No. 25-653

In The

Supreme Court of the United States

SHANNON MCKINNON,

Petitioner,

v.

GENARO HERNANDEZ,

Respondent.

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

BRIEF OF MICHAEL E. SOLIMINE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Michael E. Solimine ("Professor Solimine") is the Donald P. Klekamp Professor of law at the University of Cincinnati College of law. He teaches and writes on appellate litigation, empirical studies of various aspects of civil litigation in federal and state courts, and the doctrinal implications of the similarities and differences between the institutional structures of federal and state courts, as well as the impact of decision making of judges on those courts. Professor Solimine is the author of *Are Interlocutory Qualified Immunity Appeals Lawful?* (2019), *Revitalizing Interlocutory Appeals in the Federal Courts* (1990) and *The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine* (2019), published in the Notre Dame Law Review Online, the George Washington Law Review and the Akron Law Review, respectively. He is also a co-author of *Cases and Materials on Appellate Practice and Procedure* (2005) published by Thomson/West. He has been awarded the Harold C. Schott Publication Prize in 2002, 2004 and 2006.

Professor Solimine submits this brief to inform the Court of the broader constitutional and empirical context that militates against the Fifth Circuit Court of Appeals decision in this case. Professor Solimine has no personal interest in the outcome of this case.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus curiae* affirms that no party or counsel for any party authored this brief in whole or in part and that no one other than *amicus curiae* or his counsel contributed any money that was intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *Amicus curiae* timely notified all parties of his intention to file this brief.

Counsel for Petitioner and Respondent consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Forty years ago, Justice Brennan stated that the Supreme Court's decision allowing a government official to seek interlocutory review of a district court's decision denying the government official's qualified immunity defense on a motion to dismiss "will give government officials a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals," and "will result in denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the caseload of the appellate courts." *Mitchell v. Forsyth*, 472 U.S. 511, 556 (1985) (Brennan, J., concurring in part and dissenting in part) (footnote omitted). His words were true in 1985, and—after Fifth Circuit's decision in *Frias v. Hernandez*, 142 F.4th 803 (5th Cir. 2025), affirming the extension of the scope of the collateral order doctrine to include denials of state-law immunities—are even truer now.

Frias exacerbates delay and expense costs to plaintiffs in 42 USC § 1983 ("Section 1983") cases by providing additional recourse to appellate courts for state officials for a new group of claims without conferring any corresponding benefit on plaintiffs or the courts. And while interlocutory review of denials of defense of qualified immunity drags out litigation thus imposing significant costs on plaintiffs, empirical research indicates that reversal rates are not high enough to justify that cost. The assumption that there would be a significant numbers of reversals at the appellate level underpinned the Supreme Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985),

which gave defendants the right to file interlocutory appeals of these denials. Therefore, it is respectfully submitted that this Court should grant the petition in order to re-examine and curtail the extension of the collateral order doctrine to denials of state-law immunities

ARGUMENT

I. The Delay Costs To Plaintiffs In Section 1983 Cases Caused By Interlocutory Appeals Are Exacerbated By The Extension Of The Collateral Order Doctrine To Denials Of State-law Immunities

In a 2024 study utilizing algorithms tested for reliability, the Institute of Justice analyzed federal appellate cases from 2010-2020 to review the "landscape of qualified immunity appeals in the federal appellate courts." Jason Tiezzi, et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill its Promises*, Inst. for Just., 4, 10 (Feb. 7, 2024). Interlocutory appeals comprise more than a third of appeals in qualified immunity litigation. *Id.* at 27. Furthermore, the average number of these appeals filed each year is growing. *Id.* at fn. 94 ("Interlocutory appeals of qualified immunity rose from an average of 165 during the first part of the study period (2010–2015) to 190 during the second half (2016–2020)—an increase of 15%."). Interlocutory appeals in general represented 96% of all appeals filed by defendants. *Id.* at 27.

The prevalence (and growth) of such interlocutory appeals may "explain why the median duration of a qualified immunity lawsuit . . . [is] three years and two

months, 23% longer" than the typical federal civil suit that is up on appeal. *Id.* Indeed, other empirical research has shown that interlocutory appeals contribute to the length of litigation, averaging more than one year (441 days) from filing to resolution. Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev., 1101, 1120 (2020).

