

IN THE
Supreme Court of the United States

EDUARDO RAMIREZ, NOE CASTILLO,
BASILIO D. VILLAREAL, JR., ROEL GONZALEZ,

Petitioners,

v.

MARIN LOPEZ, PEDRO BERMEA, TRINIDAD
LOPEZ, ARTURO MENCHACA, ELADIO BERMUDEZ,
JAVIER GARCIA, ROBERT GUERRA, LUIS CARLOS
GONZALEZ, EPIGMENIO “TJ” GONZALEZ, JUAN
GARCIA, JR., JULIO EGUIA, AARON GARCIA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by holding that the district court's order denying Petitioners' motion to dismiss based on qualified immunity and requiring Petitioners to mediate before the district court considers and decides Petitioners' qualified immunity is not immediately appealable under the collateral order doctrine.

PARTIES TO THE PROCEEDING

The Petitioners, Eduardo Ramirez, Noe Castillo, Basilio D. Villareal Jr., and Roel Gonzalez, are individuals and were Defendants-Appellants below.

The Respondents, Marin Lopez, Pedro Bermea, Trinidad Lopez, Arturo Menchaca, Eladio Bermudez, Javier Garcia, Robert Guerra, Luis Carlos Gonzalez, Epimenio “TJ” Gonzalez, Juan Garcia, Jr., Julio Eguia, Aaron Garcia, are individuals and were Plaintiffs-Appellees below.

RELATED PROCEEDINGS

Marin Lopez et al v. Rio Grande City Consolidated Independent School District, et al., No. 7:20-cv-0033, in the United States District Court for the Southern District of Texas, McAllen Division, order entered on March 31, 2025.

Marin Lopez; Pedro Bermea; Trinidad Lopez; Arturo Menchaca; Eladio Bermudez; Javier Garcia; Robert Guerra; Luis Carlos Gonzalez; Epimenio “TJ” Gonzalez; Juan Garcia, Jr.; Julio Eguia; Aaron Garcia v. Eduardo Ramirez, Noe Castillo, Basilio D. Villareal Jr., and Roel Gonzalez, No. 25-40170, in the United States Court of Appeals for the Fifth Circuit, judgment entered on April 1, 2026.

Marin Lopez; Pedro Bermea; Trinidad Lopez; Arturo Menchaca; Eladio Bermudez; Javier Garcia; Robert Guerra; Luis Carlos Gonzalez; Epimenio “TJ” Gonzalez; Juan Garcia, Jr.; Julio Eguia; Aaron Garcia v. Eduardo Ramirez, Noe Castillo, Basilio D. Villareal Jr., and Roel Gonzalez, No. 23-40461, in the United States Court of Appeals for the Fifth Circuit, judgment entered on March 15, 2024.

Marin Lopez; Pedro Bermea; Trinidad Lopez; Arturo Menchaca; Eladio Bermudez; Javier Garcia; Robert Guerra; Luis Carlos Gonzalez; Epimenio “TJ” Gonzalez; Juan Garcia, Jr.; Julio Eguia; Aaron Garcia v. Eduardo Ramirez, Noe Castillo, Basilio D. Villareal Jr., and Roel Gonzalez, No. 21-40235, in the United States Court of Appeals for the Fifth Circuit, judgment entered on August 10, 2022.

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OPINIONS BELOW

The unpublished opinion of the Fifth Circuit filed on May 27, 2026, in *Marin Lopez v. Eduardo Ramirez*, No. 25-40170, 2026 WL 1481275 (5th Cir May 27, 2026), is set forth at App. A, pages 1a-12a.

The published opinion of the Fifth Circuit filed on July 9, 2026, denying petition for rehearing *en banc* and the opinions of Judge Jerry E. Smith and Judge James C. Ho dissenting from the denial of rehearing *en banc*. *Marin Lopez v. Eduardo Ramirez*, 181 F.4th 593 (5th Cir. 2026), is set forth at App. C, pages 16a-29a.

JURISDICTION

The Fifth Circuit entered judgment against Petitioners on April 1, 2026, and denied Petitioners' petition for rehearing *en banc* on July 9, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1) and Supreme Court Rule 13 because Petitioners filed this petition on the 90th day after the Fifth Circuit denied Petitioners' petition for rehearing *en banc*.

Petitioners seek the Court's review under Supreme Court Rule 10 because the Fifth Circuit entered a decision in conflict with another United States Court of Appeals on the same important matter, because the Fifth Circuit has decided an important federal question in ways that conflict with relevant decisions of this Court, and because the Fifth Circuit's opinion raises an important federal question that should be settled by this Court.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

28 U.S.C §1291

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.

STATEMENT

A. The dispute and the proceedings in the district court.

In 2018, twelve employees of the Rio Grande City Consolidated Independent School District sued three members of the district school board and the district's former interim superintendent under 42 U.S.C. § 1983 alleging they were demoted, reassigned and subjected to pay cuts in retaliation for their speech. (App. 3a). Petitioners moved to dismiss Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6) based on absolute legislative immunity and qualified immunity. (App. 3a). The district court denied the motion without prejudice to

refiling the motion as a motion for summary judgment. (App. 3a). Petitioners appealed. The Fifth Circuit vacated and remanded the case with instructions to “reassess [Defendants’] motion on a plaintiff-by-plaintiff, defendant-by-defendant basis and assign reasons for its subsequent decision.” (App. 3a) (modification by the court).

On remand, the district court allowed Plaintiffs to file an amended complaint. (App. 3a). Petitioners again moved to dismiss Plaintiffs’ complaint on immunity grounds. (App. 3a). The district court denied the motion without explanation in a minute entry order. (App. 3a). Petitioners appealed. (App. 3a). The Fifth Circuit vacated and remanded the case a second time. (App. 3a-4a).

Petitioners filed their motion to dismiss a third time. (App. 4a). The district court heard argument on the motion. (App. 4a, 13a). On March 31, 2025, the district court issued a mediation order. (App. 4a, App. 13a-15a). The district court ordered the parties to mediate with the magistrate judge, denied without prejudice all pending motions, including Petitioners’ motion to dismiss, and cancelled all scheduling order deadlines and pending settings. (App. 14a). The district court ordered each party to be present for the entire mediation and directed the parties to “endeavor in good faith to resolve the case.” (App. 14a).

B. The proceedings in the Fifth Circuit.

Petitioners filed their third notice of appeal on April 4, 2025. (App. 22a). On May 6, 2025, Plaintiffs’ counsel advised the magistrate judge that settlement was unlikely. (App. 22a). On June 25, 2025, the magistrate judge

entered an order agreeing not to conduct mediation. (App. 22a-23a). The parties submitted their briefs to the court of appeals. (App. 21a n.4). In their brief, Plaintiffs agreed that the mediation order is reviewable under the collateral order doctrine. (App. 21a n.4).

