No. 25-653

IN THE
SUPREME COURT OF THE UNITED STATES

Shannon McKinnon,
Petitioner,
v.
Genaro Hernandez,
Respondent.

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

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

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INTEREST OF AMICI CURIAE[1]

Public Accountability is a nonpartisan, nonprofit organization that promotes access to civil justice for people harmed by the government. As part of its mission, Public Accountability has developed deep expertise in official immunities—especially their interaction with the

[1] Rule 37 statement: This brief is filed more than ten days before its due date. None of it was authored by any party's counsel, and no one other than amici funded its preparation or submission.

collateral-order doctrine. Because this petition raises the scope of collateral-order review in state-law immunity cases, Public Accountability offers a perspective that will help inform the Court's decision.

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

Amici write because the Fifth Circuit's decision allows States to delay or avoid liability for harming individuals by manipulating federal jurisdiction. Congress enacted a simple rule: Federal appellate jurisdiction is for final judgments. The collateral-order doctrine treats this rule with less than perfect fidelity—a mistake this Court has come to regret. Applying it to qualified immunity heightened the error, clogging appellate dockets and needlessly delaying justice for civil-rights plaintiffs. Extending it to *state*-law immunity, as the Fifth Circuit did here, invites jurisdictional chaos.

"Small," "modest," "narrow," "selective"—these are the words this Court uses to describe the collateral-order doctrine. As applied by the Fifth Circuit, it's anything but. To restore order to appellate jurisdiction, this Court should grant review.

SUMMARY OF ARGUMENT

For all the reasons Petitioners describe, the decision below should be reversed. But more broadly, this case shows why the Court should reconsider the collateral-order doctrine—or at least its application to immunity doctrines, which has spawned no end of confusion and mischief in the lower courts.

1. The collateral-order doctrine was a mistake. Title 28 U.S.C. § 1291 gives the federal courts of appeals jurisdiction to review "final decisions" of the district courts. The collateral-order doctrine circumvents that rule by labeling some non-final orders "final" for the sake of allowing an immediate appeal. To qualify, an order must—in theory—satisfy three conditions: It must be "conclusive," it must resolve an important issue "completely separate" from the merits, and it must be "effectively unreviewable" after final judgment.

These requirements are not always followed rigorously. An order can be "conclusive" even if it allows litigation to continue and yet "tentative" even if it sounds the death knell for litigation. It can be "separate" from the merits and yet somehow include the basic merits question of whether the plaintiff states a claim. And it can be "effectively unreviewable" after a final judgment even when review is straightforward—if, as this Court has openly explained, the Court considers immediate review especially important.

At base, the collateral-order doctrine is a policy decision, a choice by the judiciary that some rights are too

important to leave to district courts. And that choice contradicts Congress's clear commands. Congress decided that in the main, courts of appeals should review only final judgments; that only a few, specific interlocutory orders, like injunctions, should be eligible for immediate review; that interlocutory review may otherwise be had on a case-by-case basis by agreement of the district court and court of appeals; and that this Court could make more classes of orders eligible for interlocutory review through *rulemaking*—not by judicial fiat.

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

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

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

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

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

4. The decision below showcases the chaos *Mitchell* spawned. The Fifth Circuit treats a state-law immunity

as an immunity from suit if that's how the State labels it. In other words—as Judge Oldham pointed out in his concurrence—the Fifth Circuit "allows States to control [federal] jurisdiction." Pet. App. 17a (Oldham, J., concurring).

The magnitude of the Fifth Circuit's error need not be belabored. Whatever power the federal courts may have to override Congress and declare a nonfinal order "final," the States surely enjoy no such power. Nor should the federal courts borrow each State's characterization of its immunity doctrines as a matter of federal common law. Interlocutory appeals come at a heavy cost to sound judicial administration, and federal appellate dockets are already clogged with *Mitchell* appeals. And while a *federal* immunity from suit at least conceivably must be harmonized with § 1291's finality rule, *state* immunities need no such harmonization because federal law is supreme.