The Institute of Justice focused on a particular case where the qualified immunity defense was raised at various stages of litigation to illustrate the delay costs to a plaintiff caused by interlocutory appeals of denials of the defense. In *Mathis v. Cnty. of Lyon*, No. 2:07-CV-00628-APG, 2014 WL 1413608 (D. Nev. Apr. 11, 2014), *aff'd*, 591 Fed. Appx. 635 (9th Cir. 2015), defendants filed interlocutory appeals of the trial court's denials of qualified immunity defense at the motion to dismiss and summary judgment stages and then filed an appeal of the final verdict awarding plaintiffs damages (raising the qualified immunity defense for yet a third time on appeal). All of those appeals were lost by the defendant officials. The judgment against those officials was finally satisfied in May 2019, a staggering 12 years after the lawsuit commenced. Jason Tiezzi, et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill its Promises*, Inst. for Just. (Feb. 7, 2024), at 27-28.

Relatedly, the United District Court for the Northern District of Ohio has noted that "an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in

place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal," given that "the [Sixth Circuit Court of Appeals] affirm district courts' denials of immunity at astoundingly high rates." *Wheatt v. City of E. Cleveland*, No. 1:17-CV-377, 2017 U.S. Dist. LEXIS 200758, at *10 (N.D. Ohio Dec. 6, 2017) (citing Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 40 (2017)); *see also Abel v. Miller*, 904 F.2d 394, 396 (7th Cir. 1990) (internal citation omitted) ("Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail."); David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives,* 93 Denv. L. Rev. 629, 673 (2021) ("[S]imply filing the interlocutory appeal wins at least a battle for the defense by forcing a delay and imposing costs on the other side . . . .").

More broadly, Schwartz's dataset, consisting of interlocutory appeals made to the Third, Fifth, Sixth, Ninth and Eleventh Circuit Courts of Appeal from district court cases filed between January 1, 2011 to December 31, 2012, shows that only 12.2% of these appeals resulted in reversals. *Id.* at 19, 40. Of the 5 interlocutory appeals made to the Fifth Circuit Court of Appeals from the United States District Court for the Southern District of Texas during this period, none resulted in reversal. *Id.* Even more broadly, in analyzing all cases in her dataset in which the defense of qualified immunity could be raised—

whether at the motion to dismiss stage, the summary judgment stage, and/or on interlocutory appeal—Schwartz found that the defense terminated just 3.9% of cases even though defendants raised the defense in more than 37% of these cases. *Id.* at 60. But even if raising the defense of qualified immunity resulted in more dismissals, it still would not be clear if that immunity from suit saved the parties and the courts' time, because the time and effort necessary to resolve qualified immunity motions and appeals is so substantial that the pretrial costs incurred by invoking the defense may be more than the trial cost saved by the defense. *Id.* at 60-61 (citing Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law,* 47 Am. U. L. Rev. 1, 100 (1997)).

As Professor Solimine noted in his previous work, district court judges with whom he has spoken all believed that defendants used interlocutory appeals of denials of qualified immunity as a "delaying tactic that hampered litigation that would otherwise be tried to settled relatively quickly." Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1191 (1990).

But even if an interlocutory appeal is baseless to the point of being potentially sanctionable, there is little deterrent against filing such an appeal solely for the purpose of delay because sanctions are rarely granted. *See, e.g.,* Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 Mo. L. Rev. 1137, 1197 (2023) (for the period of 1995 to 2022, finding that there were only 4 instances of sanctions being granted in connection with interlocutory appeals of denials of qualified immunity defense at

summary judgment stage that improperly challenged the factual basis of the denial in violation of *Johnson v. Jones*, 515 U.S. 304 (1995)).

The Cato Institute has correctly noted that defendants' right to immediate appeal of denials of qualified immunity defense requires civil rights plaintiffs to "win twice in a row"—once at the district court level and again at the appellate level—just to get before a jury. Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Inst. Pol'y Analysis at 9 (Sept. 14, 2020). Moreover, "[t]he cost of pretrial appellate litigation can easily exhaust the limited resources of civil rights plaintiffs and induces plaintiffs to settle before their case can go to trial, often on far less favorable terms than they would have in the absence of these litigation costs." *Id.*; *see also* Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101, 1121 (2020) (interviews with plaintiffs' counsel practicing in federal courts in California, Florida and Pennsylvania reporting that defense counsel use interlocutory appeals strategically to wear down plaintiffs' counsel); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1890 n.23 (2018) (in her discussions with 6 defense attorneys in Ohio concerning the qualified immunity defense, Professor Karen Blum informed that "[d]elay, of course, works to the defendant's advantage, and a typical interlocutory appeal will delay proceedings by roughly one year," and that "[t]he threat of appeal and delay also works to leverage a settlement with the plaintiff.").

