No. 22-_____

IN THE

Supreme Court of the United States

REMINGTYN A. WILLIAMS, LAUREN E. CHUSTZ, AND BILAL ALI-BEY, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

LAMAR A. DAVIS, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE LOUISIANA STATE POLICE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JARED M. GERBER
Counsel of Record
CHARITY E. LEE
THOMAS R. MINTZ
MIRANDA R. HERZOG
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jgerber@cgsh.com

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QUESTION PRESENTED

In *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995), this Court noted in dicta that it may be appropriate for a court of appeals to exercise pendent appellate jurisdiction over an issue that is otherwise not immediately appealable under narrow circumstances where the non-appealable issue is "inextricably intertwined" with an immediately appealable collateral order or where review of the former is "necessary to ensure meaningful review" of the latter. The question presented is:

May a court of appeals exercise pendent appellate jurisdiction to consider an issue, such as standing, that "significantly overlaps" with an immediately appealable collateral order, such as state sovereign immunity under the Eleventh Amendment, but is not "essential to the resolution of [a] properly appealed collateral order[]"?

PARTIES TO THE PROCEEDING

Petitioners are Remingtyn A. Williams, Lauren E. Chustz, and Bilal Ali-Bey, on behalf of themselves and all other persons similarly situated.

Respondent is Lamar A. Davis, in his official capacity as Superintendent of the Louisiana State Police.

RELATED PROCEEDINGS

United States District Court (E.D. La.):

Williams et al. v. Ferguson, et al., No. 2:21-cv-00852 (Mar. 30, 2022).

United States Court of Appeals (5th Cir.):

Williams et. al. v. Davis, No. 22-30181 (Jan. 6, 2023).

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JURISDICTION

The Fifth Circuit entered judgment on January 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

Pendent appellate jurisdiction is a judicially-created exception to a carefully constructed scheme of limited interlocutory appellate review set forth by Congress in 28 U.S.C. § 1292 and this Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35 (1995), this Court noted in dicta that pendent

appellate jurisdiction may be appropriate when an issue is "inextricably intertwined" with or "necessary to ensure meaningful review" of a collateral issue properly subject to interlocutory review, but warned that liberal exercise of pendent appellate jurisdiction would encourage to parties "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings" and instead "parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 45, 50–51.

In the ensuing years, the courts of appeals have inconsistently interpreted the Court's language in *Swint*, which has resulted in a contradictory and ever-changing landscape of pendent appellate jurisdiction. Indeed, despite (relatively) consistent acknowledgment by the courts of appeals that pendent appellate jurisdiction should be invoked only in the rarest of circumstances, certain courts, including the Fifth Circuit in this case, have taken advantage of the ambiguity in the Court's dicta in *Swint* to expand the scope of their appellate jurisdiction. These courts review not only issues that "necessarily resolve" the collateral issue appropriately subject to interlocutory appeal, but also issues that merely "significantly overlap" or "tend[] towards" the resolution of the collateral issue. App. 7. This dramatic expansion of pendent appellate jurisdiction threatens to open the floodgates to review of any and all issues on interlocutory appeal. Not only is this in direct contravention of Congress' edict that courts of appeals review only final orders and a limited universe of pre-determined non-final orders, as well

as its general prohibition of piecemeal appeals, but expansive pendent appellate jurisdiction also threatens the integrity of the judicial system, making it more difficult for trial judges to supervise trial proceedings, diminishing coherence in the proceedings, increasing costs, and heightening the chance of error by courts of appeals which are further removed from the facts of the case.

This case provides this Court with the opportunity to clear up the confusion regarding the Court's language in *Swint* and place clear limits on the exercise of pendent appellate jurisdiction. This Court should therefore grant *certiorari* and clarify that pendent appellate jurisdiction should only be exercised in the narrow circumstance where "essential to the resolution of properly appealed collateral orders." *Swint*, 514 U.S. at 51 (quoting Riyaz A. Kanji, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 530 (1990)). Remand is necessary here to cure the Fifth Circuit's improper use of pendent appellate jurisdiction, which resulted in the court issuing a premature decision on Petitioners' standing to bring claims against Respondent and, in so doing, indirectly instructed the district court how to rule on standing issues as to the remaining defendants in this case.

STATEMENT OF THE CASE

In April 2021, Petitioners filed their complaint against certain named and unnamed defendants in the District Court for the Eastern District of Louisiana. This proceeding arises from the partial denial of a

motion to dismiss the claims against a single defendant, Respondent Lamar A. Davis, and his interlocutory appeal following the district court's denial. During the course of Respondent's interlocutory appeal, related proceedings have continued against other defendants in the district court and the parties are presently engaged in discovery. Thus, the district court is far from rendering a final decision and judgment on the merits of Petitioners' claims.

I. FACTUAL BACKGROUND

On June 3, 2020, Petitioners were among a group of peaceful demonstrators who gathered in New Orleans, Louisiana to engage in a protest in the wake of the widely-publicized death of George Floyd. App. 2, 19. Around 9:30 pm, the demonstrators marched up a ramp towards the Crescent City Connection bridge, where they were met by a police barricade. App. 19. Several demonstrators asked the officers to join the march in solidarity, or else allow the march to proceed across the bridge, but these requests were declined. App. 2, 19.

The stalemate continued until a small number of demonstrators passed through the police line. App. 2, 19. At this point, at approximately 10:25 pm, officers from the New Orleans Police Department began to deploy tear gas into the crowd, without any verbal warning to the demonstrators. App. 2–3, 19–20. As the demonstrators dispersed, officers continued to fire tear gas canisters and impact munitions into the retreating crowd. App. 19–20.

II. PROCEDURAL BACKGROUND

Petitioners filed their complaint on April 28, 2021, in the U.S. District Court for the Eastern District of Louisiana, asserting a number of claims against individual officers, the superintendent of the New Orleans Police Department, the sheriff of Jefferson Parish, and Respondent Lamar Davis, in his capacity as the superintendent of the Louisiana State Police ("LSP"), under 42 U.S.C. §§ 1983 and 1985(3). App. 3, 20.

