–2a. Recognizing that jurisdiction is a "threshold matter," the Fifth Circuit started there. Pet.5a.

The Fifth Circuit began by acknowledging that it "has jurisdiction to review 'final decisions' of the district courts," which "[g]enerally" does not "include discovery orders." Pet.5a (quoting *Backe v. LeBlanc*, 691 F.3d 645, 647–48 (5th Cir. 2012)). But the Fifth Circuit noted that this "Court has interpreted § 1291 to include a grant of authority to review a small class of collateral orders traditionally considered non-final," including "orders denying qualified immunity." Pet.5a (citation and quotation marks omitted). The Fifth Circuit explained that "qualified immunity is more than a 'mere defense to liability'"—it is "also an immunity from suit." Pet.5a (quoting *Carswell*, 54 F.4th at 310). And, as such, "one of the most important benefits of

the qualified immunity defense is protection from pretrial discovery, which is costly, time-consuming, and intrusive." Pet.5a (quoting *Carswell*, 54 F.4th at 310). The Fifth Circuit discussed how, in a line of cases tracing back to *Lion Boulos v. Wilson*, 834 F.2d 504, 506 (5th Cir. 1987), it has recognized that the collateral-order doctrine applies to orders "'tantamount' to orders denying qualified immunity." Pet.5a–6a.

The Fifth Circuit then turned to analyzing whether the district court order was tantamount to a denial of qualified immunity in this case. Pet.10a. It concluded it was. Pet.11a. The court recognized that the qualified-immunity defense would turn on "whether Dowdle fired any shots; how many if so; and when, in relation to Asante-Chioke's actions and death." Pet.10a. Even though these facts "may well be discernable" through limited discovery, however, the district court refused to limit discovery, thereby depriving Dowdle of "one of the most important benefits of the qualified immunity defense": protection from intrusive discovery. Pet.10a-11a. The Fifth Circuit concluded that such a decision "was tantamount to the denial of qualified immunity" and gave rise to appellate jurisdiction. Pet.11a-12a.[3] The Fifth Circuit thus vacated the dis-

[3] The Fifth Circuit also concluded that claims against Colonel Davis, as Officer Dowdle's supervisor, are "inextricably intertwined," allowing its ruling to extend to him pursuant to pendent appellate jurisdiction. Pet.11a n.1 (quoting *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1988)). In a passing footnote, Petitioner claims (at 15 n.2) that this conclusion conflicts with *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). By failing to present that question, however, she has forfeited it. *See* Sup. Ct. R. 14.1. Moreover, *Swint* did not involve a situation

trict court opinion and directed that court "to limit discovery to uncover only the facts necessary to rule on qualified immunity." Pet.12a.

REASONS FOR DENYING THE PETITION

The Court should deny the petition. This Court already saw the same issue and the same arguments in *Carswell*—and denied certiorari. Nothing has changed in the meantime. The case does not meet the Court's ordinary certiorari criteria, not least because Petitioner's circuit split is illusory. On top of that, the decision below is correct and consistent with this Court's precedents. And, if that were not enough, this case is far from the ideal vehicle, including because it has a latent mootness problem. Accordingly, the Court should deny the petition.

I. The Question Presented Does Not Meet The Court's Certiorari Criteria.

A. The Alleged Circuit Split Is Illusory.

Citing the same three cases the petitioner in *Carswell* cited, *Carswell* Pet. 27–30, this Petition insists review is necessary to resolve a circuit split—but there

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where a district court's decision to deny one party's motion "was inextricably intertwined" with a decision to deny another party's motion. 514 U.S. at 51. That is why "the Supreme Court, [the Eleventh] Circuit, and nearly every other court of appeals has exercised pendent appellate jurisdiction over closely related issues . . . ." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1380 n.1 (11th Cir. 2009); *see, e.g.*, *Mattox v. City of Forest Park*, 183 F.3d 515, 524 (6th Cir. 1999) (explaining that *Swint* "left open the possibility that two determinations (one immediately appealable and one not) could be 'inextricably intertwined' and thus appropriately reviewed together" and that "[t]he Sixth Circuit is not alone in using this discretionary power post-*Swint*").

is no such split. In particular, Petitioner invents a circuit split by misreading the relevant cases. Petitioner boldly proclaims that the Fifth and Tenth Circuits hold that they have "jurisdiction to hear interlocutory appeals of everyday discovery orders," whereas the First, Fourth, and Sixth Circuits hold the opposite. Pet. 9. Not so. All circuits agree that *everyday* discovery orders do *not* implicate the collateral-order doctrine. *See, e.g.*, *Backe*, 691 F.3d at 647–48 ("Appellate courts have jurisdiction over virtually all 'final decisions' of the district court, a class that ordinarily does not include discovery orders." (quoting 28 U.S.C. § 1291)). But that does not mean that a discovery order that effectively denies qualified immunity is not subject to interlocutory appeal. And the First, Fourth, and Sixth Circuit cases that Petitioner cites do not hold otherwise.

