No. 22-_____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

PARTIES TO THE PROCEEDING

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

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

RELATED PROCEEDINGS

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

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

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

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

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JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides:

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

INTRODUCTION

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

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

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

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

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

STATEMENT OF THE CASE

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

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

I. FACTUAL BACKGROUND

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

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

II. PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

REASONS TO GRANT THE PETITION

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

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

standing to assert their claims against Respondent.

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

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

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

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

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

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

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

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

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

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

1. *The Restrictive Approach*

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

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relief" on the secondary issue).

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

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

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

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

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

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

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

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

2. *The Permissive Approach*

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

i. The First Permissive Sub-Group

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

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

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

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

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

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

ii. The Second Permissive Sub-Group

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

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

3. *Recent Movement Away From Swint*

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court's instruction, in the context of § 1291, which applies with equal force to pendent appellate jurisdiction, that "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted." *Digit. Equip. Corp.*, 511 U.S. at 868 (internal quotation omitted).

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

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

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

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

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

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

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

* * *

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

CONCLUSION

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

Respectfully submitted,

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April 6, 2023

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22-30181

[Filed: January 6, 2023]

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

Plaintiffs—Appellees,

versus

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

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-cv-852

Before HIGGINBOTHAM, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:[*]

While marching across a bridge, protestors were met with non-lethal force exercised by police officers. On behalf of a putative class, three of those protestors now seek to maintain a suit against the superintendent of the Louisiana State Police ("LSP"), whose troopers were allegedly "bystanders" at the event. As we find that these plaintiffs are unable to maintain this suit, we REVERSE and RENDER JUDGMENT in favor of the LSP's superintendent.

Factual Background and Procedural History

In June of 2020, several hundred protestors gathered to cross the Crescent City Connection bridge ("CCC") as part of protests in the wake of George Floyd's death. Among those protestors were the three named plaintiffs in this case: Remingtyn Williams, Lauren Chustz, and Bilal Ali-Bey ("Plaintiffs"). These protestors approached a police barricade primarily consisting of New Orleans Police Department ("NOPD") officers with support from Jefferson Parish Sheriff's Office deputies and equipment. Louisiana State Police troopers were allegedly "bystanders" at the event. Protestors requested permission to pass through the barricade but were denied. At some point, "a small group of agitated demonstrators passed through an opening in the police line." NOPD officers fired tear gas

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

and other non-lethal munitions into the crowd and the crowd dispersed.

The Plaintiffs asserted various claims relating to alleged violations of their constitutional and statutory rights against individual officers and law enforcement agencies. Relevant to this appeal are the claims against Colonel Lamar Davis ("Davis"), Superintendent of the LSP. In summary, the Plaintiffs sued Davis alleging *Monell* and supervisory liability under 42 U.S.C. § 1983 for violations of the First, Fourth, and Fourteenth Amendments, *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 685 (1978), violations of various Louisiana constitutional and statutory provisions, and violations of Title VI of the Civil Rights Act of 1964. Davis filed a motion to dismiss for failure to state a claim, stating in part that he was protected by Eleventh Amendment sovereign immunity and that the Plaintiffs lack standing to proceed against him.

The district court granted the motion as to the *Monell* claims and the Title VI claim but denied it as to the § 1983 claims and the state law claims. The court did not address the state law claims in detail as it found it unnecessary to do so given its findings on the federal claims. Evaluation of the § 1983 claims began with an inquiry into standing, which concluded: "[T]he Plaintiffs allege their constitutional rights have been violated, such violations are ongoing or may occur again at a later protest, and this Court can remedy those risks with prospective relief, namely injunctions curtailing LSP's policies. Therefore, at this time, the Plaintiffs have standing to bring this suit." The court also concluded that the Plaintiffs adequately pleaded

§ 1983 claims to fit within the relevant exception to Eleventh Amendment immunity as they "sued Col. Davis in his official capacity, 'allege[] ongoing violations of federal law by LSP,' and seek prospective relief." Davis promptly filed a notice of interlocutory appeal seeking review of the denial of Eleventh Amendment sovereign immunity.