The Fifth Circuit panel raised the question of appellate jurisdiction *sua sponte*. (App. 21a n.4). The panel unanimously dismissed the appeal for want of appellate jurisdiction. (App. 2a). Petitioners petitioned for rehearing en banc. (App. 2a). The panel treated the motion as a motion for panel rehearing, granted rehearing, withdrew its prior opinion and substituted a new opinion. (App. 2a).

In its new opinion, the panel acknowledged that the district court denied Petitioners' motion to dismiss, but held that the district court's order is not appealable because the district court denied the motion "without prejudice as an incident of referring the case to mediation," "made plain that the immunity question could be taken up after mediation concluded on a refiled motion to dismiss," and cancelled "all scheduling-order deadlines and pending settings." (App. 7a). "Given the peculiar (and tortured) procedural history of this case and given that the parties and the magistrate judge immediately concluded that the ordered mediation would not be productive, the district court's order did not impose the litigation burdens immunity is designed to prevent," the panel concluded. (App. 7a). The panel characterized the order as, "in substance, a case-management deferral pending a discrete, non-binding event that Defendants emphasize never occurred. Not a conclusive determination of anything." (App. 10a-11a).

The Fifth Circuit denied Petitioners’ petition for rehearing en banc, with seven judges voting for rehearing. (App. 17a). Judge Jerry E. Smith and Judge James C. Ho dissented. (App. 18a-29a). Judge Smith wrote that the mediation order is an appealable order, because “the judge either (1) refused to rule, awaiting ‘mandatory’ mediation, or (2) actually ruled by denying the QI motion to dismiss.” (App. 21a-22a). Both dissenting judges observed that the district court’s order defeated the objectives of qualified immunity. (App. 24a, App. 27a). Judge Smith wrote that mediation “adds time and expense, in contravention of the principle that a QI defendant is entitled to an ‘immediate appeal.’” (App. 24a.) “Worse still, this panel has drawn a handy roadmap for district judges who are not fond of QI to delay—seemingly indefinitely—the ability of QI defendants to take interlocutory appeals,” Judge Smith wrote further. (App. 24a). Judge Smith warned that the court’s opinion would allow any district judge to “force a mediation settlement offer from a QI defendant as a condition, ultimately, of being able to appeal once mediation has concluded.” (App. 24a).

Judge Smith also decried the panel’s apparent reliance on the magistrate judge’s determination, made after Petitioners appealed, that mediation should not proceed. (App. 23a). The panel “implied[d] that . . . any established appellate jurisdiction retroactively dissolved into thin air, ‘*nunc pro tunc*.’” (App. 23a). Whereas “[t]he parties are entitled to know from the face of a QI order, whether there is jurisdiction to take a collateral-order appeal,” Judge Smith continued, “the panel’s inventive approach only clouds what should be a matter of certainty.” (App. 23a-24a).

REASONS FOR GRANTING THIS PETITION

I. The Court should grant certiorari in order to resolve a conflict between the Fifth Circuit and Eleventh Circuit.

Orders denying qualified immunity are appealable under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). “[T]his Court has been careful to say that a district court’s order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a ‘final decision.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). Orders denying qualified immunity are immediately appealable because qualified immunity “is an *immunity from suit*” that “is effectively lost if a case goes to trial,” and having been lost is “effectively unreviewable on appeal from a final judgment.” *Mitchell*, 472 U.S. at 526-27 (emphasis in the original).

The Fifth Circuit held that the district’s court’s order denying qualified immunity is not really an order denying qualified immunity because the district court ordered the parties to mediate. The court characterized the order as a mere “case management deferral pending a discrete, non-binding event.” (App. 10a-11a).

The Fifth Circuit’s holding squarely conflicts with the Eleventh Circuit’s conclusion *Bouchard Transp. Co. v. Florida Dept of Environmental Protection*, 91 F.3d 1445 (11th Cir. 1996). In *Bouchard*, the district court ordered the parties to mediate without first ruling on the defendant’s motion to dismiss based on Eleventh Amendment immunity. *Id.* at 1446. The Eleventh Circuit found appellate jurisdiction because the order to mediate

“effectively denied [the defendant] the right not to participate in this litigation.” *Id.* at 1448.

II. The Court should grant certiorari because the Fifth Circuit’s opinion conflicts with this Court’s precedent in a manner that undermines the objectives of qualified immunity.

The conflict that the Fifth Circuit’s opinion in this case creates is highly consequential. Left uncorrected, the Fifth Circuit’s opinion may be used by lower courts to thwart the objectives of qualified immunity. Judge Smith said it best: “this panel draws a handy roadmap for district judges who are not fond of QI to delay—seemingly indefinitely—the ability of QI defendants to take interlocutory appeals.” (App. 24a).

To see why the dissents below are correct, one needs only to consider qualified immunity’s objective of safeguarding the public’s interest in having officials act “with independence and without fear of consequences.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). The relevant consequences “include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens of from acceptance of public office.” *Id.* at 814. “Litigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.” *Iqbal*, 556 U.S. at 685. The necessity of avoiding these “heavy costs” is why this Court stresses “the importance of resolving immunity questions at the earliest possible stage in litigation.” *Pearson v. Callahan*, 555 U.S. 223,

232 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

The costs to the government that qualified immunity is designed to avoid are not limited to burdens explicitly imposed by a court order. “It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. . . . Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.” *Iqbal*, 556 U.S. at 685-86.

Indeed, the very threat of litigation is one of the burdens qualified immunity is designed to prevent. *Roth v. City of Hermitage*, 709 Fed. Appx. 733, 735 (3rd Cir. 2017) A “stay order [that] does not immediately subject [the defendant] to ‘the personal costs and aggravations of presenting a defense’ . . . still subjects him to the continued threat of future litigation.” *Id.* (citation omitted).

In this case, the Fifth Circuit concluded that the concerns underpinning qualified immunity do not apply if an order can be characterized as a mere “case management deferral pending a discrete non-binding event.” (App. 11a). But, as Judge Ho observed, “[m]ediation is much more than that. It’s a method of alternative dispute resolution. As such, mediation is (by definition) an ‘alternative’ to trial.” (App. 27a) (citing *BPX Prod. Co. v. Certain Underwriters at Lloyd’s London*, 2025 WL 2952911, *3 (5th Cir.)).