Start with Petitioner's lead case: *In re Flint Water Cases*, 960 F.3d 820 (6th Cir. 2020). The district court in that case dismissed all but one claim against the state defendants based on qualified immunity. *Id.* at 824. While the state defendants appealed the partial denial of their motion to dismiss, "the district court granted the state defendants effective immunity pending the final resolution of their motions to dismiss based on qualified immunity." *Id.* at 826. It did so by "treat[ing] them as though they had already proven their immunity and were dismissed from the case," and was simply "permit[ting] the state defendants to be deposed as non-party fact witnesses to events regarding separate claims brought against different defendants . . . during the pendency [of the appeal]." *Id.* Because ordering state defendants "to comply with discovery requests as non-party fact witnesses to

events regarding wholly separate claims against different defendants does not, in the abstract, interfere with their immunity," the district court's discovery order could not be considered "an implicit denial of qualified immunity." *Id.* at 830. The Sixth Circuit accordingly dismissed the appeal for lack of jurisdiction. *Id.*

In doing so, the Sixth Circuit recognized that "discovery orders *generally* are non-final, non-appealable orders" and the "discovery order *like the one at issue*" in that case was not immediately appealable. *Id.* at 829 (emphases added). That, of course, is not equivalent to a holding that no discovery order will *ever* be subject to review under the collateral-order doctrine. Indeed, the Sixth Circuit acknowledged the well-established rule that decisions that "operate[] . . . as a denial of summary judgment on the question of qualified immunity" are "eligible for immediate interlocutory appeal." *Id.* at 830. Petitioner's reliance on dicta from *In re Flint Water Cases* does not a circuit split make. And that is Petitioner's best case.

The First Circuit case that Petitioner cites even more clearly demonstrates that the asserted circuit split is illusory. In *Lugo v. Alvarado*, 819 F.2d 5, 5 (1st Cir. 1987), the issue was "whether appellant is entitled to a stay of *all* discovery proceedings pending resolution by the district court of a claim of qualified immunity." The First Circuit concluded that the answer was no and that, on the particular facts before the court—where the discovery order was "narrowly tailored" and the plaintiffs "have the right to engage in discovery as to the equitable claims" regardless of the damages claims for which the defendants asserted

qualified immunity—there was "no valid ground" for allowing an interlocutory appeal. *Id.* at 7–8.

Notably, *Lugo* indicates that an interlocutory appeal would be available for discovery orders in other § 1983 cases, such as when a district court "inordinately delays decision on qualified immunity but allows extensive discovery." *Id.* at 8 n.3. It is therefore unsurprising that, in a different case, the First Circuit held that it had jurisdiction to consider an interlocutory appeal of "a case-management order" "to the extent the appeal raises immunity defenses." *Torres*, 485 F.3d at 9.

The cited Fourth Circuit case also does not salvage Petitioner's claimed circuit split. In *District of Columbia v. Trump*, 959 F.3d 126, 131 (4th Cir. 2020) (en banc), the district court deferred ruling on President Trump's immunity defense, but "stated in writing that it intended to rule" on the issue. The Fourth Circuit concluded that this particular deferral was not an effective denial of sovereign immunity, because the delay was not "unreasonabl[e]" and the district court was working through "many aspects of th[e] complex litigation against the President" and held multiple hearings. *Id.* at 131–32. Because the deferral was not an effective denial based on the facts of the case and was the only asserted "jurisdictional basis for th[e] interlocutory appeal," the Fourth Circuit held that it lacked jurisdiction over the appeal. *Id.* at 132.

In a footnote, the Fourth Circuit also briefly addressed whether discovery "implicat[ing] third parties and low-level government officials" qualified as a denial of President Trump's immunity defense. *Id.* at 131

n.4. The Fourth Circuit pointed out that while the district court had authorized some discovery, there was no "discovery order against the President in his individual capacity," and the ordered discovery "would have proceeded apace" even if "the President in his individual capacity had been dismissed." *Id.* Given that the "sole discovery order" was directed at claims for which immunity was not asserted, the Fourth Circuit rejected the argument that allowing "discovery directed at *anyone* in a case in which the President in his individual capacity is a named defendant constitutes a denial of immunity." *Id.* That is far different than holding that an order allowing discovery regarding the merits of claims for which immunity is asserted would be improper for interlocutory appeal.