With respect to Respondent, Petitioners asserted claims for violations of the First, Fourth, and Fourteenth Amendment pursuant to 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); violations of equal protection and substantive due process; violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; and various state law violations.[1] App. 3, 20–21.

Respondent moved to dismiss the claims against him, arguing *inter alia* that he was protected by Eleventh Amendment sovereign immunity, that "in his official capacity as a state official, [he] is not a 'person' amenable to suit under Section 1983," and that the exception set forth in *Ex parte Young*, 209 U.S. 123 (1908), does not apply to Petitioners' claims because

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[1] Petitioners' *Monell* and Title VI claims against Respondent, which were dismissed by the district court for failure to state a claim under Fed. R. Civ. P. 12(b)(6), are not at issue in this petition. *See* App. 34–36. Petitioners' state law claims against Respondent are also not at issue in this petition. *See* App. 16–17.

Petitioners failed to request "viable prospective relief." App. 21–22. Respondent also asserted that Petitioners' "stated injuries, namely the existence of LSP policies that could cause harm at a future protest, are insufficient to meet the standing requirements." App. 24.

The district court granted Respondent's motion as to Petitioners' *Monell* and Title VI claims, and denied the motion as to the remainder of Petitioners' claims against Respondent. The district court held that Petitioners had standing because they adequately alleged "a continuing injury or a threatened future injury that may be remedied by prospective relief." App. 30, 32 (internal quotation omitted). Specifically, the court held that Petitioners had alleged "their constitutional rights have been violated, such violations are ongoing or may occur again at a later protest, and this Court can remedy those risks with prospective relief, namely injunctions curtailing LSP's policies." App. 32. The district court therefore found that, "at this time, the [Petitioners] have standing to bring this suit." App. 32.

The district court also held that Petitioners had satisfied the requirements of *Ex parte Young* to assert a § 1983 claim, having "sued [Respondent] in his official capacity, 'allege[d] ongoing violations of federal law by LSP,' and [sought] prospective relief." App. 32. The court held that Petitioners had "pled sufficient factual allegations to posit § 1983 claims at this time," noting that "Rule 12(b)(6) motions are not dispositive in regard to a suit's ultimate merits." App. 33, 33 n.66.

Respondent filed a notice of interlocutory appeal to the Fifth Circuit pursuant to the collateral order doctrine, seeking review of the district court's denial of Eleventh Amendment sovereign immunity. App. 38–39.

The court of appeals first concluded that it did not have jurisdiction to review the district court's finding of standing under the collateral order doctrine, because standing can be effectively reviewed on appeal from a final judgment, "in part because the question of standing is often intertwined with that of the merits." App. 5 (internal quotation omitted). Nevertheless, the court of appeals determined that it could, in its discretion, exercise pendent appellate jurisdiction over the standing issue. The court stated that "our Article III standing analysis and *Ex parte Young* analysis 'significant[ly] overlap'" and that "our caselaw shows that a finding of standing tends toward a finding that the *Young* exception applies to the state official(s) in question." App. 7 (quoting *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019)). Thus, while acknowledging that the "[e]xercise of pendent appellate jurisdiction is not mandatory," the court determined that "this court's jurisprudence nonetheless permits this panel" to exercise such jurisdiction. App. 7.

The court of appeals dismissed Petitioners' argument that a ruling from the court of appeals on standing would inappropriately instruct the district court on how to decide the same issue for the remaining defendants, stating that the court had identified "no caselaw or other reasoning for why this would be

problematic in itself." App. 7–8. The court also rejected Petitioners' argument that a permissive application of pendent appellate jurisdiction "would encourage parties to parlay . . . collateral orders into multi-issue interlocutory appeal tickets[,]" stating that "this immunity appeal is not meritless" and "review of the *Ex parte Young* factors in this particular case is inextricably bound up with the issue of standing." App. 8. Thus, although the court acknowledged that pendent appellate jurisdiction should be limited to "rare and unique circumstances," it nonetheless concluded that "our jurisprudence suggests that review of standing challenges in evaluating Eleventh Amendment immunity claims is often relevant." App. 8 (internal quotation omitted).

Having reached the standing issue, the court of appeals first ruled that Petitioners "have not demonstrated more than a speculative future injury with little to no basis in past practice." App. 14. The court then considered Respondent's Eleventh Amendment immunity argument and held, "[a]s is made clear in our analysis of standing . . . [Petitioners] have not demonstrated that they seek prospective relief to redress ongoing conduct." App. 16 (internal quotation omitted).

During the pendency of this appeal, litigation has continued before the district court against the other defendants. Discovery is underway, and significant factual development remains outstanding before the district court may properly test the merits of Petitioners' many remaining claims.

REASONS TO GRANT THE PETITION

In *Swint*, this Court noted in dicta that pendent appellate jurisdiction may be appropriate when an issue is "inextricably intertwined" with or "necessary to ensure meaningful review" of a collateral issue appropriately subject to interlocutory review. 514 U.S. at 51. In the absence of further guidance from this Court, the courts of appeals have inconsistently exercised pendent appellate jurisdiction, and certain courts of appeals have expanded the doctrine to permit review of any issue that "significantly overlaps" with, but does not necessarily resolve, the collateral issue in the interests of judicial efficiency. *See, e.g.*, App. 7; *City of Austin*, 943 F.3d at 1002. Such broad and liberal exercise of pendent appellate jurisdiction contradicts not only this Court's admonition that it be applied in rare and limited circumstances, but also the careful structure created by Congress for review of non-final orders. It also inflicts serious and substantial harm on litigants and the integrity of the judicial process. This case presents an ideal opportunity for the Court to provide the courts of appeals with much-needed guidance as to the appropriate exercise of pendent appellate jurisdiction and clarify that such jurisdiction should only be exercised in narrow circumstances where "essential to the resolution of properly appealed collateral orders." *Swint*, 514 U.S. at 51 (quoting Kanji, *supra*, at 530).