Indeed, plaintiffs' attorneys have also reported that the availability of interlocutory appeals of qualified

immunity defenses may discourage them from taking on Section 1983 cases in the first instance because such appeals normally stays discovery, and while the stay is in place, "evidence may become stale" and "witnesses may disappear." Alexander Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 493-94 (2011).

The foregoing demonstrates that the delay created by interlocutory appeals significantly benefits defendant officials by making the cases against them harder to litigate and more costly for plaintiffs, but the low reversal rates should cause this Court to reconsider whether the burden placed on plaintiffs and appellate courts having to hear these appeals has become too great. While the Supreme Court stated that protecting government officials from the burdens of discovery and trial serves as one of the bases for allowing interlocutory appeals of denials qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985), nonetheless,

> interlocutory appeals of qualified immunity denials infrequently serve that function. Defendants filed interlocutory appeals of 21.7% of decisions denying qualified immunity in whole or part. Of the appeals that were filed, just 12.2% of the lower court decisions were reversed in whole, and just 9.8% of the interlocutory appeals filed resulted in case dismissals. Interlocutory appeals may have prompted case resolutions in

> another way—39.0% of interlocutory appeals were never decided, apparently because the cases were settled while the motions were pending. But defendants' interlocutory appeals rarely resulted in case dismissals on qualified immunity grounds. It is far from clear that interlocutory appeals shield defendants from litigation burdens—the time and money spent briefing and arguing interlocutory appeals may in fact exceed the time and money saved in the relatively few reversals on interlocutory appeal.

Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 74-75 (2017). Thus, the practical reality of interlocutory appeals of denials of qualified immunity defense is that plaintiffs pay what is effectively a delay tax, while defendants rarely obtain reversals, thereby undermining one of the rationales for the exception to the rules against interlocutory appeals.

Substantial empirical evidence shows that interlocutory appeals of qualified immunity denials at the pleading and summary judgment stages impose significant delay and expense on plaintiffs. This underscores the need to reexamine and limit the Fifth Circuit's expansion of the

collateral order doctrine to denials of state-law immunities.[2]

II. When Viewed In The Light Of Practical Realities, The Inherent One-Sided Benefit That Interlocutory Appeals Of State-law Immunities Confers On Defendants Inappropriately Discourages Potentially Meritorious Suits By Plaintiffs

While defendants have a right to seek interlocutory review of a denial of qualified immunity defense, plaintiffs do not have a right to seek interlocutory review of a grant of qualified immunity defense, making this right a one-sided benefit in favor of defendants. However, the benefit extends further. The right of interlocutory review may discourage plaintiffs from pursuing meritorious claims because the costs associated with interlocutory appeals. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 61-62 (2017); Alexander A. Reinert, *Does*

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[2] Limiting the collateral order doctrine to exclude denials of state-law immunities would not necessarily deprive the appellant here of any interlocutory appellate recourse. As I noted my prior scholarship, permissive interlocutory appeals pursuant to 28 USC § 1292(b), which has been favorably cited by the Supreme Court, are an option for litigants seeking interlocutory review. *See* Michael E. Solimine, *The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine*, 53 Akron L. Rev. 607, 610-12 (2019) (citations omitted). Moreover, this Court has previously placed limits on the scope of the collateral order doctrine in qualified immunity cases. *See, e.g., Swint v. Chambers County*, 514 U.S. 35 (1995) (no authority to hear a pendent party's appeal in conjunction with an interlocutory appeal of the qualified immunity defense); *Johnson v. Jones*, 515 U.S. 304 (1995) (collateral order appeal not appropriate when facts underlying qualified immunity defense or disputed). The present case similarly calls for such limits.

Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477, 491-495 (2011) (describing conversations with more than forty attorneys and law firms, each of which had experience with multiple *Bivens* actions from 2006 to 2017, and reporting that the availability of interlocutory appeal or the likelihood of stays of discovery pending resolution of the qualified immunity defenses, among other factors, affected counsel's case-screening decisions). In this way, interlocutory review of qualified immunity defenses may not be carrying out the intended function of shielding defendants from insubstantial cases or coercing settlement of them at public expense. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 61-62 (2017); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982) (discussing qualified immunity's goal of preventing "insubstantial claims" from proceeding to trial). Instead, defendants are receiving the extra (and unintended) benefit of being shield from meritorious claims.

It is respectfully submitted that the chilling effect created by interlocutory review is only exacerbated by the Fifth Circuit's "supercharging" this right here by allowing defendants to now seek interlocutory review of denials of state-law immunities.

CONCLUSION

For the forgoing reasons, the Court should grant the petition.

Dated: December 18, 2025

Respectfully submitted,

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