Judge Ho’s observation is correct. Mediation, like other parts of the litigation process, imposes burdens on governmental defendants. Mediation “adds time

and expense, in contravention of the principle that a QI defendant is entitled to an ‘immediate’ appeal.” (App. 24a) (Smith, J., dissenting). “An unsuccessful mediation will postpone the ultimate resolution of the case . . . and, thus, prolong the litigation.” *In re Atlantic Pipe Corp.*, 304 F.3d 135, 147 (1st Cir. 2002).

When a court orders mediation and defers a ruling on governmental immunity, the governmental defendant is burdened by a continuing threat of litigation. *Roth*, 709 Fed. Appx. at 735. More than the prolonged threat of litigation, the governmental defendant must prepare (and pay his attorney to prepare) for mediation by evaluating the case, formulating a settlement position, and drafting a memorandum or position statement for the mediator. The governmental defendant and his attorney must be present for mediation, which “may be short or lengthy.” (App. 24a). The governmental defendant who fails to prepare for and participate in mediation may be subject to the district court’s authority to impose sanctions. *See, e.g., Negron v. Woodhull Hosp.*, 173 Fed. Appx. 77, 79 (2nd Cir. 2006) (recognizing court’s authority to sanction a defendant for failing to comply with mediator’s instructions); *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590, 596-97 (8th Cir. 2001) (affirming monetary sanctions against the defendant for failing to submit a memorandum to the mediator and sending a representative with limited authority to mediation).

The Fifth Circuit’s opinion undermines qualified immunity by “giving a license to district judges to require mediation before having to rule on QI,” and thereby “force a mediation settlement offer from a QI defendant as a condition . . . of being able to appeal” the denial of qualified

immunity. (App. 24a). Worse still, there is no reason why the court of appeals' approach would be limited to orders compelling mediation. After all, one might describe any number of orders as a "case management deferral pending a discrete non-binding event." Before ruling on qualified immunity, a district court might order a party to provide a short deposition, answer interrogatories, or submit to an inspection. After all, these are also "discrete non-binding events," and a district court can state he or she is simply engaging in "case management." The Court should grant certiorari and correct the Fifth Circuit's error before the error metastasizes.

III. The Court should grant certiorari because the Fifth Circuit adopted a merits bound and case specific approach to determining whether an order is immediately appealable that conflicts with the categorical approach this Court's precedent requires.

Of equal consequence, the Fifth Circuit's opinion replaces certainty with confusion on the question of when an order denying qualified immunity may be immediately appealed. The Fifth Circuit held that the district court's order denying Petitioners' motion to dismiss is not appealable because of the district court's stated reason for denying the motion—to order mediation—and because of an event that occurred after Petitioners appealed—the magistrate judge's decision that mediation would not proceed.

The Fifth Circuit's merits bound, and case specific approach squarely contradicts the categorical approach this Court applies in determining whether an order is appealable. The Court identifies immediately appealable

collateral orders “by category, not case-specific circumstances.” *Geo Group, Inc. v. Menocal*, 607 U.S. 438, 444 (2026). “This Court . . . has expressly rejected efforts to reduce the finality requirement of §1291 to a case-by-case determination of whether a particular ruling should be subject to appeal.” *Richardson-Merrell v. Kohler*, 472 U.S. 424, 439 (1985) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 362, 473-75 (1978)). “The potential waste of resources” occasioned by such a case-by-case approach “is plain.” *Coopers & Lybrand*, 437 U.S. at 473.

The problems posed by the Fifth Circuit’s merits bound and case-specific evaluation are particularly acute where the order in question denies qualified immunity. The Fifth Circuit’s approach creates doubt about whether any given order denying qualified immunity is immediately appealable. And the only possible way for a governmental defendant to resolve such doubt is to appeal and have the appellate court decide whether the order is in fact appealable. The resulting delay in obtaining a determination of qualified immunity is obvious.

This case illustrates the problem. The district court denied Petitioners’ motion to dismiss three times, and Petitioners appealed three times. On the first two appeals, the Fifth Circuit exercised appellate jurisdiction and vacated each order. But on the third appeal, the Fifth Circuit concluded that the order was not appealable. The only discernable differences between the third order and the first two orders are the district court’s reason for denying the third motion to dismiss (to order the parties to mediate) and what happened after Petitioners appealed (the magistrate judge decided mediation would not proceed).

This Court's precedent teaches that whether an order is appealable under the collateral order doctrine is a categorical determination because that is what certainty and economy require. *Geo Group*, 607 U.S. at 444. The Fifth Circuit replaces certainty with guess work and in doing so undermines the objectives of qualified immunity. The Fifth Circuit's approach requires a governmental defendant to first obtain a merits-bound determination of whether an order denying qualified immunity is appealable before the defendant may obtain a determination of the merits of the appeal. Such satellite litigation by definition compounds the litigation burdens that qualified immunity is designed to avoid. The Court should grant certiorari to prevent the Fifth Circuit's error from proliferating.

CONCLUSION

The Fifth Circuit's holding that the district court's order denying qualified immunity is not an appealable order conflicts with the conclusion reached by the Eleventh Circuit and with this Court's precedent, which teaches both that district courts must determine qualified immunity at the earliest possible stage in the litigation and that the determination of whether an order is appealable under the collateral order doctrine is categorical, and is not made on a case-by-case basis. The Fifth Circuit's holding undermines the objectives of qualified immunity and, as the Fifth Circuit dissenters observed, invites mischief. Petitioners request the Court to grant certiorari, correct the Fifth Circuit's error and remand this case to the Fifth Circuit for a determination of Petitioners' qualified immunity.

Respectfully Submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT,
FILED MAY 27, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-40170

MARIN LOPEZ; PEDRO BERMEA; TRINIDAD
LOPEZ; ARTURO MENCHACA; ELADIO
BERMUDEZ; JAVIER GARCIA; ROBERT GUERRA;
LUIS CARLOS GONZALEZ; EPIGMENIO “TJ”
GONZALEZ; JUAN GARCIA, JR.; JULIO EGUIA;
AARON GARCIA,

Plaintiffs-Appellees,

v.

EDUARDO RAMIREZ; NOE CASTILLO; BASILIO
D. VILLAREAL, JR.; ROEL GONZALEZ,

Defendants-Appellants.