Petitioner is therefore wrong that the decision below conflicts with *In re Flint Water Cases*, *Lugo*, and *Trump*. None hold that a discovery order or refusal to limit discovery to qualified-immunity issues can *never* be immediately appealable.[4] Although everyday discovery orders cannot be immediately appealed—a proposition with which the Fifth Circuit and Tenth Circuit do not disagree, *see, e.g.*, *Backe*, 691 F.3d at 647–48—there is widespread agreement among the

[4] Neither do the cases that amici cite, which are even further afield. *See McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 347, 353 (D.C. Cir. 1995) (concluding it lacked jurisdiction to consider an interlocutory appeal of the district court's refusal to "impose certain sanctions on Iran for its failure to comply with discovery requests"); *Garraway v. Ciufo*, 113 F.4th 1210, 1221 (9th Cir. 2024) (contrasting an adverse *Bivens* decision with a qualified-immunity decision and declining "to extend the collateral order doctrine to allow for the immediate appeal" of "an order recognizing a *Bivens* remedy").

circuits that decisions which effectively deny the benefits of qualified immunity and turn on legal issues can be appealed under the collateral-order doctrine, *see supra* pp. 7–10. And that agreement extends to the First, Fourth, and Sixth Circuits. *See, e.g.*, *Torres*, 485 F.3d at 9 (First Circuit had jurisdiction over a "case-management order" where district court refused "to consider the merits of a pretrial motion raising an immunity defense"); *Jenkins*, 119 F.3d at 1159 (Fourth Circuit had jurisdiction where "[t]he district court's refusal to consider the question subjected [defendant] to further pretrial procedures, and so effectively denied him qualified immunity"); *Myers*, 41 F.4th at 756 (Sixth Circuit had jurisdiction where, "in punting a decision on qualified immunity, the district court effectively denied it" by "unlock[ing] discovery"). A contrived circuit split is no reason to grant certiorari.

B. The Issue Presented Is Not Exceptionally Important.

With no circuit split to lean on, Petitioner pivots, depicting the Fifth Circuit's decision as a sea change that will enable defendants to immediately appeal any discrete discovery request and will upend the entire litigation process for claims implicating qualified immunity. This wildly overstates Petitioner's case.

First, there is no sea change. The decision below did not "rip[] a hole in the tightly circumscribed collateral order doctrine," Pet.2, and it will not disrupt the "orderly administration of the courts of appeals," Pet.17. The courts of appeals have long held that implicit or practical denials of qualified immunity satisfy the requirements of the collateral-order doctrine. *See*

supra pp. 7–10. Indeed, even by Petitioner's own telling (at 13), the Tenth Circuit has recognized—since at least 1989—that it has jurisdiction over interlocutory appeals based on an "impermissible infringement on [the defendant's] immunity interest in freedom from overly broad discovery." *See Maxey*, 890 F.2d at 283–84. And the Fifth Circuit's own cases trace back at least to its 1987 decision in *Lion Boulos*. *See* 834 F.2d at 207 (explaining that "immediate appeal" is available from orders that infringe on "an immune defendant's right to be free of the burdens of broad-reaching discovery"). Despite three decades' worth of material to work with, however, Petitioner does not even try to show that the Fifth and Tenth Circuits have seen a deluge of appeals regarding "discovery disputes of every shape and kind (*e.g.*, each set of interrogatories, every deposition notice, and potentially any question asked at a deposition)." Pet.17.

Second, even pretending the decision below represents a sea change, there is no reason to think it will lead to increased interlocutory appeals in the Fifth Circuit. Quite the contrary. One, as just explained, Petitioner has no evidence that this has occurred in the Tenth Circuit. Two, if district courts were initially confused about this Court's instruction in *Anderson*, they are now more likely to make interlocutory appeals unnecessary by properly limiting discovery to qualified-immunity issues so qualified immunity can be "determined at the earliest possible stage of litigation." Pet.6a (citation and quotation marks omitted); *see Tippitt v. Iversen*, No. 6:23-CV-00515-JDK, 2024 WL 3153351, at *2 (E.D. Tex. June 24, 2024) (granting the "motion to limit discovery to the issue of qualified immunity" and explaining that, "[i]n order for the court