Accordingly, Petitioners respectfully request that the Court grant *certiorari* and reverse the Fifth Circuit's decision that Petitioners do not have

standing to assert their claims against Respondent.

I. THE FIFTH CIRCUIT'S DECISION IS EMBLEMATIC OF BROAD CONFUSION AMONG THE CIRCUITS ON THE PROPER SCOPE OF PENDENT APPELLATE JURISDICTION

Although this Court in *Swint* expressly avoided "definitively or preemptively settl[ing] here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable[,]" that decision has nevertheless become the leading authority on exactly that question. 514 U.S. at 50–51; *see also* Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2d 199, 205 (2013). As a result, three decades of caselaw now rest largely upon dicta in which the Court suggested that pendent appellate jurisdiction, if it exists at all, requires that the issue properly appealable under 28 U.S.C. § 1292 or the collateral order doctrine be either "inextricably intertwined" with the issue under pendent appellate jurisdiction, or that resolution of the pendent issue is "necessary to ensure meaningful review" of the issue properly under interlocutory review. *Swint*, 514 U.S. at 51. In the absence of additional guidance from this Court, the circuits have taken the dicta in *Swint* and crafted a sprawling and often conflicting web of caselaw governing the exercise of pendent appellate jurisdiction, leading to significant differences among appellate courts' review of substantive issues on interlocutory review. *See, e.g.*, Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809,

1849–50 (2018) (summarizing inconsistent application of pendent appellate jurisdiction in the context of qualified immunity appeals).

The Fifth Circuit's decision in this case crystallizes both the existence of that circuit split and its material effect on litigants. While the Fifth Circuit had jurisdiction to review the denial of Respondent's motion to dismiss on sovereign immunity grounds, it had no authority to take pendent appellate jurisdiction over Petitioners' standing—which Respondent did not even raise in his notice of interlocutory appeal—when doing so. *See* App. 38–39 (Notice of Interlocutory Appeal). As the Eleventh Circuit explained when facing essentially the same question in *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278 (11th Cir. 1998), *Swint* does not allow pendent appellate review of a plaintiff's standing when reviewing a district court's denial of a defendant's immunity because immunity can be resolved "without reaching the merits of" the plaintiff's standing. 145 F.3d at 1281 n.3.

The Second, Fourth, and Ninth Circuits have also refused to address standing when reviewing a district court's immunity decision. *See Rux v. Republic of Sudan*, 461 F.3d 461, 476 (4th Cir. 2006) (finding standing and foreign sovereign immunity not "sufficiently interconnected to justify pendent appellate jurisdiction"); *Sierra Nat'l Ins. Holdings, Inc. v. Credit Lyonnais S.A.*, 64 F. App'x 6, 7 n.1 (9th Cir. 2003) (refusing to address standing when reviewing statutory immunity because, "[u]nlike the immunity issue, however, standing is potentially

quite fact-dependant [*sic*] in this case and can be adequately addressed after a final decision is entered"); *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 82, 82 n.16 (2d Cir. 2013) (incorporating the Fourth Circuit's reasoning in *Rux* when refusing to address whether plaintiff had "standing under the ICSID Convention" when reviewing district court's foreign sovereign immunity decision). Courts of appeals have also been reluctant to exercise pendent appellate jurisdiction over standing in other, non-immunity contexts as well. In *Griswold v. Coventry First LLC*, 762 F.3d 264 (3d Cir. 2014), for example, the Third Circuit refused to address standing when reviewing the district court's denial of a motion to compel arbitration because "[r]egardless of how we adjudicate the standing question, we may still reach the arbitration question." 762 F.3d at 270.

A. *Swint's* Ambiguity Has Led To Inconsistent Exercise Of Pendent Appellate Jurisdiction

Broadly speaking, there are currently two distinct (but not static)[2] camps among the courts of appeals

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[2] In certain cases, how a particular court of appeals interprets *Swint* has changed over time. *Compare, e.g.*, *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1345 (Fed. Cir. 2000) (exercising pendent appellate jurisdiction over a secondary issue because it was "closely interrelated factually" to preliminary injunction that was the primary issue under review) *with Entegris, Inc. v. Pall Corp.*, 490 F.3d 1340, 1348 (Fed. Cir. 2007) (reframing the *Helifix* decision as having turned on the fact that "the district court based its denial of preliminary injunctive

concerning the proper scope of pendent appellate jurisdiction: a restrictive view under which it may be exercised *only* when "resolution of the collateral appeal *necessarily* resolves the pendent claim as well[,]" *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995) (emphasis in original),[3] and a second, more permissive view that affords courts of appeals more latitude.

1. *The Restrictive Approach*

Under the restrictive approach, which has been endorsed to varying degrees in certain decisions by the Third, Fourth, Sixth, Eighth, and Ninth Circuits, pendent appellate jurisdiction is appropriate where "resolution of the collateral issue *necessarily* resolves the pendent claim as well." *Moore*, 57 F.3d at 930.[4]

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relief" on the secondary issue).

[3] In *Moore*, 57 F. 3d at 926–27, 930, the Tenth Circuit took pendent appellate jurisdiction of a claim against a municipality for a violation of First Amendment rights when reviewing the district court's denial of the city's police chief's qualified immunity to suit for the same claim, concluding that the two appeals were "coterminous."

[4] *See Griswold*, 762 F.3d at 269; *Lyons v. PNC Bank, N.A.*, 26 F.4th 180, 190–91 (4th Cir. 2022); *Brennan v. Twp. of Northville,* 78 F.3d 1152, 1158 (6th Cir. 1996); *Langford v. Norris*, 614 F.3d 445, 458 (8th Cir. 2010); *Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012) (applying *Swint* restrictively). But courts of appeals are also divided on whether it is the collateral issue or the pendent issue that has to "necessarily resolve" the other issue in order to exercise pendent appellate jurisdiction. *Compare, e.g.*, *Langford*, 614 F.3d at 458 ("[D]efendants get the analysis backward; resolving the collateral claim . . . must necessarily resolve the pendent claim . . . *not the other way around*") (emphasis added) *with CDK Glob.*

This narrower formulation of pendent appellate jurisdiction is derived from the Court's admonition in *Swint* that pendent appellate jurisdiction should be applied "[o]nly where essential to the resolution of properly appealed collateral orders[.]" *Swint*, 514 U.S. at 51 (quoting Kanji, *supra*, at 530).