Filed May 27, 2026

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:20-CV-33

*Appendix A***ON PETITION FOR PANEL REHEARING**

Before WILLETT, WILSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is GRANTED. *See* 5TH CIR. R. 35 I.O.P. Our prior panel opinion, *Lopez v. Ramirez*, No. 25-40170, 2026 WL 893104 (5th Cir. Apr. 1, 2026) (unpublished), is WITHDRAWN and the following opinion is SUBSTITUTED therefor:

This is the third interlocutory appeal following the district court’s denial of an immunity-based motion to dismiss in a First Amendment retaliation suit brought by twelve school-district employees against three school-board members and a former interim superintendent. Twice before we have vacated the district court’s orders and remanded because it denied Defendants’ motions without analysis. This time, the district court referred the case to mediation and, in the same order, denied Defendants’ motion without prejudice to refile the same after mediation concluded. Because the district court’s mediation order was not an appealable final decision for purposes of 28 U.S.C. § 1291, we DISMISS for lack of jurisdiction.

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

*Appendix A***I**

Twelve employees of the Rio Grande City Consolidated Independent School District allege that after they publicly supported a slate of candidates in a 2018 school-board election, they were demoted, reassigned, and subjected to pay cuts in retaliation for their speech. They brought First Amendment retaliation claims under 42 U.S.C. § 1983 against board members Eduardo Ramirez, Noe Castillo, and Basilio D. Villareal, Jr., and former interim superintendent Roel Gonzalez. Defendants moved to dismiss on multiple grounds including absolute legislative immunity and, alternatively, qualified immunity.

The district court denied Defendants’ motion “without prejudice to refiling as a motion for summary judgment” in a minute-entry order with no analysis or reasons given. Defendants filed their first interlocutory appeal. We vacated and remanded “to allow the district court to reassess [Defendants]’ motion on a plaintiff-by-plaintiff, defendant-by-defendant basis and assign reasons for its subsequent decision.” *Lopez v. Ramirez*, No. 21-40235, 2022 WL 3230442, at *2 (5th Cir. Aug. 10, 2022) (per curiam) (unpublished) (*Lopez I*). On remand, the district court permitted Plaintiffs to file an amended complaint. Defendants again moved to dismiss on immunity grounds among others, and the district court again denied the motion in a similar minute-entry order without explanation. And we again vacated and remanded, observing that “for the second time, the district court not only provided no individualized analysis as to each officer’s entitlement to either legislative or qualified immunity, it

Appendix A

provided no analysis period.” *Lopez v. Ramirez*, No. 23-40461, 2024 WL 1168048, at *2 (5th Cir. Mar. 15, 2024) (per curiam) (unpublished) (*Lopez II*).

On the second remand, Defendants refiled their motion to dismiss. The district court heard argument on the motion and noted that it “w[ould] issue [a] ruling.” On March 31, 2025, the district court issued a mediation order that acknowledged “[c]urrently before the Court is a Motion to Dismiss of the Defendants,” observed the suit’s “extensive procedural history,” and found “the parties would benefit from proceeding before a Magistrate in a mediation setting.” The order referred the parties to a magistrate judge for mediation, and provided:

Rule 16 Scheduling Order deadlines and pending settings are hereby cancelled. All pending motions are denied without prejudice to refiling same in writing within seven (7) days after Notice from Magistrate Judge Hacker to this Court that mediation has concluded if the mediation was unsuccessful and without any waiver of a substantive or procedural right of any party with regard to any motion which may be filed or refiled.

Defendants timely noticed this third interlocutory appeal. In the interim, the parties “almost immediately” reported to the magistrate judge that mediation would be unproductive. The magistrate judge “agreed not to conduct the mediation.”

*Appendix A***II**

We begin, as always, with jurisdiction. *Backe v. LeBlanc*, 691 F.3d 645, 647 (5th Cir. 2012) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)). Both parties contend that the collateral order doctrine supplies appellate jurisdiction here. But neither addressed whether that doctrine reaches an order that denied Defendants' immunity-based motion to dismiss only as an incident of a mediation referral and without prejudice to refile the same if mediation failed. We requested supplemental briefing on that point. Having reviewed the parties' responses, we hold that it does not.

Our jurisdiction is limited to appeals from "final decisions" of the district courts. 28 U.S.C. § 1291. The collateral order doctrine, however, permits immediate appellate review of a "small class" of interlocutory orders "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). The doctrine is narrow by design, and its conditions are "stringent." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

Orders denying dispositive pretrial motions asserting immunity from suit ordinarily satisfy that standard, and the same is true of orders that decline or refuse to rule on an immunity claim. *See Walton v. City of Verona*, 82 F.4th 314, 320 (5th Cir. 2023) (collecting cases); *Helton*

Appendix A

v. Clements, 787 F.2d 1016, 1017 (5th Cir. 1986). Such an order, the Supreme Court has explained, “conclusively” determines the immunity question in either of two ways. *See Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). First, “it may represent the trial court’s conclusion that even if the facts are as asserted by the defendant, the defendant’s actions . . . are [] not within the scope of the qualified immunity.” *Id.* Second, the court “may rule only that if the facts are as asserted by the plaintiff, the defendant is not immune.” *Id.* In either case, the order is effectively unreviewable on later appeal because it deprives the defendant of immunity’s protection against “standing trial” and avoiding the burdens of “such pretrial matters as discovery” where possible. *Id.* at 526 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982)); *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996); *Helton*, 787 F.2d at 1017. Once those burdens are imposed, the right immunity confers cannot be remedied on appeal from final judgment. *Mitchell*, 472 U.S. at 526-27 (citing *Harlow*, 457 U.S. at 816-19).

These principles explain why we had jurisdiction to consider the first two interlocutory appeals in this case. In the first, the district court “denied” Defendants’ immunity-based motion to dismiss “without prejudice to refile as a motion for summary judgment.” *Lopez I*, 2022 WL 3230442, at *1. In the second, the court “summarily denied Defendants’ motion without prejudice in a minute-entry order.” *Lopez II*, 2024 WL 1168048, at *1. Each conclusively rejected an immunity-based defense at the pleadings stage, addressed an issue distinct from the merits, and required Defendants continue litigating

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despite their asserted right not to, which could not be meaningfully reviewed after final judgment.

The mediation order before us is different. True, the court “denied” all pending motions, including Defendants’ motion to dismiss. But it did so without prejudice as an incident of referring the case to mediation. The court made plain that the immunity question could be taken up after mediation concluded on a refiled motion to dismiss and preserved Defendants’ “substantive or procedural right[s] . . . with regard to any motion which may be filed or refiled.” At the same time, the court effectively suspended the litigation by canceling all scheduling-order deadlines and pending settings. This is not the order of a court that “intends to have nothing further to do . . . with the motion.” *Ueckert v. Guerra*, 38 F.4th 446, 450 (5th Cir. 2022) (quoting *State Nat. Bank of El Paso v. United States*, 488 F.2d 890, 893 (5th Cir. 1974)). Nor is it a flat “refusal to rule on a claim of immunity until trial.” *Helton*, 787 F.2d at 1017.