Standard of Review

"This court reviews denials of Eleventh Amendment immunity *de novo*." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (citing *Cozzo v. Tangipahoa Par. Council—President Gov't*, 279 F.3d 273, 280 (5th Cir. 2002)). We likewise review questions concerning standing *de novo*. *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 671 (5th Cir. 2022).

Discussion

I. Jurisdiction

"This court has a continuing obligation to assure itself of its own jurisdiction, *sua sponte* if necessary." *United States v. Pedroza-Rocha*, 933 F.3d 490, 493 (5th Cir. 2019) (citing *Bass v. Denney*, 171 F.3d 1016, 1021 (5th Cir. 1999)). Orders denying Eleventh Amendment sovereign immunity are reviewable under the "collateral order doctrine." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

Less clear, however, is whether we have jurisdiction to review the district court's finding of standing. The Supreme Court has held that reviewable issues under the collateral order doctrine are those which "'[1] conclusively determine the disputed question,

[2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment.'" *P.R. Aqueduct*, 506 U.S. at 144 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The Eleventh Circuit has explicitly considered whether standing is one such issue: "In contrast to the question of Eleventh Amendment immunity, however, we have held that a district court's denial of a motion to dismiss on justiciability grounds is *not* immediately appealable under the collateral order doctrine." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) (citation omitted) (emphasis in original). Under Eleventh Circuit precedent, then, the "*only*" way the court can review a district court's finding of standing on interlocutory appeal is via the "pendent appellate jurisdiction doctrine." *Summit Med. Assocs.*, 180 F.3d at 1335 (emphasis in original).

This comports nicely with the nature of the collateral order doctrine. Eleventh Amendment immunity cannot effectively be reviewed "on appeal from a final judgment," *P.R. Aqueduct*, 506 U.S. at 144 (quoting *Coopers & Lybrand*, 437 U.S. at 468), because as immunity is "an immunity from suit rather than a mere defense to liability … it is effectively lost if a case is erroneously permitted to go to trial." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (ellipses in original, internal quotation marks omitted) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, (1985)). Standing, however, can and often is reviewed on appeal without such loss, in part because the question of standing is often "intertwined" with that of the merits. *See Barrett Comput. Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 219

(5th Cir. 1989). This makes questions of standing inappropriate for collateral review. If we are to address standing on the merits, therefore, it must be by the exercise of pendent appellate jurisdiction.

II. Whether to Exercise Pendent Appellate Jurisdiction

Pendent appellate jurisdiction may only be exercised in one of two "carefully circumscribed" circumstances: "(1) If the pendent decision is 'inextricably intertwined' with the decision over which the appellate court otherwise has jurisdiction, pendent appellate jurisdiction may lie, or (2) if 'review of the former decision [is] necessary to ensure meaningful review of the latter.'" *Escobar v. Montee*, 895 F.3d 387, 391 (5th Cir. 2018) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 51 (1995)).

This court has previously exercised pendent appellate jurisdiction to address justiciability issues such as standing. In *Hospitality House, Inc. v. Gilbert*, it was held: "where … we have interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity, we may first determine whether there is federal subject matter jurisdiction over the underlying case." 298 F.3d 424, 429 (5th Cir. 2002). As standing indisputably goes to whether or not a court has subject matter jurisdiction, *see, e.g., Abraugh v. Altimus*, 26 F.4th 298, 301 (5th Cir. 2022), this panel can exercise pendent appellate jurisdiction to address standing issues. In fact, while reviewing a denial of Eleventh Amendment immunity, the panel in *Whole Woman's Health v. Jackson* determined that through the exercise of pendent

appellate jurisdiction it had jurisdiction over justiciability issues such as standing. 13 F.4th 434, 446 (5th Cir. 2021).