Nevertheless, the courts of appeals that have adopted this restrictive approach have struggled with whether this Court intended the phrases "inextricably intertwined" and "necessary to ensure meaningful review" to be two distinct concepts and if so, in which circumstances the two concepts should apply. The ambiguity caused by *Swint*'s disjunctive terminology—"inextricably intertwined" *or* "necessary to ensure meaningful review"—is clear from the way that courts have struggled to delineate the two concepts. *Compare Watkins v. Healy*, 986 F.3d 648, 659 (6th Cir. 2021), *as corrected on denial of reh'g en banc* (Mar. 16, 2021), *cert. denied*, 142 S. Ct. 348 (2021) (describing pendent appellate jurisdiction as appropriate *only* when the two issues are inextricably intertwined, which occurs when the "finding on the first issue necessarily and unavoidably decides the second")[5] *with Moore*, 57 F.3d at 930 (recognizing "inextricably intertwined" and "necessary to ensure

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LLC v. Brnovich, 16 F.4th 1266, 1274 (9th Cir. 2021) (approving of pendent appellate jurisdiction where review of one issue "require[s] review" of the other).

[5] The phrase "inextricably intertwined" is itself ambiguous. As the First Circuit noted in *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003), the *Swint* Court "left open the question of the scope of appellate jurisdiction when the issues are inextricably intertwined." 353 F.3d at 123.

meaningful review" as distinct concepts and explaining that two issues are inextricably intertwined "when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well") *and Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999) ("[Under the doctrine of pendent appellate jurisdiction, we may exercise jurisdiction over standing *only if* standing and Eleventh Amendment immunity are *either* inextricably intertwined *or* the determination of one is essential to the resolution of the other.") (emphasis added).

The Third Circuit's decision in *Griswold* exemplifies the tension caused by this ambiguity as well. There, the court identified "inextricably intertwined" and "necessary to review" as distinct concepts ("declin[ing] to exercise pendent appellate jurisdiction" over a secondary issue because the secondary issue was neither "inextricably intertwined" with the primary issue nor "necessary to adjudicate" the primary issue), but also contradictorily suggested that the two concepts must be synonymous and ultimately rejected pendent appellate jurisdiction because "neither issue's determination is dependent upon the other." *Griswold*, 762 F.3d at 270.

2. *The Permissive Approach*

Within courts taking the more permissive view of *Swint*, there are two further distinct sub-groups.

i. The First Permissive Sub-Group

The first sub-group, including certain decisions by the Second and Fifth Circuits, holds that pendent appellate jurisdiction is limited to the two examples referenced in *Swint* (like the courts in the restrictive camp), but, unlike the courts in the restrictive camp, believes those conditions can be met even if "resolution of the collateral appeal" *does not "necessarily* resolve[] the pendent claim as well." *Moore*, 57 F.3d at 930.

The Fifth Circuit consistently falls within this sub-group, as it did here when it took pendent appellate jurisdiction of standing simply because the issue *may have been* either inextricably intertwined with or necessary to ensure meaningful review of Respondent's immunity, because, in the court's view, the analysis for the former "significant[ly] overlap[s]" with the latter and "a finding of standing *tends toward* a finding that the *Young* exception" would also "appl[y] to the state official(s) in question[.]" App. 7 (quoting *City of Austin*, 943 F.3d at 1002) (emphasis added). The Fifth Circuit's willingness to take pendent appellate jurisdiction without determining that the issues were actually inextricably intertwined or that review of standing was in fact necessary to ensure meaningful review of the question of immunity is notable, particularly given the court's concessions that its authority to exercise jurisdiction over

standing at all was questionable, and that pendent appellate jurisdiction should be exercised only in "rare and unique circumstances." App. 8; *see also Escobar v. Montee*, 895 F.3d 387, 392–93 (5th Cir. 2018) (approving of pendent appellate jurisdiction when "addressing the pendent claim will *further the purpose* of officer-immunities by helping the officer avoid trial") (emphasis added).

Though these courts acknowledge the "inextricably intertwined" and "necessary to ensure meaningful review" standard set forth in *Swint*, their permissive approach allows for significant differences in how both of those concepts are defined. The result is that the actual application of pendent appellate jurisdiction can vary widely even among courts ostensibly following the same standard. For example, courts can take a very liberal view of whether one issue is necessary to ensure meaningful review of another. In *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999), for example, the Second Circuit, citing *Swint*, concluded that review of the district court's subject matter jurisdiction was necessary to ensure meaningful review of its denial of an immunity defense because subject matter jurisdiction "goes to the very power of the district court to issue the rulings now under consideration." 187 F. 3d at 269.[6] In other

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[6] *Merritt* is in direct conflict with decisions by courts of appeals in the restrictive camp that have refused to take pendent appellate jurisdiction of "threshold jurisdictional questions." *See, e.g.*, *Griswold*, 762 F.3d at 270 ("Regardless of how we adjudicate the standing question, we may still reach the arbitration question").