to resolve the issue of qualified immunity at the earliest stage possible, the court agrees that a truncated discovery period related to this issue is appropriate" (citing *Asante-Chioke v. Dowdle*, No. 23-30694, 2024 WL 2842206, at *5 (5th Cir. June 5, 2024)). As such, in most cases there will be no need to appeal a refusal to limit discovery to qualified-immunity issues. Three, if district courts appropriately limit discovery to qualified-immunity issues following a motion-to-dismiss denial, defendants will be less likely to appeal that motion-to-dismiss denial than if they were subject to unlimited merits discovery before a qualified-immunity decision at the summary-judgment stage. Four, defendants are not incentivized to pursue meritless qualified-immunity appeals. Frivolous appeals only increase their own litigation costs and burdens, not to mention the risks of sanctions. *See, e.g.*, *McDonald v. Flake*, 814 F.3d 804, 817–18 (6th Cir. 2016) (granting sanctions in a qualified-immunity appeal where defendants "have filed and pursued a knowingly frivolous appeal in bad faith").

For these reasons, Petitioner's efforts to puff up the importance of her issue presented are in vain.

II. The Decision Below Is Correct.

That the Fifth Circuit unquestionably reached the right result below only reinforces that this case is not cert-worthy.

This Court has emphasized time and again that a primary purpose animating qualified immunity is "to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.'" *Anderson*, 483 U.S. at 646 n.6 (quoting

Harlow, 457 U.S. at 817). That is why the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). And that is why any discovery that is necessary to decide qualified immunity at the summary-judgment stage must "be tailored specifically to the question of [the defendant's] qualified immunity." *Anderson*, 483 U.S. at 646 n.6. By refusing to so tailor discovery, however, the district court flouted this directive and denied the benefits of qualified immunity. The Fifth Circuit properly rectified that mistake. And it had jurisdiction to do so under this Court's precedent regarding the collateral-order doctrine.

As this Court has explained, the collateral-order doctrine has "been distilled down to three conditions: that an order [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) (citation and quotation marks omitted). And "[t]he applicability of the doctrine in the context of qualified-immunity claims is well-established," *Iqbal*, 556 U.S. at 672—"pretrial orders denying qualified immunity generally fall within the collateral order doctrine," *Plumhoff*, 572 U.S. at 772. As long as a qualified-immunity denial turns on a legal question, it falls within the collateral-order doctrine because it (1) "conclusively determine[s]" that the defendant loses his entitlement to avoid broad discovery or trial, (2) is separate from the merits, and (3) will be effectively unreviewable after a final judgment because the immunity

from broad discovery or trial will have been lost. *Id.*; *Iqbal*, 556 U.S. at 672.[5]

That is exactly the case here. Contrary to Petitioner's insinuations (at 16), the district court did not make a "fact-bound" determination based on record evidence. Instead, the district court held that Petitioner's *allegations* were sufficient to deny qualified immunity and order unlimited merits discovery based on the court's perceived "discretion" over discovery. *See* Pet.35a. The only question the Fifth Circuit had to answer was a legal one: whether the district court had discretion to disregard precedent dictating that discovery must be limited to qualified-immunity issues so qualified immunity can be resolved on summary judgment before, if necessary, officers are subjected to merits discovery and trial. *See, e.g.*, *Anderson*, 483 U.S. at 646 n.6 (instructing that discovery before a "motion for summary judgment on qualified immunity grounds can be resolved" "should be tailored specifically to the question of . . . qualified immunity"); *Wicks*, 41 F.3d at 995 ("If the complaint alleges facts to overcome the defense of qualified immunity, the district court may then proceed under *Lion Boulos* to allow the discovery

[5] Petitioner's pervasive reliance on *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), to argue otherwise is perplexing. That the Court there concluded there was no "sufficiently strong" justification to allow an immediate appeal over an entirely different category of orders—"orders adverse to the attorney-client privilege"—which implicate different interests is immaterial. *See Mohawk*, 558 U.S. at 107–08. And Petitioner cannot seriously contend that the Court's 2009 *Mohawk* decision overruled these qualified-immunity cases *sub silentio*, especially when this Court has continued to apply them after *Mohawk*. *See, e.g.*, *Plumhoff*, 572 U.S. at 771–72.

necessary to clarify those facts upon which the immunity defense turns."); *Backe*, 691 F.3d at 648 (explaining that a court's "discovery order" cannot "exceed[] the requisite 'narrowly tailored' scope" (quoting *Lion Boulos*, 834 F.2d at 507–08)); *Carswell*, 54 F.4th at 312 (explaining that, after a motion to dismiss based on qualified immunity is denied, "the defendant can move the district court for discovery limited to the factual disputes relevant to whether QI applies, then reassert QI in a summary judgment motion").

