No. 24-387

IN THE

Supreme Court of the United States

MALIKAH ASANTE-CHIOKE,

Petitioner,

v.

NICHOLAS DOWDLE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The courts of appeals are indisputably divided on whether discovery orders in qualified immunity cases are immediately appealable under the collateral order doctrine after denial of a motion to dismiss on qualified immunity grounds. That is the question presented here, no matter how much Respondents wish it were something else. This case is not about whether a court may defer ruling on a qualified immunity defense raised in a dispositive motion; the district court here did rule on Respondents' qualified immunity defense, denying it "at the earliest possible stage of a litigation." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). Respondents advanced—then abandoned—their appeal of that denial; and the Fifth Circuit acknowledged that the "district court was correct in recognizing that to have continued shooting is a clear violation under this circuit precedent." Pet. App. 10a.

Respondents' efforts to change the question presented are unavailing. They list district court orders that defer ruling on motions to dismiss, arguing that such orders are immediately appealable because they "effectively deny" defendants the benefits of qualified immunity. But those decisions are irrelevant given the district court's denial of Respondents' motion to dismiss. Respondents also seize on the Court's denial of certiorari in one such deferral case, *Carswell v. Camp*, 54 F.4th 307 (5th Cir. 2022). But this case is not *Carswell*. And if this Court's denial of certiorari in *Carswell* proves anything, it is that litigants still

need clarity from this Court on the scope of interlocutory appeals in § 1983 cases.

On the merits, this Court has placed strict limitations on the collateral order doctrine, for good reason. The rule in the Fifth and Tenth Circuits violates those limitations, upending the civil litigation process. Under this rule, even where a plaintiff's allegations survive a motion to dismiss, so long as one defendant utters the words "qualified immunity," all defendants in that case are entitled to limited, bifurcated discovery and the absolute right to appeal immediately any discovery order they deem insufficiently limited.

Respondents cannot deny that the courts of appeals are split on the question presented; they cast no doubt on the importance of the question presented; and they are wrong that "lurking" mootness presents an obstacle to review. The Court should grant certiorari.

ARGUMENT

I. The Circuits Are Divided On The Question Presented

The circuits are divided on whether the collateral order doctrine extends to discovery orders in qualified immunity cases, as Petitioner and *amici* explain and Respondents implicitly acknowledge. Pet. 9-14; *Amici Curiae* Br. of Erwin Chemerinsky & David Rudovsky 12-14; BIO 9 (citing only Fifth and Tenth Circuit decisions for proposition that "appellate jurisdiction exists to decide appeals from discovery orders that have denied a defendant 'the benefits of the qualified immunity defense'").

In two circuits, defendants may not immediately appeal such orders. *In re Flint Water Cases*, 960 F.3d 820, 830 (6th Cir. 2020); *Lugo v. Alvarado*, 819 F.2d 5, 8 (1st Cir. 1987). In two others, the same is true for defendants in presidential and sovereign immunity cases. *District of Columbia v. Trump*, 959 F.3d 126, 130-32 (4th Cir. 2020) (en banc); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995). These courts have rightly held that discovery orders are not equivalent to actual denials of immunity and thus are not immediately appealable. *See, e.g.*, *Flint*, 960 F.3d at 830 (discovery order not "tantamount to a denial of qualified immunity").

Defendants in the Fifth and Tenth Circuits enjoy the opposite rule. These appellate courts exercise broad jurisdiction over discovery orders in qualified immunity cases, even those issued after a district court denies a motion to dismiss. Pet. App. 11a; *Maxey ex rel. Maxey v. Fulton*, 890 F.2d 279, 283-84 (10th Cir. 1989). They treat such orders as denials of qualified immunity, giving defendants a right to appeal them immediately, even when (as here) defendants decline to appeal the actual denial of qualified immunity.

Faced with the circuits' clear divide on the law, Respondents unsuccessfully attempt to distinguish decisions from the First, Fourth, and Sixth Circuits on their facts.