words, the Second Circuit concluded that it could not reach the issue of the immunity defense without first deciding that the district court had subject matter jurisdiction in the first place. *Id.* ("Accordingly, our review of the district court's order on the *Bivens* claim would be meaningless if the district court was without jurisdiction over that claim in the first instance."). But the Second Circuit later struggled to distinguish *Merritt's* broad exercise of pendent appellate jurisdiction when it rejected a defendant-appellant's request to "consider [defendant-appellant]'s argument that the District Court lacked diversity jurisdiction over the suit and that it should have remanded the case to state court." *Funk v. Belneftekhim*, 739 F. App'x 674, 677 (2d Cir. 2018). To do so, the court circuitously concluded that the subject matter jurisdiction issues of diversity and removal were not "inextricably intertwined" with the collateral order since "there is no dispute [as there was in *Merritt*] that the District Court had subject matter jurisdiction to decide" the collateral issue. *Id.*

ii. The Second Permissive Sub-Group

The second sub-group of courts applying *Swint* in a permissive manner, including certain decisions of the Seventh and D.C. Circuits, goes even further and rejects the idea that *Swint's* two phrases are an exhaustive list of the only circumstances in which pendent appellate jurisdiction is appropriate. Instead, these courts see "inextricably intertwined" and "necessary to ensure meaningful review" as representative examples meant to guide an open-ended inquiry that turns on more nebulous concepts

such as equity and fairness, *see, e.g.*, *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997), judicial efficiency, *see, e.g.*, *Greenwell v. Aztar Ind. Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001), or even simply because there are "compelling reasons for not deferring the appeal of the otherwise unappealable interlocutory order," *Abelesz v. OTP Bank*, 692 F.3d 638, 647 (7th Cir. 2012) (internal quotation omitted).

3. *Recent Movement Away From Swint*

Further complicating matters, some courts have departed from the standard set forth in *Swint* altogether and adapted this Court's decisions in *Hartman v. Moore*, 547 U.S. 250 (2006), and *Wilkie v. Robbins*, 551 U.S. 537 (2007), to develop an even looser test for pendent appellate jurisdiction. Those courts have taken the position that this Court in *Wilkie* blessed the exercise of pendent appellate jurisdiction over an entire cause of action in an interlocutory qualified immunity appeal because of a quotation from a footnote in *Hartman* that describes an element of the cause of action as being "directly implicated" by qualified immunity. *Wilkie*, 551 U.S. at 549 n.4. In the ensuing years, these courts have used the phrase "directly implicated" to review merits issues on interlocutory qualified immunity appeals, even in scenarios where it is at best unclear whether the issues that may be "directly implicated" in qualified immunity are necessarily "inextricably intertwined" under *Swint*. *See, e.g.*, *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 856 (10th Cir. 2016) (citing *Wilkie* for the view that the court had

jurisdiction to consider whether a remedy existed because it was "sufficiently implicated" by the qualified immunity defense).

* * *

As demonstrated above, the confusion around the standard set forth in *Swint* has resulted in a number of deep circuit splits regarding the exercise of pendent appellate jurisdiction, and the courts need this Court's guidance on the appropriate standard to apply.

II. THE CONFUSION AMONG THE CIRCUITS HAS RESULTED IN DECISIONS THAT CONFLICT WITH THE INSTRUCTIONS OF CONGRESS AND THE STANDARD SET FORTH IN *SWINT*

In *Swint*, this Court noted that the case at hand did not require a preemptive ruling on "whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." 514 U.S. at 50–51. As the divergent views of the courts of appeals make clear, however, this issue has now become ripe for resolution. The rift between the courts of appeals on the proper scope of pendent appellate jurisdiction has once again encouraged parties to "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings." *Id.* at 45.

The wildly divergent views espoused by the courts of appeals risk expanding a narrow and rarely-exercised judge-made exception to the collateral order doctrine into both statutorily and constitutionally inappropriate territory. This Court's decision in *Swint*

was squarely aimed at protecting this congressionally mandated structure from broad overreach by courts of appeals that would infringe upon lower courts' authority and litigants' rights. Extending pendent appellate jurisdiction beyond the contours of this Court's edict in *Swint* threatens to upend that delicate balance. *See Swint*, 514 U.S. at 47 ("If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.").

A. Congress And This Court Have Set Forth Clear Rules Limiting The Availability Of Interlocutory Review

The baseline rule instituted by Congress is that the courts of appeals have jurisdiction of appeals from "final decisions of the district courts of the United States." 28 U.S.C. § 1291.[7] Congress decided to supplement the final decision rule by granting the courts of appeals limited jurisdiction over certain interlocutory appeals. First, Congress established in 28 U.S.C. § 1292(a) a limited category of interlocutory orders which are appealable as of right. Each of the

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[7] Congress delegated authority to this Court to prescribe rules to "define when a ruling of a district court is final for the purposes of appeal under section 1291" or "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in § 1292. 28 U.S.C. §§ 1292(e), 2072(c). As this Court cautioned in *Swint*, "[t]he procedure Congress ordered for such changes, however, is not expansion by court decision, but by rulemaking under § 2072." 514 U.S. at 48.

congressionally-enumerated categories of appealable interlocutory orders (*e.g.*, injunctions, receiverships, and rights and liabilities in admiralty) reflects an understanding that appellate review of non-final orders is best aimed at critical disputed legal flashpoints "of serious, perhaps irreparable, consequence," and not issues close to the facts of the case where the trial court is better-positioned. *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

Congress also defined a clear process for parties to pursue discretionary interlocutory appeals in 28 U.S.C. § 1292(b). First, the district judge who issued the non-final order may certify an issue for interlocutory appeal only when there is "a controlling question of law as to which there is substantial ground for difference of opinion" and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). [8] The relevant court of appeals may thereafter, "in its discretion, permit an appeal to be taken from such order." *Id.*

The process outlined by Congress is the primary mechanism by which litigants should seek, and district courts should certify, review of non-final orders beyond

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[8] Pursuant to the Federal Rules of Appellate Procedure, parties may petition the district court for permission to pursue a discretionary interlocutory appeal. *See* Fed. R. App. P. 5(a). Despite these clear procedural instructions, Respondent in this case failed to request review of the district court's ruling on standing. *See* App. 38–39 (Notice of Interlocutory Appeal).

the enumerated list in § 1292(a). As this Court has cautioned, Congress "carefully confined" availability of discretionary review through § 1292(b), *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978), *superseded by rule*, Fed. R. Civ. P. 23(f), *as recognized in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), which "counsels against expanding other judicial exceptions to the rule against piecemeal appeals," *Behrens v. Pelletier*, 516 U.S. 299, 323 (1996).