In short, Congress's power over federal appellate jurisdiction is plenary and Congress has spoken. Any further expansion of interlocutory appeals must come from rulemaking, not from judicial opinions and certainly not from state law. The Fifth Circuit disregarded this clear command. Left uncorrected, that court's freewheeling approach to jurisdiction will undermine and perhaps unravel the final-judgment rule. This Court should grant certiorari and reverse.

ARGUMENT

1. *Cohen*'s collateral-order doctrine was a mistake—an atextual, unworkable exception to Congress's final-judgment rule.

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

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

Until 1949, this Court's decisions reflected the statutory text. But then, in *Cohen* v. *Beneficial Industrial Loan Corp.*, the Court introduced the collateral-order doctrine, under which some nonfinal orders are

nonetheless deemed "final" for the sake of allowing immediate appeal. 337 U.S. 541, 546–547 (1949); *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 116 (2009) (opinion of Thomas, J.).

At the time, the Court touted the doctrine as a "practical rather than a technical construction" of Section 1291. *Cohen*, 337 U.S. at 546. Some have since questioned whether it is "a legitimate interpretation of the narrow statutory language." Michael E. Solimine & Christine O. Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review*, 41 Wm. & Mary L. Rev. 1531, 1549 (2000). In fact, it is—in Justice Scalia's words—an "invent[ion]" for which "[t]he statutory text provides no basis." *Sell* v. *United States*, 539 U.S. 166, 189 & n.4 (2003) (Scalia, J., dissenting).

In theory, the doctrine comprises three "stringent" elements: A collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (cleaned up).

In practice, the Court's application of these elements has been less than consistent:

- **Conclusiveness.** In a series of immunity cases, this Court held that a denial of immunity was conclusive because it *conclusively allowed litigation to continue*. *See*, *e.g.*, *Helstoski* v. *Meanor*, 442 U.S. 500, 506–507 (1979) (legislative immunity);

Nixon v. *Fitzgerald*, 457 U.S. 731, 742 (1982) (absolute immunity); *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985) (qualified immunity). Of course, that is true for *any* order that rejects a "meritorious pretrial claim for dismissal." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988). Meanwhile in other cases, the Court declared orders that truly were conclusive—orders that sounded the "death knell" for litigation, like denial of class certification—"inherently tentative." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 & n.11 (1978); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 871–872 (1994).

- **Separateness.** The separateness requirement began life as "separable from" the merits. *Cohen*, 337 U.S. at 546. But when the collateral-order doctrine needed reining in, "separable" hardened to "completely separate" from the merits. *Coopers*, 437 U.S. at 468. Then, to accommodate qualified immunity, it softened to merely "conceptually distinct" from—that is, not identical to—the merits. *Mitchell*, 472 U.S. at 527–528. Eventually it dissolved entirely: Collateral-order review now can, in fact, *embrace* the merits. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672–673 (2009).

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

> judicial administration against its immediate desire to review an issue it thought especially important. *See* Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539, 609 (1998). Eventually the Court gave in and declared that "unreviewable" just meant that delaying review would imperil "some particular value of a high order." *Will*, 546 U.S. at 352; *see also Digital Equipment*, 511 U.S. at 878–879. In other words, it's a policy decision.

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

The Constitution, however, vests the power to set the lower federal courts' jurisdiction in *Congress*, not the courts. U.S. Const. art. III, § 1; *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."). And Congress exercised that power. It made several policy choices about appellate jurisdiction that "warrant[] the Judiciary's full respect." *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995); *see also Mohawk*, 558 U.S. at 114–115, 119 (opinion of Thomas, J.). In fact,

every time Congress has visited the issue of appellate jurisdiction, it has rejected the collateral-order doctrine.

First, of course, there's the final-judgment rule. 28 U.S.C. § 1291. In the mine run of routine orders, Congress determined that "the harassment and cost of a succession of separate appeals" outweighs the convenience of immediate review. *Cunningham*, 527 U.S. at 203–204 (cleaned up).