Respondents stress that the defendants in *Flint* were appealing an order requiring them to participate in discovery as non-parties, speculating that the Sixth Circuit might have reached a different outcome on a different discovery order. BIO 16-17. But *Flint* did not turn on the scope of the underlying order; the

court held, categorically, that this Court's cases "simply do not establish an entitlement to an interlocutory appeal from a discovery order itself." *Flint*, 960 F.3d at 829. *Flint* emphasized that defendants "are not entitled to appeal any number of discovery matters that they believe have some impact on their immunity interest." *Id.* at 830. The rule in the Fifth and Tenth Circuits is irreconcilable with *Flint*.

Respondents' attempt to square the First Circuit's decision in *Lugo* with the decision below also fails. Respondents quote *Lugo*'s dictum that an interlocutory appeal may be available from an order that "inordinately delays decision on qualified immunity but allows extensive discovery." 819 F.2d at 8 n.3. Of course, that did not happen here. Nothing in *Lugo*—which stated unequivocally that "pretrial discovery order[s] . . . are not appealable before final judgment," *id.* at 8—suggests that the First Circuit somehow agrees with the Fifth Circuit's expansive "tantamount-to-denial" rule.

Respondents' efforts to read their imagined universal effective-denial rule into the Fourth Circuit's decision in *Trump* similarly fizzle. *Compare* BIO 18 (claiming decision was based on fact that district court order "was not an effective denial"), *with Trump*, 959 F.3d at 131 n.3 ("The dissent cites not a single case in which, in the absence of a clear denial of an immunity claim, an appellate court held the district court had denied immunity . . . . We have found none."). And the same footnote from which Respondents attempt to extract a factual distinction explains that "a defendant must wait to appeal until the district court conclusively rules on immunity." *Trump*, 959 F.3d at 131 n.4.

More fundamentally, Respondents' focus on factual differences among the cases is misplaced. As *amici* explain, under this Court's cases, decisions about appealability must be made on a categorical basis. Chemerinsky & Rudovsky Br. 6-7. Thus, it would not matter if, as Respondents wrongly claim, the First, Fourth, and Sixth Circuits had not explicitly stated that orders regarding the scope of discovery in qualified immunity cases "can *never* be immediately appealable." BIO 19. *But see Flint*, 960 F.3d at 829; *Lugo*, 819 F.2d at 8; *Trump*, 959 F.3d at 131 nn.3-4. The question presented demands a categorical answer and cannot be decided through the sort of "individualized jurisdictional inquiry" Respondents propose. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009).

Rather than challenging the circuit split head on, Respondents stand up and knock down strawmen. Citing cases in a different procedural posture, they claim there is "widespread agreement." BIO 19-20. *But see* BIO 9 (listing only decisions from Fifth and Tenth Circuits). But their parade of lower-court decisions—on a different legal issue that is the subject of a separate, unresolved circuit split, BIO 2—proves nothing. Those cases hold that defendants may appeal immediately when district courts refuse to rule on qualified immunity. BIO 7-10. But the district court below did not do that; it denied qualified immunity on the merits. The decision below—which endorsed a right to freestanding interlocutory appeals of discovery orders—went far beyond the deferral cases, as Respondents candidly acknowledged under questioning from Judge Ho. Oral Argument at 35:35-35:46, *Asante-Chioke v. Dowdle*, 103 F.4th 1126 (5th Cir. 2024) (No. 23-30694),

https://www.ca5.uscourts. gov/OralArgRecordings/23/23-30694_4-3-2024.mp3 (Q.: "You're agreeing we've never said before that there's appellate jurisdiction in this posture, but that we should . . . ?" A.: "On this particular and precise act, there is not a case on point."). Yet now, Respondents wrongly claim that the deferral cases show "widespread agreement," BIO 19, on the separate issue of whether discovery orders in qualified immunity cases are categorically appealable under the collateral order doctrine.

II. The Question Presented Is Exceptionally Important

Respondents belittle Petitioner's warnings about the consequences of the decision below, BIO 3, asserting that it did not change the law and will not lead to an increase in interlocutory appeals, BIO 20-22. But the decision below broke new ground by extending the collateral order doctrine to decisions that did not defer ruling on qualified immunity. Petitioner's alarm is well-founded.