Put plainly, the order did not conclusively deny Defendants’ asserted immunity; the district court offered no analysis of the issue whatsoever. Given the peculiar (and tortured) procedural history of this case, and given that the parties and the magistrate judge immediately concluded that the ordered mediation would not be productive and therefore would not be conducted, the district court’s order did not impose the litigation burdens immunity is designed to prevent.

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Defendants highlight *Carswell v. Camp*, 54 F.4th 307 (5th Cir. 2022), and *Ashley v. Clay County*, 125 F.4th 654 (5th Cir. 2025), as compelling an opposite result. Both are distinguishable. In *Carswell*, the district court issued a scheduling order that denied an immunity-based motion to dismiss without prejudice, “postponed ruling on the immunity issue until summary judgment,” and permitted discovery against the individual defendants in the meantime. 54 F.4th at 309-11. We found that arrangement “‘effectively . . . denied [defendants] the benefits of the qualified immunity defense’ and ‘vest[ed] this court with the requisite jurisdiction to review the discovery order.’” *Id.* at 311 (quoting *Wicks v. Miss. State Emp. Servs.*, 41 F.3d 991, 994 (5th Cir. 1995)). The mediation order here did the opposite. It cancelled all scheduling-order deadlines, halted pending settings, and preserved Defendants’ substantive and procedural rights. The hallmark of *Carswell*, the imposition of active litigation burdens despite an unresolved immunity claim, is absent here.

Ashley is the closer case but is equally unavailing. There, a former hospital employee sued Clay County and its county-owned hospital, alleging First Amendment retaliation and a violation of the Texas Occupations Code. *Ashley*, 125 F.4th at 657-58. The hospital moved to compel arbitration under an employment agreement. *Id.* at 658. The County asserted governmental immunity under Texas law and moved to dismiss. *Id.* Rather than address the County’s immunity defense, the district court *sua sponte* compelled the County to arbitrate alongside the hospital and denied the County’s motion to dismiss as moot. *Id.* We held that the district court’s refusal to address the issue

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of the County's immunity before compelling arbitration and denying the County's motion to dismiss constituted a "final decision" under 28 U.S.C. § 1291. *Id.* at 661. Two features of *Ashley* that drove the outcome are absent here.

First, the County's governmental immunity defense, if successful, "operates as a jurisdictional bar" that would have prevented the district court from compelling arbitration. *Id.* This created an "underlying jurisdictional tension" between governmental immunity and the Federal Arbitration Act's ("FAA") statutory bar on interlocutory appeals of arbitration orders under 9 U.S.C. § 16(b)(2). *Id.* at 660. To resolve that tension, we framed the question as "whether the district court properly addressed its own jurisdiction to compel arbitration." *Id.* And because the district court denied the County's immunity defense, thereby failing to assure itself of its own authority to compel the County to arbitrate "in accordance with established principles of jurisdictional authority," the decision was final for purposes of § 1291. *Id.* at 661. Defendants here assert absolute legislative and qualified immunity, neither of which concern the district court's jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 373 (2001) ("There is no authority what[so]ever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction[.]"); *see also St. Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007) ("[L]egislative immunity is not a jurisdictional bar. . .").¹

1. The Eleventh Circuit's decision in *Bouchard Transp. Co. v. Fla. Dep't of Env't Prot.*, 91 F.3d 1445 (11th Cir. 1996), is distinguishable for the same reason. The immunity defense there was Eleventh Amendment immunity, which "is in the nature of a

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Second, the district court's order in *Ashley* eliminated the County's opportunity to obtain a pretrial immunity ruling. By compelling the County to arbitrate before resolving immunity, 125 F.4th at 658, the district court shifted resolution of the merits to another forum and bound the County to its outcome. *See Doe v. Tonti Mgmt. Co.*, 24 F.4th 1005, 1008-09 (5th Cir. 2022). Such an order consigns the immunity-asserting defendant to merits-stage proceedings in that other forum, with no mechanism to obtain a pretrial immunity ruling. By contrast, nothing in the district court's order here eliminated Defendants' ability to press their immunity defense. It deferred a ruling, but it also deferred discovery, case management deadlines, and the like, while expressly preserving Defendants' right to refile their immunity motion.

The record reinforces that, in this case at least, the district court's order did not constitute an effective denial of Defendants' immunity defense. Defendants concede that the parties "almost immediately" reported to the magistrate judge that mediation would be unproductive, and that "the magistrate judge agreed not to conduct the mediation." The mediation order expressly contemplated the next step: that the immunity question would be taken up on a refiled motion. The order is, in substance, a case-

jurisdictional bar" and which protects sovereign states from the very "indignity" of being subjected to private suit. *Id.* at 1448 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). In other words, the Eleventh Amendment's "ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated." *Puerto Rico*, 506 U.S. at 146.

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management deferral pending a discrete, nonbinding event that Defendants emphasize never occurred, not a conclusive determination of anything.

Our unpublished decision in *De Leon v. Munoz*, No. 24-40215, 2025 WL 957500 (5th Cir. Mar. 31, 2025) (per curiam) (unpublished), points the same way.² There, the district court denied a defendant’s motion to dismiss on qualified immunity “without prejudice to his right to refile after mediation.” *Id.* at *1 n.2, *4. The defendant later filed a second motion to dismiss, which the district court again denied. *Id.* at *4-*5. The defendant noticed his appeal within thirty days of the second order. *Id.* at *1 n.2. The plaintiff argued the first order triggered the notice deadline, rendering the appeal untimely. *Id.* We disagreed, holding that the court’s “denial of [defendant]’s first motion to dismiss . . . without prejudice to his right to refile after mediation . . . was not a final, unequivocal refusal to render a pretrial determination of [defendant]’s qualified immunity defense,” and thus “was not an appealable final decision for purposes of 28 U.S.C. § 1291.” *Id.* (citing *Ueckert*, 38 F.4th at 453).

At bottom, the result here, as in *De Leon*, follows from the two grounds the Supreme Court identified in *Mitchell*. The mediation order does not “represent the trial court’s conclusion” that, on Defendants’ version of the facts, immunity does not apply, *Mitchell*, 472 U.S. at 527,

2. Unpublished opinions issued on or after January 1, 1996, are not binding precedent, but they may be persuasive authority. *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006); 5TH CIR. R. 47.5.4.