Second, there are several statutes in which Congress determined that *some* classes of orders *do* merit interlocutory review. *E.g.*, 28 U.S.C. § 1292(a) (injunctions, receivers, and admiralty); 28 U.S.C. § 158(a) (bankruptcy); 9 U.S.C. § 16(a) (arbitration). That is, where Congress thought an exception might make sense, it enacted one. Adding to these by judicial decree "amount[s] to legislation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012) (quotation marks omitted).

Third, there's the discretionary appeal statute, 28 U.S.C. § 1292(b), in which Congress accounted for unforeseen cases by allowing ad hoc interlocutory review. *Swint*, 514 U.S. at 46–47. But here too, Congress made a policy choice at variance with the Court's. To avoid swallowing the final-judgment rule, Congress enacted a "two-tiered" gatekeeping mechanism under which both the district court and the court of appeals must agree the issue warrants immediate review. *Digital Equipment*, 511 U.S. at 883; *Swint*, 514 U.S. at 47. In other words, Congress anticipated that some decisions might be too "important" to await final judgment for review, but it chose a

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

Last and most important, Congress *did* expressly empower the judiciary to declare some types of orders eligible for interlocutory review—but only *this* Court, and only by *rulemaking*. 28 U.S.C. § 1292(e); 28 U.S.C. § 2072(c). The difference is not insubstantial: Rulemaking, unlike opinion-writing, requires public bench-bar meetings and submission of any proposed rule to Congress. *See Swint*, 514 U.S. at 48. That's a policy choice about trust—whom Congress trusts with the power to open up interlocutory review, and what processes it trusts to generate sound decisions.

And it's a telling choice: Congress chose rulemaking *in response to* the chaos of case-by-case accretion under *Cohen*. *Mohawk*, 558 U.S. at 115 (opinion of Thomas, J.). It wouldn't be unreasonable to say Congress has overruled *Cohen*. At the very least, it has limited *Cohen* and its progeny to their facts. *See Mohawk*, 558 U.S. at 115 (opinion of Thomas, J.). For a lower appellate court to invent *new* categories of interlocutory appeal, *now*, accords Congress's policy choices something less than "full respect." *Cf. Swint*, 514 U.S. at 48.

Cohen was a New Deal-era decision. This Court has since come to disfavor "freewheeling judicial policymaking." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022); *see also*, *e.g.*, *Pereida* v. *Wilkinson*, 592 U.S. 224, 241 (2021). Now, when it mentions the

collateral-order doctrine, it emphasizes its "small," "modest," "narrow," and "selective" scope. *Swint*, 514 U.S. at 42; *Will*, 546 U.S. at 350; *Mohawk*, 558 U.S. at 113. In an appropriate case, it should scrap the doctrine entirely—much as the Romans did. *Cf.* Crick, 41 Yale L.J. at 540–541; *accord Mohawk*, 558 U.S. at 117–119 (opinion of Thomas, J.). At minimum, it should reverse the Fifth Circuit's expansion of the doctrine here.

But before discussing the decision below, a word on *Mitchell* v. *Forsyth*. The Fifth Circuit has never actually applied *Cohen*'s analysis to state-law immunities. Instead, its precedents in the area focus on *Mitchell*, which extended *Cohen* to denials of *federal* qualified immunity. *Sorey* v. *Kellett*, 849 F.2d 960, 962–963 (5th Cir. 1988); *Cantu* v. *Rocha*, 77 F.3d 795, 803–904 (5th Cir. 1996). *Mitchell* compounded every problem with the collateral-order doctrine. And since it undergirds the Fifth Circuit's extension of that doctrine to state-law immunities, its flaws merit independent scrutiny.

2. Extending *Cohen* to qualified immunity heightened its flaws.

Qualified immunity shields government agents from liability for violating constitutional rights if those rights weren't "clearly established" at the time of the violation. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In the mid-1980s, it was a relatively new doctrine—one whose implementation might need closer appellate supervision—while the collateral-order doctrine was enjoying its heyday. Anderson, 46 Drake L. Rev. at 573–574. So in

Mitchell v. *Forsyth*, this Court announced that denials of qualified immunity would be eligible for collateral-order review. 472 U.S. at 530.