Respondents' appeal in this case is part of a growing trend. Interlocutory appeals in qualified immunity cases across all circuits have grown by 15% in the last ten years alone. *Amicus Curiae* Br. of Michael E. Solimine 3-4. This is not surprising given defendants' willingness—which Respondents ably document, *see* BIO 7-9—to seek immediate appeals of even minor or procedural discovery orders. *See, e.g.*, *Carswell*, 54 F.4th at 309 ("boilerplate scheduling order"); *Howe v. City of Enter.*, 861 F.3d 1300, 1302 (11th Cir. 2017) (per curiam) (order "instruct[ing] the parties to confer and develop their Rule 26(f) report"); *Gaines v. Davis*, 928 F.2d 705, 705 (5th Cir. 1991) (order regarding scope of deposition questions). Moreover, defendants

commonly request dismissal and orders limiting discovery as alternative forms of relief—as Respondents did below, Pet. App. 35a—providing many opportunities for future appeals. *See, e.g.*, *Tuttle v. Todd*, No. 22-20319, 2023 WL 4884853, at *4 (5th Cir. Aug. 1, 2023) (noting that defendant appealed both denial of motion to dismiss and separate partial stay order). This is why the Sixth Circuit presciently warned of a "deluge of appeals." *Flint*, 960 F.3d at 830.

Respondents do not deny that they now have a right to immediately appeal any discovery order they deem "overly broad." Instead, they promise they will not need to because district courts will preemptively limit discovery. BIO 21. The steady stream of interlocutory appeals following *Maxey* suggests otherwise. *See Lewis v. City of Fort Collins*, 903 F.2d 752, 754 (10th Cir. 1990); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (rejecting mandamus because of availability of interlocutory appeal); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1387 (10th Cir. 1994); *Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1064 (10th Cir. 2010) (concerning Foreign Sovereign Immunities Act immunity). Nor has the Fifth Circuit's directive to limit discovery to "the facts necessary to rule on qualified immunity" proved workable in this case. Pet. App. 12a. Since that decision, the parties have locked horns in numerous disputes about its practical effect, illustrating its administrability problems and providing ample fodder for future appeals. *See* ECF Nos. 121, 123, 141, 165; Chemerinsky & Rudovsky Br. 14-15.

Even if Respondents were correct, they amplify a troubling aspect of the Fifth and Tenth Circuits' rule: its stark one-sidedness. As the petition and *amici*

explain, the rule allows defendants in qualified immunity cases to appeal immediately discovery orders they deem too broad while plaintiffs are barred from doing so for orders they deem too narrow. Pet. 4; Br. for *Amici Curiae* Public Accountability & Cato Institute 21; Chemerinsky & Rudovsky Br. 19. The rule creates a one-way ratchet: The scope of discovery will only ever shrink, never expand, as will district courts' discretion to manage discovery. Indeed, the decision below is already having this effect in the Fifth Circuit. BIO 21. Such one-sided downstream doctrinal effects are precisely why this Court has rejected previous efforts to expand the collateral order doctrine. *See, e.g.*, *Microsoft Corp. v. Baker*, 582 U.S. 23, 41-42 (2017).

Finally, Respondents suggest that the threat of sanctions will deter defendants, BIO 22: wishful thinking. Even frivolous interlocutory appeals rarely lead to sanctions. Solimine Br. 6-7. Nor has defendants' low win rate led to fewer interlocutory appeals. Pet. 23-24. This is why such appeals are widely regarded as a delay tactic. Pet. 20-21. This Court should stem the flood.

III. The Decision Below Is Wrong

Respondents argue that this case is not cert-worthy because the decision below was correct. BIO 22-26. They are wrong.

As the petition and *amici* explain, in qualified immunity cases, this Court has permitted interlocutory appeals only from actual denials of qualified immunity at the dismissal or summary-judgment stages. This Court's precedents clearly prohibit further judge-made extension of the collateral order doctrine to all decisions that are arguably "denial-like."

First, Respondents are wrong that, once a district court denies a motion to dismiss, its only option is to limit discovery to the issue of qualified immunity in anticipation of a summary judgment motion. They construct this imagined rule from a footnote in *Anderson*, which directed that, on remand, discovery should be "tailored specifically to the question of qualified immunity." 483 U.S. at 646 n.6. But this Court has since emphasized that district courts have "broad discretion" to manage discovery in qualified immunity cases. *Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998) (holding that district courts "may limit . . . discovery" and "may . . . set the timing and sequence of discovery"). *Crawford-El* explicitly referred to the *Anderson* footnote but confirmed that decisions about how to manage discovery were for the district court to make. *Id.* at 600 ("It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases . . . .").