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because the district court conducted no immunity analysis at all. Nor does it deprive Defendants of immunity’s protection against “standing trial” or against “such pretrial matters as discovery.” *Mitchell*, 472 U.S. at 526 (citing *Harlow*, 457 U.S. at case-management deadlines, and contemplated that any immunity ruling would be made on a refiled motion following a nonbinding mediation that Defendants concede never occurred. Because the order neither rejected the immunity defense nor imposed the litigation burdens immunity exists to prevent, it is not an appealable final decision for purposes of § 1291.³

III

We DISMISS the appeal for lack of appellate jurisdiction.

3. We again note our concern that the district court has yet to provide the reasoned, individualized analysis necessary to resolve Defendants’ immunity assertions. Immunity is an entitlement to avoid not just liability, but also the burdens of litigation. *Mitchell*, 472 U.S. at 526. Those issues should be addressed promptly and consistently with this court’s earlier mandates on a refiled motion to dismiss, rather than further deferred without explanation. The case now proceeds before Chief Judge Crane, to whom it has since been reassigned.

**APPENDIX B — MINUTE ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, MCALLEN
DIVISION, FILED MARCH 31, 2025**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

CIVIL ACTION NUMBER
M-20-033

MARIN LOPEZ, *et al.*

VS.

RIO GRANDE CITY CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, *et al.*

Filed March 31, 2025

MEDIATION ORDER

Currently before the Court is a Motion to Dismiss of the Defendants. The Court observes the matter's extensive procedural history since the Motion was first filed. The Court is now of the opinion that the parties would benefit from proceeding before a Magistrate in a mediation setting.

Therefore, having determined that this case is appropriate for referral to mediation under Local Rule 16.4, the Court on its own motion refers this case to

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Magistrate Judge J. Scott Hacker for mediation. Mediation is a mandatory but nonbinding settlement conference in which the parties attempt to resolve their differences with the assistance of a third-party mediator.

Within five (5) business days from the date of this order all counsel must contact Magistrate Judge Hacker to arrange the details of mediation. A schedule for mediation shall be determined by Magistrate Judge Hacker. All proceedings in a mediation session are confidential and privileged from discovery. No subpoena, summons, or discovery paper shall be served at or near the location of any mediation session upon any person entering, leaving, or attending any mediation session.

Counsel and the parties shall endeavor in good faith to resolve the case through mediation. Each party who is a natural person must be present during the entire mediation. Each party that is not a natural person must be represented by a principal, partner, officer, or official with authority to negotiate a settlement. If one or more insurance companies must be involved in a settlement of the case, a representative from each insurance company with authority to negotiate a settlement shall be present during the mediation.

Rule 16 Scheduling Order deadlines and pending settings are hereby cancelled. All pending motions are denied without prejudice to refile same in writing within seven (7) days after Notice from Magistrate Judge Hacker to this Court that mediation has concluded if the mediation was unsuccessful and without any waiver of a

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substantive or procedural right of any party with regard to any motion which may be filed or refiled.

SIGNED on this 31st day of March, 2025, at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT
JUDGE

**APPENDIX C — ORDER DENYING REHEARING
OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT, FILED JULY 9, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-40170

MARIN LOPEZ; PEDRO BERMEA; TRINIDAD
LOPEZ; ARTURO MENCHACA; ELADIO
BERMUDEZ; JAVIER GARCIA; ROBERT GUERRA;
LUIS CARLOS GONZALEZ; EPIGMENIO “TJ”
GONZALEZ; JUAN GARCIA, JR.; JULIO EGUIA;
AARON GARCIA,

Plaintiffs-Appellees,

versus

EDUARDO RAMIREZ; NOE CASTILLO; BASILIO
D. VILLAREAL, JR.; ROEL GONZALEZ,

Defendants-Appellants.

Filed July 9, 2026

Appeal from the United States District Court
for the Southern District of Texas
USDC NO. 7:20-CV-33

Appendix C

ON PETITION FOR REHEARING EN BANC

Before WILLETT, WILSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P.40 and 5TH CIR. R.40).

In the en banc poll, seven judges voted in favor of rehearing (JUDGES JONES, SMITH, RICHMAN, HO, DUNCAN, ENGELHARDT, and OLDHAM), and ten voted against rehearing (CHIEF JUDGE ELROD, and JUDGES STEWART, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, WILSON, DOUGLAS, and RAMIREZ).

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JERRY E. SMITH, *Circuit Judge*, joined by DUNCAN, *Circuit Judge*, dissenting from the denial of rehearing en banc:

Welcome to Groundhog Day in July.¹

These defendants are caught in a time loop as seemingly endless as the one in the movie. Because the district court, the Fifth Circuit panel, and now the en banc court refuse to fix it, I respectfully dissent from the denial of rehearing en banc.

This distinguished panel has made an honest effort to compensate for the district court's mishandling. Unfortunately, the panel's solution—with the best of intentions—only makes it worse.

The defendants assert absolute legislative immunity and qualified immunity (jointly, “QI”) from alleged First Amendment violations.² The law is settled that a defendant can invoke the collateral order doctrine to take

1. “*Groundhog Day* [starring Bill Murray] is a 1993 American fantasy romantic comedy film [that] tells the story of a cynical television weatherman covering the annual Groundhog Day event in Punxsutawney, Pennsylvania, who becomes trapped in a time loop, forcing him to relive February 2 repeatedly. . . . The term *Groundhog Day* mean[s] a monotonous, unpleasant, and repetitive situation.” WIKIPEDIA, *Groundhog Day (film)*, [https://en.wikipedia.org/wiki/Groundhog_Day_\(film\)](https://en.wikipedia.org/wiki/Groundhog_Day_(film)) (last accessed July 6, 2026).

2. I express no view on the underlying substantive issues. The question now is whether there is appellate jurisdiction under the collateral order doctrine, not whether the defendants will ultimately prevail on their QI defense.

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an immediate interlocutory appeal from the denial of QI. As distinguished from ultimate immunity from liability, that is an immunity from further proceedings until QI is decided by the court of appeals.

The revised panel opinion—like the panel’s initial opinion—has many flaws. Perhaps the most prominent of these is the unanimous panel’s absolute refusal to articulate or even acknowledge the standard that governs the timing of an interlocutory QI appeal. That well-established standard was recently reiterated—and in fact was repeated eight times—in *Wertenbroch v. Hardeman*, 178 F.4th 186 (5th Cir. 2026).³

Relying largely on *Carswell v. Camp*, 54 F.4th 307 (5th Cir. 2022), the *Wertenbroch* panel eight times reminds the reader that “[b]ecause immunity presents ‘threshold questions,’ it must be ‘resolved as early in the proceedings as possible.’” *Wertenbroch*, 178 F.4th at 190 (citation modified). And again: “Because [QI] is an immunity from

3. *Wertenbroch* was decided seven days after the *Lopez* panel issued its substitute opinion. Being published, *Wertenbroch* is binding circuit law. But there’s no need to decide the potentially murky question, under this court’s rule of orderliness, of whether a panel that issues an unpublished opinion (*Lopez*) is bound by a subsequent published opinion announced before the mandate has issued for the unpublished opinion. *Wertenbroch* only articulated the law that had long existed per *Carswell* and other authorities. Moreover, *Wertenbroch* was brought to the panel’s attention via a petition for rehearing en banc, so the panel easily could have acknowledged the correct standard by amendment. And *Wertenbroch* was well known to the active judges by the time they voted to deny rehearing en banc.