The decision has attracted criticism, to say the least. *E.g.*, Anderson, 46 Drake L. Rev. at 569–574; Solimine & Hines, 41 Wm. & Mary L. Rev. at 1572 n.219; Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 Mo. L. Rev. 1137, 1201 (2022) ("*Mitchell* was wrong on the day it was decided.").[2] Just as *Cohen* mangled the final-judgment rule, *Mitchell* mangled *Cohen*'s rules:

- A collateral order must be "conclusive"; denials of qualified immunity are not. A defendant can assert qualified immunity on the pleadings, in multiple summary-judgment motions as discovery progresses, in a motion for judgment as a matter of law during trial, *and again* at the end of trial. Anderson, 46 Drake L. Rev. at 600–601.

- A collateral order must be "completely separate" from the merits; for denials of qualified immunity, the leading treatise calls that a "transparent fiction." 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3937 (3d ed. West 2024). Indeed, *Mitchell* silently watered the test down to "conceptually distinct," even though a different

[2] *See also*, *e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 84 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 74–75 (2017); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. Rev. 1237, 1253–1257 (2007).

case *that same Term* used the "completely separate" test with no explanation for the inconsistency. *Compare* 472 U.S. at 527–528 *with Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 436 (1985). And as mentioned above, even "conceptually distinct" eventually dissolved as a limit on *Mitchell*'s reach. *Compare Mitchell*, 472 U.S. at 528 (explaining that immunity was "conceptually distinct" from the merits because a reviewing court need not "determine whether the plaintiff's allegations actually state a claim"), *with Ashcroft*, 556 U.S. at 672–675, 680 (determining that the plaintiff's allegations did not state a claim).

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

In short, denials of qualified immunity meet *none* of the collateral-order doctrine's elements.

The Court sidestepped these problems by positing that unlike other rights that may be denied during litigation, qualified immunity entitles the officer "not to be forced to *litigate*." *Mitchell*, 472 U.S. at 527 (emphasis added). On this rationale, a denial of qualified immunity conclusively denies the officer's claim to a right against litigation; whether he has a right against litigation is not

the same question as whether he violated a constitutional right; and if he must await final judgment, appellate review cannot give him back his right against litigation. *Id.* at 526–530.

But that explanation raised a new problem: What made qualified immunity different from any other right that might be "enforced appropriately by pretrial dismissal"? *Digital Equipment*, 511 U.S. at 873. It couldn't be that the right would be "irretrievably lost" without immediate review—that's also true for, say, class certification or the right to a speedy trial. *Cf. ibid.*; *United States* v. *MacDonald*, 435 U.S. 850, 860–861 (1978). It couldn't be that qualified immunity is an "explicit statutory or constitutional guarantee that trial will not occur"—it's not. *Compare Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989) (offering the Double Jeopardy Clause and the Speech or Debate Clause as examples), *with Digital Equipment*, 511 U.S. at 875 (acknowledging that "we would be hard pressed" to call qualified immunity "explicitly guaranteed" by any constitutional or statutory provision (cleaned up)).

Ultimately, the Court concluded that a right enforceable by dismissal was a right to avoid trial if trial would "imperil a substantial public interest." *Will*, 546 U.S. at 352–353. In other words, qualified immunity is a right to avoid trial—unlike, say, the right to a speedy trial or the right to counsel of one's choice—because that is the Court's policy choice. *Cf.*, *e.g.*, *MacDonald*, 435 U.S. at 860–861; *Flanagan* v. *United States*, 465 U.S. 259, 267–268 (1984).