Second, Respondents are wrong that a failure to limit discovery deprives defendants of the "basic benefit of the qualified immunity defense." BIO 2. It is true that a meritorious assertion of qualified immunity protects defendants from pretrial discovery as well as trial. *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996). But once a plaintiff survives a motion to dismiss, the right to avoid discovery evaporates. *See id.* ("[D]enial of a motion to dismiss is conclusive as to this right."). Defendants are still protected from having to stand trial in cases that survive on the pleadings but cannot survive two (or more) levels of review on summary judgment. But Respondents' expansive, vague conception of qualified immunity—as permitting certain discovery, but only if it is not "overly broad"—is inconsistent with this Court's precedents. Qualified

immunity is not a right to be free from incremental discovery after losing a motion to dismiss.

Third, even if Respondents were correct that "denial-like" discovery orders should be immediately appealable, the decision to expand the collateral order doctrine was not for the Fifth Circuit to make. This Court has not minced words: The collateral order doctrine should be extended, "if at all, though rulemaking," not "by court decision." *Mohawk*, 558 U.S. at 113-14.[1] The Fifth Circuit's expansion of the collateral order doctrine is the sort of freewheeling judicial policymaking that this Court has condemned. Public Accountability & Cato Institute Br. 10-12.

Finally, Respondents are wrong that the Fifth Circuit's exercise of pendent-*party*—as opposed to pendent-*issue*—appellate jurisdiction is consistent with this Court's decision in *Swint*. 514 U.S. at 51 ("there is no 'pendent party' appellate jurisdiction"). That issue is "fairly included" in the question presented, because a reversal would also impact Respondent Davis. Sup. Ct. R. 14.1; *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 579 n.4 (2008). Petitioner and *amici* addressed this issue at length, Pet. 9, 15 n.2, 21-22; Public Accountability & Cato Institute Br. 24-25; Solimine Br. 11-14, and the Court may consider it.

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[1] *Mohawk* hardly stands alone. *See Will v. Hallock*, 546 U.S. 345, 350 (2006); *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995). And though *Mohawk* involved a different "institutional interest[]"—the attorney-client privilege—its holding that an interest's "importance" does not justify expanding the collateral order doctrine squarely applies here. 558 U.S. at 108-09.

IV. There Is No Better Vehicle

Respondents urge this Court to "await a better vehicle" to avoid a "looming mootness problem." BIO 26-27. Such arguments highlight why this Court should intervene.

Mootness problems are a feature of the Fifth Circuit's one-sided rule, not a bug. Section 1983 defendants have an interest in staying discovery while appeals proceed; plaintiffs do not. As a result, defendants can always run out the clock while interlocutory appeals are pending, insulating lower-court decisions from review. That would be true in any future case, too.

Regardless, this controversy remains live. Respondents are wrong about the schedule, which provides for at least six additional months of discovery, with no summary judgment briefing before September 2025. ECF No. 164. Obviously, if this Court were to grant certiorari or reverse before then, the schedule would change.

Even if Respondents were correct about the schedule, this case would be justiciable because it is "capable of repetition, yet evading review." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (citation omitted). The time from the disposition of Respondents' interlocutory appeal to the end of discovery is currently 11 months. That is "too short" for the question presented to receive plenary review in this Court. *See id.* (holding 2 years too short for review). There is also a "reasonable expectation" that Petitioner will "be subject to the same action again." *Id.* (citation omitted). In the six months since the Fifth Circuit's decision in this case, the parties have

had numerous disputes about the scope of discovery. ECF Nos. 121, 123, 141, 165. Of course, Petitioner cannot appeal any adverse discovery decisions immediately. But Respondents can and may do so again.

This Court is not powerless to curtail disruptive "piecemeal" appeals, which violate Congress's policy choices and this Court's precedents. *Mohawk*, 558 U.S. at 106. It frequently grants certiorari to review cases in an interlocutory posture. *See, e.g.*, *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 478 (2023); *Fischer v. United States*, 144 S. Ct. 537 (2023); *Shoop v. Twyford*, 142 S. Ct. 857 (2022). It should similarly do so here.

CONCLUSION

For the foregoing reasons and those in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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