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suit, . . . we had jurisdiction because the district court refused to rule on [QI] at the earliest possible stage of litigation.” *Id.* at 191 (citation modified). And again: “Whatever the circumstance, the district court must rule on [QI] at the earliest possible stage.” *Id.* at 192 (citation modified). And again: *Carswell* dealt with “an express refusal to rule on [QI] early in stages of litigation.” *Id.* And again: “[W]hen the motion-to-dismiss stage is the ‘earliest possible stage in litigation’ at which [QI] could be adjudicated, a district court is *required* to rule on the motion.” *Id.* (citation modified). And again: “[B]ased on the earliest-possible-litigation principle in *Carswell*, [the QI defendant] was entitled to a ruling on his defense at this stage.” *Id.* And again: “We therefore hold that when a district court allows litigation to proceed without adjudicating a [QI] defense at the earliest possible stage of litigation, the resulting order is immediately appealable, even if the district court does not expressly address [QI] in its order.” *Id.* And finally: “Because the district court did not address [QI] at the earliest possible stage in the litigation, we VACATE the district court’s order and REMAND.” *Id.* at 193.

The underlying facts of this case”*Lopez v. Ramirez*” occurred in 2018. Plaintiffs sued in February 2020. Defendants moved to dismiss a month later. This matter is now buried in a third appeal, following, *inter alia*, a third amended complaint, four motions to dismiss, and three remands. Still no ruling on QI. And *à la Groundhog Day*, there is no end in sight.

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Let's focus on the order currently being appealed. After the second remand, the defendants again moved to dismiss. A year after the remand, the district court entered its March 31, 2025, "MEDIATION ORDER." The defendants immediately appealed, whereupon this Fifth Circuit panel has ruled that it has no appellate jurisdiction.⁴

Under the collateral order doctrine, a QI defendant can take an immediate appeal. The most common way is when the district judge explicitly denies the QI motion to dismiss at the Rule 12(b) or summary judgment stage. The less common way is where the district judge has failed or refused to rule on the motion to dismiss; that's deemed a denial.

The March 31 order either denies the motion or refuses to rule on it, so these defendants can appeal under either reading of the order.

First, the order states that "the Court on its own motion refers this case . . . for mediation" and emphasizes that "[m]ediation is a mandatory but nonbinding settlement conference." Second, the order states that "[a]ll pending motions are denied without prejudice to refiling . . . [if] . . . mediation was unsuccessful." So the judge either (1)

4. In their initial brief on appeal, the plaintiffs-appellees had agreed with the defendants-appellants that "to the extent Appellants present a legal challenge to the denial of [QI], § 1291 permits immediate review." Nonetheless, the panel raised the question of appellate jurisdiction *sua sponte*.

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refused to rule, awaiting “mandatory” mediation, or (2) actually ruled by denying the QI motion to dismiss.

No one can reasonably doubt that the district judge failed to rule at the earliest stage of the litigation, which, here, was at the motion-to-dismiss stage.⁵ Now—years later—is hardly the “earliest stage.” But the panel seems implicitly to advance the notion that mediation is not a “stage” of litigation, so even after any mediation, the litigation mystically would still be at the earliest stage. That is both fanciful and unrealistic.

And then there’s the question whether appellate jurisdiction ever existed, even for a fleeting moment. To answer that, we must examine the sequence of events in the district court and the Fifth Circuit.

As stated, the March 31, 2025, order either “denied” all motions or declined to rule awaiting mediation. The appeal was noticed April 4. On April 8, the parties appeared by video to discuss available mediation dates in April and May. On April 10, a settlement conference was set for April 26. On May 5, the mediation conference was reset for May 12. On May 6, plaintiffs’ lawyer advised the court that settlement was unlikely. On May 9, the May 12 settlement conference was terminated. On June 23, a status conference with the district judge was set for July 22. On June 25, the magistrate judge entered an order that the parties “are not interested in participating in

5. The panel admits that the district judge “deferred a ruling.”

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a mediation at this time.” In the meantime, the record had been certified to the Fifth Circuit, the case had been assigned to (and then removed from) the Fifth Circuit settlement program, and (on May 5) the Fifth Circuit had issued the briefing notice.

The panel takes the inventive position that appellate jurisdiction never existed because, viewed *post hoc*, there was never a productive settlement conference. But that cannot be.

There was surely appellate jurisdiction on, say, April 10 and/or May 5, as of which dates the district judge either had denied QI or had forced the defendants to wait for a ruling pending the scheduled mediation. Although the panel does not identify whether there was jurisdiction as of either of those dates, the panel implies that it doesn’t matter, because, once it became certain that the parties weren’t going to settle, any established appellate jurisdiction somehow retroactively dissolved into thin air, *nunc pro tunc*. In the panel’s words, the March 31 “order is, in substance, a case-management deferral pending a discrete, nonbinding event that Defendants emphasize never occurred, not a conclusive determination of anything.”

By this notion, the parties meandered in and out of appellate jurisdiction based on a given day-to-day’s estimate of the likelihood of productive bargaining. But that’s not the way jurisdiction works. The parties are entitled to know, from the face of a QI order, whether there is jurisdiction to take a collateral-order appeal. The

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panel's inventive approach only clouds what should be a matter of certainty.

Mediation may be short or lengthy. Either way, it adds time and expense, in contravention of the principle that a QI defendant is entitled to an “immediate” appeal. The panel flatly errs in claiming, to the contrary, that the order of “mandatory” mediation “neither rejected the immunity defense nor imposed the litigation burdens immunity exists to prevent.”

Worse still, this panel has drawn a handy roadmap for district judges who are not fond of QI to delay—seemingly indefinitely—the ability of QI defendants to take interlocutory appeals. Any district judge can, in effect, force a mediation settlement offer from a QI defendant as a condition, ultimately, of being able to appeal once mediation has concluded. This panel casts no shadow over such potential perfidy and, in fact, can be understood as giving license to district judges to require mediation before having to rule on QI.