Beyond the procedures outlined by Congress, the availability of interlocutory appeal is sharply (and appropriately) limited. In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), this Court set forth the circumstances under which a non-final order may nonetheless be considered "final" for purposes of § 1291. 337 U.S. at 546. The collateral order is "not [] an exception to the 'final decision' rule laid down by Congress in § 1291, but [] a 'practical construction' of it." *Digit. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 867 (1994) (quoting *Cohen*, 337 U.S. at 546). The orders that are treated as "final" for purposes of the collateral order doctrine are limited to "district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.* This Court has cautioned that these requirements must be stringently kept in order to prevent the collateral order doctrine from "overpower[ing] the substantial finality interests § 1291 is meant to further." *Will v. Hallock*, 546 U.S. 345, 350 (2006).

The narrowly-confined universe of these *Cohen*-type appealable collateral orders reflects this Court's respect for the scheme Congress has fashioned, and this Court's recognition that any judicially-developed doctrine interpreting that scheme must be confined accordingly. As this Court has repeatedly stressed, the *Cohen* construction of § 1291 should "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digit. Equip. Corp.*, 511 U.S. at 868 (internal citation omitted).

B. The Inconsistent Application Of Pendent Appellate Jurisdiction By The Courts Of Appeals Threatens The Careful Balance Set By Congress And This Court

Pendent appellate jurisdiction, in contrast to the sharply-delineated and narrow categories of interlocutory appeals described above, is a judge-made exception that injects uncertainty, inefficiency, and the risk of error into the appeals process. The divergent and inconsistent application of pendent appellate jurisdiction among the courts of appeals poses a serious threat to the statutory allocation of jurisdiction mandated by Congress, as interpreted by this Court through the collateral order doctrine. Whereas the statutory framework provides litigants certainty and clarity as to the timing of appeals, the lack of instruction from this Court on the scope of pendent appellate jurisdiction has transformed the doctrine into an increasingly broad judicial exception that

threatens to "swallow the general rule" of finality as a prerequisite to appealability. *Digit. Equip. Corp.*, 511 U.S. at 868.

Courts of appeals, for example, have struggled with whether and when threshold, non-merits-related questions, such as the standing issue raised in this case and other jurisdictional issues, are appropriate for pendent appellate review. *See supra* Part I.A.ii.1 (comparing *Merritt*, 187 F.3d 263 with *Funk*, 739 F. App'x 674, and *Griswold*, 762 F.3d 264). The courts' inconsistency on this issue highlights both the uncertainty to which litigants are subjected and the dangers of allowing broad exceptions to the final decision rule. As discussed above, the Second Circuit in *Merritt* exercised pendent appellate jurisdiction to review *sua sponte* the district court's subject matter jurisdiction because subject matter jurisdiction "goes to the very power of the district court to issue the rulings now under consideration." 187 F.3d at 268–69. But almost any jurisdictional question would theoretically go to the district court's power to issue the ruling properly under review, and thus it is not clear which jurisdictional questions, if any, would *not* be appropriate for pendent review. Taking the Second Circuit's reasoning to its natural conclusion, courts of appeals could take indiscriminate appellate jurisdiction over *any* threshold question, even issues such as standing that are not, in and of themselves, immediately appealable as collateral orders. All of this would encourage, and likely allow, the exact harm that this Court warned against in *Swint*: litigants "parlay[ing] *Cohen*-type collateral orders into multi-

issue interlocutory appeal tickets" for substantive jurisdictional questions not otherwise eligible for interlocutory review. 514 U.S. at 50.

What is more, certain courts of appeals have even extrapolated from the dicta in *Swint* to reach issues for reasons of mere judicial efficiency—a rationale expressly rejected by *Swint*. *Compare Swint*, 514 U.S. at 45 (rejecting the parties' judicial economy arguments as "drift[ing] away from the statutory instructions Congress has given to control the timing of appellate proceedings") *with Greenwell*, 268 F.3d at 491 (holding that "we might as well decide" the pendent issue because "this is one of those cases in which allowing an interlocutory appeal prevents rather than produces piecemeal appeals").

While it may seem efficient or convenient to allow interlocutory appeals of threshold issues, as the Fifth Circuit did here or as the Second Circuit did in *Merritt*, this Court has expressly warned against treating such issues as "final decisions" for the purposes of § 1291:

> [V]irtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial[.] Allowing immediate appeals to vindicate every such right would move § 1291 aside for claims that the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and

> the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim. Such motions can be made in virtually every case.

Digit. Equip. Corp., 511 U.S. at 873 (internal citations and quotations omitted). Under a broad interpretation of pendent appellate jurisdiction, all of the foregoing issues, where they "significantly overlap" with an immediately appealable collateral order, could be swept up in that appeal—notwithstanding that *none* of the foregoing issues would independently confer an immediate right to interlocutory review.

Furthermore, adding yet another layer of uncertainty to the appeal process, unlike § 1292(b), which implements two layers of discretionary review before an issue may be considered on interlocutory appeal, the courts of appeals have granted themselves sole discretion to determine which issues they will hear under pendent appellate jurisdiction. In certain cases, courts have even exercised pendent appellate jurisdiction *sua sponte*. *See, e.g.*, *Merritt*, 187 F.3d at 268 (holding that while "none of the defendants appealed" the subject matter jurisdiction issue, "[w]e nonetheless reach the subject matter jurisdiction issue of our own accord" through pendent appellate jurisdiction). This unfettered judicial discretion stands in sharp contrast to the statutory scheme.