The notion that reviewing qualified immunity after trial would imperil a substantial public interest is difficult to square with recent scholarship suggesting that Congress didn't intend to allow qualified immunity at all. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 234–238 (2023). But even as judicial policymaking, it's a poor policy choice. In fact, this Court has countless times denied interlocutory review with reasoning that could be cut and pasted into the qualified-immunity context with minimal changes. *E.g.*, *Coopers*, 437 U.S. at 469; *Midland*, 489 U.S. at 799–802; *Cunningham*, 527 U.S. at 205–206; *Mohawk*, 558 U.S. at 107–112.

The best example is *Microsoft Corp.* v. *Baker*, 582 U.S. 23 (2017). There, class-action plaintiffs had tried to appeal the denial of class certification by stipulating to voluntary dismissal with prejudice. *Id.* at 27. The Court explained that allowing the appeal would have inflicted a "heavy cost . . . to the judicial system's overall capacity to administer justice." *Id.* at 28 (quotation marks omitted). The Court's reasoning in *Microsoft* applies with at least equal force to *Mitchell* appeals.

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

with Woods v. *Smith*, 60 F.3d 1161, 1167 (5th Cir. 1995). Just as in *Microsoft*, *Mitchell* appeals "allow indiscriminate appellate review of interlocutory orders" and disturb the relationship between trial and appellate courts. *Compare Microsoft*, 582 U.S. at 39, *with*, well, *Frias* v. *Hernandez*, 142 F.4th 803 (5th Cir. 2025).

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

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

the Federal Courts Study Committee 95 (1990).[3] It resulted in a category of orders that sometimes are and sometimes are not immediately appealable, depending on "the extent [to which they] turn[] on an issue of law." *Mitchell*, 472 U.S. at 530; *Johnson* v. *Jones*, 515 U.S. 304, 307 (1995). And it has led to boundless mission creep as the courts of appeals have interpreted *Mitchell*—combined with the "pride of place" qualified-immunity cases have on the Court's docket—as a signal to halt civil-rights cases at the earliest possible point. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 48, 82–88 (2018); Lammon, 87 Mo. L. Rev. at 1177–1187 (detailing how defendants and lower courts have tacked all sorts of ancillary issues onto *Mitchell* appeals, including evidence admissibility, municipal claims, *Heck* issues, state-law claims, and more).

Using rulemaking instead of case-by-case accretion would avoid all these pitfalls. It would allow for rules that are more flexible, more clear, and more doctrinally stable. And perhaps more importantly, it would avoid "subordinat[ing] what [Congress said] to what the Court

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[3] The Judicial Conference didn't call *Mitchell* out by name. It simply noted, somewhat obliquely, that the law of finality under Section 1291 "strikes many observers as unsatisfactory in several respects" and recommended that Congress delegate rulemaking authority to replace doctrines like "'practical finality' and especially the 'collateral order' rule." *Ibid.* But given the timing—more than four decades after *Cohen*, but only five years after *Mitchell*—the implication is hard to miss.

thinks is a good idea." *Mohawk*, 558 U.S. at 119 (opinion of Thomas, J.).

* * *

When the Court decided *Mitchell* v. *Forsyth* in 1985, Congress had not yet enacted the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089 (codified at 28 U.S.C. § 2072(c)), or the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506 (codified at 28 U.S.C. § 1292(e)), both of which granted this Court rulemaking power over interlocutory appeals. Nor was it clear the extent that interlocutory review of qualified-immunity denials would devolve into a jurisdictional free-for-all. Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 Green Bag 2d 199, 207–212 (2013). But with forty years' experience and the benefit of congressional guidance, the lesson is clear: *Mitchell* is Exhibit A in the case against the collateral-order doctrine. The Court should overrule the entire edifice, and it should start with *Mitchell*.

3. As this case shows, these mistakes have left appellate jurisdiction in disarray.

The officer defendant here appealed a denial not of qualified immunity but of *state*-law immunity. Pet. 1. The Fifth Circuit nevertheless asserted jurisdiction to reverse the district court. Pet. App. 6a. Its decision showcases the jurisdictional disarray *Mitchell* has wrought. *Cf.* Lammon, 87 Mo. L. Rev. at 1177–1187. To return order to the lower courts' exercise of interlocutory jurisdiction, this Court should reverse.