But it gets worse. Given the panel's refusal even to acknowledge the “earliest stage” requirement, and the en banc court's failure to correct that grave error, there will be yet another remand. And the losing side will file yet another appeal. And yet another panel of this court will be tasked with opining on the legal questions regarding QI. Then, depending on that result, likely years down the road, there could be trial, followed by another appeal.

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The en banc court had the opportunity to put this matter partly out of its misery by at least admitting that the Fifth Circuit has appellate jurisdiction, then returning the case to the panel to exercise that jurisdiction by ruling on QI. That lost opportunity is, at the very least, unfortunate.

The bad news is that this conscientious panel errs in multiple ways. First, it declines to state the governing test. Second, it pretends that an order stating that all motions are denied isn't a denial at all. Third, it posits that an order delaying a ruling—for an indefinite period—isn't really a delay at all.

The good news—if we can call it that—is that the panel opinion is unpublished, meaning that it isn't binding Fifth Circuit law. That may only confuse future litigants, who may not know to what extent they must defer to the panel's unanimous ruling.⁶ The en banc court could easily have granted rehearing to repair any uncertainty.

* * * * *

6. The revised panel opinion joins an equally errant unpublished opinion on which it relies, *De Leon v. Munoz*, No. 24-40215, 2025 WL 957500 (5th Cir. Mar. 31, 2025) (per curiam) (unpublished). As a matter of meaningless coincidence, *De Leon* was decided the same day as the district court order *à quo*.

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Movie buffs dispute how many years the main character in *Groundhog Day* was caught in the time loop. The lowest estimate seems to be about 8½ years.⁷ At the current rate of derailment and delay, the instant litigation (*Lopez v. Ramirez*) isn't far behind.

I respectfully dissent from the refusal to grant rehearing en banc.

7. *How Many Days Bill Murray Spent Trapped in "Groundhog Day,"* <https://movieweb.com/how-many-days-bill-murray/trapped-groundhog-day/> (last accessed July 6, 2026).

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JAMES C. Ho, *Circuit Judge* dissenting from the denial of rehearing en banc:

I’m grateful to Judge Smith for flagging this case for our attention, and share his dismay that the court is denying rehearing en banc. The mediation order should have been sufficient to establish appellate jurisdiction over this interlocutory appeal from the denial of qualified immunity.

Qualified immunity presents “threshold questions” that “must be resolved as early in the proceedings as possible.” *Wertenbroch v. Hardeman*, 178 F.4th 186, 190 (5th Cir. 2026) (quoting *Boyd v. Biggers*, 31 F.3d 279, 284 (5th Cir. 1994) (citing *Siegert v. Gilley*, 500 U.S. 226, 231-33 (1991))). The district court failed to do so here, so we should have intervened.

The panel held that we lack appellate jurisdiction. It treated the mediation order as a mere “case-management deferral pending a discrete, nonbinding event,” and “not a conclusive determination of anything.”

But mediation is far more than that. It’s a method of alternative dispute resolution. As such, mediation is (by definition) an “alternative” to trial. *See, e.g., BPX Prod. Co. v. Certain Underwriters at Lloyd’s London*, 2025 WL 2952911, *3 (5th Cir.) (“Black’s Law Dictionary defines ‘alternative dispute resolution’ as ‘[a]ny procedure for settling a dispute by means other than litigation, as by arbitration or mediation.’”) (quoting *Alternative Dispute Resolution*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

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Moreover, this is not just a mistake of law—it’s a mistake that could cause mischief. To be sure, there are times when mediation can be useful and efficient. But it can also be misused. In particular, mediation can be deployed to delay finality in the district court, as a stratagem to avoid appellate review by pressuring the parties into settling the case. Indeed, this is not the first time that Judge Smith has rightly raised such concerns about district court misuse of mediation. *See, e.g., United States ex rel. Harman v. Trinity Indus.* (5th Cir.) (No. 14-40995), Oral Arg. at 2:30-4:05. I agree. *See, e.g., Whole Woman’s Health v. Smith*, 896 F.3d 362, 376 (5th Cir. 2018) (Ho, J., concurring) (expressing concerns about efforts to evade appellate review); *see also In re Westcott*, 135 F.4th 243, 250 (5th Cir. 2025) (Ho, J., concurring).

For these reasons, I dissent from the denial of rehearing en banc.

* * *

A final point: In footnote 6 of his dissent, Judge Smith notes that the panel found support in our court’s “equally errant” unpublished decision in *De Leon v. Munoz*, 2025 WL 957500 (5th Cir.).

I joined that unpublished decision. That decision, to be clear, found appellate jurisdiction in *DeLeon*—the same result that both Judge Smith and I urge here. That said, footnote 2 of the per curiam decision separately suggests that there was no appellate jurisdiction at an earlier stage in the case.

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If footnote 2 was wrong, so be it. It's unfortunate when errors arise in our decisions—whether in express holdings in precedential decisions, or footnote asides in unpublished per curiam rulings. But errors happen. Because judges are human—and humans make mistakes. A black robe is no guarantee of gray matter. I am happy to admit error.

As judges, we should strive to be open about our mistakes, and look for opportunities to correct them. Any judge who claims that he or she has never made a mistake is a judge I wouldn't trust. *See, e.g., Planned Parenthood of Greater Texas, Inc. v. Kauffman*, 981 F.3d 347, 384 (5th Cir. 2020) (Ho, J., concurring) (“as human beings, judges sometimes make mistakes,” but “it is more important to get the law right than to guard our self-esteem”).

There's no shame in admitting error. There's only shame in *not* admitting error. *See, e.g.,* PROVERBS 12:1 (“[W]hoever hates correction is stupid.”); PROVERBS 9:8 (“[But] rebuke the wise and they will love you.”).

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**APPENDIX D — JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, FILED APRIL 1, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-40170

MARIN LOPEZ; PEDRO BERMEA; TRINIDAD
LOPEZ; ARTURO MENCHACA; ELADIO
BERMUDEZ; JAVIER GARCIA; ROBERT GUERRA;
LUIS CARLOS GONZALEZ; EPIGMENIO “TJ”
GONZALEZ; JUAN GARCIA, JR.; JULIO EGUIA;
AARON GARCIA,

Plaintiffs-Appellees,

versus

EDUARDO RAMIREZ; NOE CASTILLO; BASILIO
D. VILLAREAL, JR.; ROEL GONZALEZ,

Defendants-Appellants.

Filed April 1, 2026

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:20-CV-33

Appendix D

JUDGMENT

Before WILLETT, WILSON, and DOUGLAS, *Circuit Judges*.

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the appeal is DISMISSED for lack of jurisdiction.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.