The rationale of *Swint*, and of this Court's rulings on the scope of the collateral order doctrine, have been clear and consistent: it is not appropriate for courts to craft exceptions to the clear dictates of the final

decision rule. *See Swint*, 514 U.S. at 41–42 (citing *Digit. Equip. Corp.*, 511 U.S. at 867). Because the final decision rule admits no judicially-created exceptions, the scope of pendent appellate jurisdiction likewise cannot operate as a limitless exception that would result in indiscriminate interlocutory review of non-final issues. Rather, courts should only exercise pendent appellate jurisdiction where consideration of an issue is "essential to the resolution of properly appealed collateral orders." *Swint*, 514 U.S. at 51 (quoting Kanji, *supra*, at 530). Absent further direction on the appropriate scope of *Swint*, the increasingly broad exceptions crafted by the courts of appeals threaten to swallow the limits on interlocutory appeals prescribed by Congress and this Court.

C. Broad Application Of Pendent Appellate Jurisdiction Harms The Integrity Of The Judicial Process And Litigants

The lack of clarity from this Court on the standard for invoking pendent appellate jurisdiction has led not only to inconsistent application of *Swint* across (and even within) the courts of appeals, but also to increasingly broad exceptions to the strict statutory scheme for the timing of appeals. These exceptions threaten the integrity of the judicial system. The primary harm that both Congress and this Court guarded against when developing the rules for appellate jurisdiction in § 1291, § 1292, *Cohen*, and *Swint* was the improper invasion of the federal appellate courts into the trial court process:

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. . . . To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Cobbledick v. United States, 309 U.S. 323, 325 (1940). Confinement of appellate review to final decisions "is the means for achieving a healthy legal system." *Id.* at 326. Indeed, the final decision rule embodied in § 1291 "recognizes that rules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence." *Johnson v. Jones*, 515 U.S. 304, 309 (1995). Moreover, broad application of pendent appellate jurisdiction heightens the chance for error when appellate courts step beyond their charge and wade into merits or gatekeeping issues that are closely tied to the facts and better housed under the purview of the district courts.

Broad application of pendent appellate jurisdiction would also impose significant costs on litigants. It would force litigants to guard against attacks from multiple fronts during what should be a narrow appeal of a collateral order. Upon such an appeal, their opposition would be capable of raising to the court of

appeals' attention not only the collateral order but also *any* other issue that may "significant[ly] overlap" with the appealable order. Indeed, this is precisely the harm that this Court warned against in *Swint*: "encourag[ing] parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 49–50. Even if the improperly raised arguments ultimately prove to be meritless upon appellate review, as this Court has explained in the context of describing the need for narrow review of interlocutory orders: "the damage to the efficient and congressionally mandated allocation of judicial responsibility would be done, and any improper purpose the appellant might have had in saddling its opponent with cost and delay would be accomplished." *Digit. Equip. Corp.*, 511 U.S. at 873. Similarly, another harm from a court of appeals stepping in too early is that it may cause the court to inappropriately signal to the district court how it should decide issues that have not yet been fully developed before the district court.

III. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THIS COURT TO ALIGN THE COURTS OF APPEALS AND PROTECT THE CONGRESSIONALLY-MANDATED ALLOCATION OF JURISDICTION AMONG THE FEDERAL COURTS

This case provides an ideal opportunity for the Court to bring clarity to the cacophony that the courts of appeals have created and clarify that pendent appellate jurisdiction should be exercised only in the limited circumstance where it is "essential to the

resolution of properly appealed collateral orders." *Swint*, 514 U.S. at 51 (quoting Kanji, *supra*, at 530).

A. The Court Of Appeals' Decision To Rule On Standing Was An Inappropriate Exercise Of Pendent Appellate Jurisdiction

It is well-established that appeals from a district court's denial of Eleventh Amendment immunity meet the stringent requirements of the collateral order doctrine. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). Because the Eleventh Amendment confers absolute immunity from suit, denials of such immunity claims "purport to be conclusive determinations that [defendants] have no right not to be sued in federal court," resolve an issue that "generally will have no bearing on the merits of the underlying action," and strip defendants of a benefit that "is for the most part lost as litigation proceeds past motion practice." *Id.* at 145.

In contrast, a finding that a plaintiff has standing to pursue a given claim is not among the limited scope of issues that may be treated as a "final decision" under the collateral order doctrine. This is because standing "can and often is reviewed on appeal . . . in part because the question of standing is often 'intertwined' with that of the merits." App. 5 (quoting *Barrett Comput. Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 219 (5th Cir. 1989)); *see also, e.g.*, *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) ("[T]he issue of standing is not effectively unreviewable on appeal from a final judgment and,

thus, fails the last prong of the collateral order doctrine."); *Sierra Nat'l Ins. Holdings, Inc. v. Credit Lyonnais S.A.,* 64 F. App'x 6, 7 n.1 (9th Cir. 2003) (holding that because standing issues are often fact-dependent, they can be adequately addressed after a final decision is entered). Unlike a collateral order, a finding that the plaintiff has standing at a preliminary stage in the district court's proceedings is far from a final decision. As even the Fifth Circuit recognized here, standing is often "intertwined" with the merits. App. 5. Moreover, where a court makes a preliminary determination that a plaintiff has sufficiently pleaded the existence of standing in the complaint, the plaintiff must continue to prove the existence of standing through all the successive stages of the litigation, with the degree of evidence required increasing with each such stage. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In other words, the issue of standing will continue to be tested, with increasingly more precise evidentiary requirements, as the litigation proceeds. Thus, a determination that the plaintiff has standing at the pleading stage is far from "final," and, in accordance with congressional instruction, should not generally be subject to interlocutory review by the courts of appeals.

Here, however, the Fifth Circuit determined that it could nevertheless reach the issue of standing through pendent appellate jurisdiction. The Fifth Circuit reasoned that pendent appellate jurisdiction was appropriate because "our Article III standing analysis and *Ex parte Young* analysis 'significant[ly] overlap.'" App. 7 (quoting *City of Austin v. Paxton*, 943

F.3d 993, 1002 (5th Cir. 2019)). The Fifth Circuit's decision to review Petitioners' standing was error and should be reversed.