The Fifth Circuit's decisions extending *Mitchell* to state-law immunities turn on state law. If a State characterizes its immunity doctrine as an immunity from suit, a defendant can seek interlocutory review—by right. *Cantu*, 77 F.3d at 804 & n.3; *Sorey*, 849 F.2d at 963. In other words, the Fifth Circuit's rule "allows States to control [federal] jurisdiction." Pet. App. 17a (Oldham, J., concurring). Worse yet, because designating a defense an immunity from suit boils down to a policy decision that the immunity protects a value of an especially "high order," *Will*, 546 U.S. at 352, the Fifth Circuit's rule essentially means that a State can expand federal appellate jurisdiction simply by labeling an issue really, really "important." *See Lauro Lines*, 490 U.S. at 502–503 (Scalia, J., concurring).

This Court has rejected that approach. "In using the phrase 'final decisions,'" it has explained, "Congress obviously did not mean to borrow or incorporate state law." *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988). The Fifth Circuit's contrary rule is flatly mistaken and should be overruled. Even if *federal* courts have the power to override Congress and declare a nonfinal order too important to await final judgment, *but see Mohawk*, 558 U.S. at 118–119 (opinion of Thomas, J.), the *States* surely enjoy no such power. Their power over their own courts is plenary—and over the federal courts, nil. *Budinich*, 486 U.S. at 198–199; *Sheldon*, 49 U.S. (8 How.) at 449. So whether a district court's decision is a "final decision" under § 1291 is strictly "a matter of federal law." *Budinich*, 486 U.S. at 199.

Nor should the federal courts adopt, as a matter of federal common law, a rule of finality that borrows from state law. *Cf. Budinich*, 486 U.S. at 199–203. First, as this Court has explained, when poking holes in the barrier of finality, it's of paramount importance to do so with a "uniform," "bright-line rule"—rather than a state-by-state patchwork. *Id.* at 202–203. Second, appellate dockets are already clogged with interlocutory appeals of federal qualified immunity. Just three years after *Mitchell*, the Ninth Circuit was already lamenting that "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decision." *Schwartzman* v. *Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988).

And third, even accepting the premises of *Mitchell* and the collateral-order doctrine, only federal law can confer the kind of right against litigation that defeats the final-judgment rule. A *federal* right not to litigate must, in theory, be "reconcile[d]" with § 1291's finality rule. *United States* v. *Wampler*, 624 F.3d 1330, 1336 (10th Cir. 2010) (Gorsuch, J.). But a similar creature of *state* law needs no such reconciliation: Under the Supremacy Clause, Section 1291 controls.

The Fifth Circuit's decisions have "drift[ed] away" from that elementary principle. *Swint*, 514 U.S. at 45. In fact, the collateral-order doctrine has seen significant metastasis in that court. In *Asante-Chioke* v. *Dowdle*, for instance, it asserted interlocutory appellate jurisdiction over a routine discovery order because qualified immunity was present in the background. 103 F.4th 1126, 1127

(5th Cir. 2024). And in *Whole Woman's Health* v. *Jackson*, it extended interlocutory review to a private party who enjoyed no immunity whatever. 13 F.4th 434, 445–447 (5th Cir. 2021). Extending it to state-law immunities is part of the same pattern.

This Court should grant certiorari and reverse. Allowing piecemeal interlocutory appeals exacts a heavy cost on the judicial system, and the power to balance those costs against other values lies with Congress. *Microsoft*, 582 U.S. at 28; U.S. Const. art. III, § 1. Congress chose to favor finality, and its policy choice "warrants the Judiciary's full respect." *Cf. Swint*, 514 U.S. at 48. So does its choice to allow exceptions through "rulemaking," not "judicial decisions" or "inventive litigation ploys." *Microsoft*, 582 U.S. at 39. In taking finality into its own hands, the Fifth Circuit substituted judicial will for legislative judgment.

CONCLUSION

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

Respectfully submitted.

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