Thus, the district court's decision denying qualified immunity and subjecting Respondents to unlimited discovery turns on a legal question and falls within the collateral-order doctrine. That is because it (1) "conclusively determine[s]" that they will be subject to "the burdens of broad-reaching discovery," (2) "is conceptually distinct from the merits of the plaintiff's claim," and (3) "is effectively unreviewable on appeal from a final judgment." *See Mitchell*, 472 U.S. at 526–27 (citations and quotation marks omitted); *see also Iqbal*, 556 U.S. at 672.

Petitioner tries to avoid this conclusion by insisting (at 15) that interlocutory jurisdiction only exists over "*actual* denials of qualified immunity" under this Court's precedents. But here, the district court's discovery order literally came in tandem with an actual denial of qualified immunity—and even more importantly, this Court has never said, much less held, that an explicit denial is required. For good reason. Such a holding would be inconsistent with this Court's cases recognizing that "the label attached to an order is not dispositive." *Abbott*, 585 U.S. at 594. This Court

instead assesses the "practical effect" of an order to determine how "it should be treated . . . for purposes of appellate jurisdiction." *Id.* (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981)). It would be incongruous for the Court to embrace that approach in assessing jurisdiction under 28 U.S.C. § 1253 and § 1292(a)(1), *see id.* at 594–96, and then take a different approach here. That is especially so when circuit courts have routinely exercised appellate jurisdiction over orders (and refusals to rule) that have the practical effect of denying qualified immunity. *See supra* pp. 7–10. And again, this Court has properly rejected requests that it grant certiorari in such cases. *See Carswell*, 54 F.4th at 310 (concluding it had jurisdiction over a "scheduling order" that "effectively . . . denied [defendants] the benefits of the qualified immunity defense" (citation omitted)); *Carswell v. Camp*, 144 S. Ct. 73 (2023) (denying certiorari); *Jenkins*, 119 F.3d at 1159 (concluding it had jurisdiction where "the district court refused to rule on the question of qualified immunity" because it subjected the defendant "to further pretrial procedures, and so effectively denied him qualified immunity"); *Jenkins v. Medford*, 118 S. Ct. 881 (1998) (denying certiorari).

In sum, the decision below simply and correctly applies settled law. There is no good reason for this Court to intervene.

III. This Case Is A Poor Vehicle.

Finally, even if Petitioner were correct about everything in her Petition, there are two interrelated reasons to await a better vehicle to address her concerns.

The *first* is a looming mootness problem. Petitioner challenges the Fifth Circuit's decision below because she does not want to conduct discovery limited to the qualified-immunity defense. Instead, she wants to conduct broad-reaching discovery on the qualified-immunity issues and merits simultaneously. But even if the Court granted certiorari, the objected-to discovery will likely be substantially, if not completely, finished before this Court issues an opinion. *See* ECF 164 at 1 (ordering all "[w]ritten fact discovery" on Respondents' qualified-immunity defense to be "completed by January 10, 2025," and all "[f]act depositions" be completed by "March 7, 2025").[6] That means it is likely that, even if this Court were to reverse the Fifth Circuit, it would have zero impact on Petitioner—it would be too late for her to obtain simultaneous qualified-immunity and merits discovery. And, if so, this case would become moot; all that would remain is "a dispute solely about the meaning of law, abstracted from any actual or threatened harm" that is "unlikely to affect [Petitioner] any more than" any other citizen. *See Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

Second, and relatedly, if Petitioner truly believes that the decision below "opens the floodgates to serial interlocutory appeals," Pet.2; *contra supra* Section I.B, that means the Court will have its choice among innumerable forthcoming petitions presenting the same or similar questions. By Petitioner's own lights, therefore, the Court should deny certiorari here and grant

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[6] Based on the docket, it appears that at least one deposition has already occurred. *See* ECF 169-1 (deposition transcript from November 18, 2024).

review in a future case (a) based on evidence, not conjecture, about the repercussions of the decision below and (b) that does not suffer from the latent mootness issue lurking here. Petitioner identifies no reason why the Court must—or even should—grant certiorari in this likely-to-be-moot case as opposed to one of the flood of cases she predicts will come (but apparently has not yet come in the past 30 years in the Fifth and Tenth Circuits).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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