To be clear, the Fifth Circuit's invocation of "significant overlap" is not a mere restatement of the *Swint* standard, or a slightly more permissive interpretation of the *Swint* framework. Instead, the Fifth Circuit announced a new approach that adds to the already discordant jurisprudence developed by the courts of appeals and moves the needle closer to a broad relevance standard. *See* App. 8 ("[R]eview of standing challenges in evaluating Eleventh Amendment immunity claims is often relevant[.]"). This standard imposes a substantially lower threshold to the exercise of pendent appellate jurisdiction than *Swint*'s requirements of "necessary to ensure meaningful review" and "inextricably intertwined." 514 U.S. at 51. Legal issues on appeal may present significant overlap by requiring similar legal reasoning or application to a similar set of facts, even when the resolution of one issue has no bearing on the resolution of another and thus would not qualify for pendent appellate review under *Swint*. Because pendent issues must be "essential to the resolution of properly appealed collateral orders," significant overlap is not sufficient to exercise pendent appellate jurisdiction. *Id.* at 51 (quoting Kanji, *supra*, at 530).

The loose reasoning that the Fifth Circuit applied in this case exemplifies the risk of expansive interlocutory appellate review to which the permissive view of pendent appellate jurisdiction opens the door.

The Fifth Circuit reasoned that because standing questions may "significant[ly] overlap" with Eleventh Amendment immunity, they therefore are inextricably intertwined. Such reasoning stands in direct contravention of *Swint* and creates a slippery slope to the pendent appellate jurisdiction exception swallowing the final decision rule.

The Fifth Circuit's opinion does not properly establish why review of standing is essential to the resolution of the Eleventh Amendment issue in *this case*, let alone as a general matter. Indeed, the Eastern District of Louisiana was able to analyze Respondent's Eleventh Amendment immunity entirely independently of its analysis of Petitioners' standing. *See* App. 30–32 (evaluating standing), 32–33 (evaluating immunity); *see also Summit Med. Assocs.,* 180 F.3d at 1335 ("[W]e may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing."). If resolution of standing was actually essential to the resolution of the immunity question, that would not be analytically possible.

The lack of meaningful analysis is evidenced by the circularity of the Fifth Circuit's reasoning. Although the Fifth Circuit acknowledged the risk of "encouraging parties . . . to file meritless immunity appeals just so they could seek premature interlocutory review of standing," it reasoned that the dangers outlined by this Court in *Swint* were of no concern because—in its determination—*this* immunity appeal was not meritless. *See* App. 8 (internal quotation omitted). This approach contravenes this

Court's instruction, in the context of § 1291, which applies with equal force to pendent appellate jurisdiction, that "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." *Digit. Equip. Corp.*, 511 U.S. at 868 (internal quotation omitted).

Ironically, this reasoning also rests the Fifth Circuit's capacity to reach the standing question partly on the merits of the immunity appeal, implicitly evaluating the strength of the immunity claim *prior to evaluating Petitioners' standing* and thereby demonstrating that the standing review is *not* essential to the resolution of Eleventh Amendment immunity. In essence, the Fifth Circuit used the merits of the immunity appeal to justify the exercise of pendent appellate jurisdiction over standing, which justified the merits of the immunity appeal. *Swint*, however, requires a linear progression where the pendent question *must* be addressed because it is "essential to the resolution" of the properly appealed collateral order. *Swint*, 514 U.S. at 51 (quoting Kanji, *supra*, at 530).

This Court identified in *Swint* that upholding the proper divisions of responsibility between appellate and trial courts was the best method of achieving an efficient judicial system, and thereby grounded the exercise of pendent appellate jurisdiction in principles of logical necessity. But, under the Fifth Circuit's reasoning here, collateral order appeals would become coterminous with otherwise unreviewable

gatekeeping issues, thus inappropriately expanding the scope of pendent appellate jurisdiction.

B. This Case Demonstrates The Pernicious Harms Of Considering Gatekeeping Issues At The Interlocutory Stage

Granting the petition will give this Court an opportunity to correct the damage done to Petitioners. Despite the Fifth Circuit's dismissal of the risks to the judiciary inherent in its permissive standard, this case is an exemplar of the potential of appellate overreach to corrupt the process that Congress has properly allocated to the trial court. It demonstrates the damaging consequences to the efficiency and final authority of each category of tribunal, and, by addressing this case now, this Court can both prevent the Fifth Circuit's standard from taking root and realign the courts of appeals around an approach to pendent appellate jurisdiction that protects both litigants and the judicial system.

This appeal involves only one of numerous defendants, and the litigation at the district court level is moving forward against the remaining defendants in parallel with this appeal. By reaching the issue of Petitioners' standing when reviewing the lower court's decision on the entirely separate issue of Respondent's immunity under the Eleventh Amendment, the Fifth Circuit indirectly instructed the district court on how to rule on standing issues as to the remaining defendants in this dispute, as well as Respondent if at the end of the appeals process he is reinstated as a defendant. Even if on remand the Fifth Circuit reaches

a similar conclusion on Eleventh Amendment immunity, a reversal of the Fifth Circuit's finding on Petitioners' standing to assert claims against Respondent would still cure the harm done to Petitioners' case against the remaining defendants by this premature standing analysis. By improperly previewing its disposition toward the standing issues in this case, the Fifth Circuit damaged the perceived authority of the district court and effectively rendered any standing decision below illusory. This should be corrected.

* * *

By reaffirming *Swint*'s requirements, this Court can align the courts of appeals around a clear restatement of the law that pendent appellate jurisdiction is appropriate only where "essential to the resolution of properly appealed collateral orders," before loose and harmful standards like that of the Fifth Circuit and its sister courts in the "permissive" camp are permitted to develop further. In so doing, this Court can repair the harms caused by the Fifth Circuit's decision in this case, stand firm against the unwarranted and dangerous expansion of pendent appellate jurisdiction, and uphold Congress' careful and limited allocation of appellate jurisdiction to the benefit of both litigants and the courts.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

JARED M. GERBER
Counsel of Record
CHARITY E. LEE
THOMAS R. MINTZ
MIRANDA R. HERZOG
CLEARY GOTTLIEB STEEN &
HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jgerber@cgsh.com
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