Exercise of pendent appellate jurisdiction is not mandatory – as appellees point out, the Supreme Court carefully noted that "no one contest[ed] th[e] decision" to review standing on appeal in *Whole Woman's Health*. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 537 (2021). Though that is not the case here, this court's jurisprudence nonetheless permits this panel to exercise pendent appellate jurisdiction. For one, "our Article III standing analysis and *Ex parte Young* analysis 'significant[ly] overlap.'" *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (quoting *Air Evac EMS, Inc. v. Tex.*, 851 F.3d 507, 520 (5th Cir. 2017)). In fact, "our caselaw shows that a finding of standing tends toward a finding that the *Young* exception applies to the state official(s) in question." *Id.* Additionally, "[w]e … address standing … when there exists a significant question about it." *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010). The *K.P.* court even addressed standing before proceeding to an *Ex parte Young* analysis even though "neither party … raised the issue of standing." *Id.*

Appellees recommend against exercising pendent appellate jurisdiction in this case for two main reasons. First, they note that as not all defendants are participating in this appeal, ruling on standing will "prematurely instruct the district court on how to decide this case for all of the defendants who are not participating in this appeal." But while the Plaintiffs stress this point, they submit no caselaw or other

reasoning for why this would be problematic in itself. More persuasive are Plaintiffs' cites to *Swint* for the proposition that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay … collateral orders into multi-issue interlocutory appeal tickets." *Swint*, 514 U.S. at 49–50. We are conscious of the risk of encouraging parties with potential Eleventh Amendment immunity claims (or other claims which are appealable on an interlocutory basis) to file "meritless immunity appeals just so they could seek premature interlocutory review of standing, allowing them to short-circuit the normal appeals process when other defendants do not enjoy that same privilege." *See Abney v. United States*, 431 U.S. 651, 663 (1977) ("Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.").However, this immunity appeal is not meritless; further, we find that review of the *Ex parte Young* factors in this particular case is inextricably bound up with the issue of standing.

In sum, an exercise of pendent appellate jurisdiction "'is only proper in rare and unique circumstances.'" *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009) (quoting *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1998)). But our jurisprudence suggests that review of standing challenges in evaluating Eleventh Amendment immunity claims is often relevant as the issues may be both "'inextricably intertwined'" and "'necessary to ensure meaningful review.'" *Escobar*, 895 F.3d at 391 (quoting *Swint*, 514

U.S. at 51). While panels should review each case to determine whether or not it is an appropriate case for such an exercise, Fifth Circuit precedent suggests that cases such as this are "rare circumstances" in which pendent appellate jurisdiction may be exercised to review standing. As "our Article III standing analysis and *Ex parte Young* analysis 'significant[ly] overlap,'" *City of Austin*, 943 F.3d at 1002 (citation omitted), this case presents an appropriate opportunity to exercise pendent appellate jurisdiction to review standing, and we thus do so.

III. Standing on the Merits

"[T]he irreducible constitutional minimum of standing contains three elements:" (1) "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, … and (b) 'actual or imminent,' not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of;" and (3) "it must be likely … that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). Davis contends that the Plaintiffs have no standing because their alleged future injuries are speculative.

The parties suggest that the standing debate largely turns on whether this case is more akin to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) or *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990). In *Lyons*, a plaintiff sued the City of Los Angeles and several of its police officers after he was placed in a chokehold. *Lyons*, 461 U.S. at 97. The Supreme Court found that while he had standing to pursue his claim of being

subjected to a chokehold, he was without standing to seek injunctive relief to enjoin the Los Angeles police force from the use of chokeholds because he had demonstrated neither that he was likely to have another encounter with the police nor "(1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner." *Id.* at 106 (emphasis in original). *Hernandez* involved an American citizen born in Puerto Rico who presented a birth certificate indicating his place of birth while attempting to re-enter the United States from Mexico. *Hernandez*, 913 F.2d at 232. He was initially denied entry by an INS official who doubted the authenticity of the birth certificate; after several attempts, Hernandez was granted entry by another INS official. *Id.* at 232-33. Both Lyons and Hernandez sought to change an allegedly unconstitutional government policy. The *Hernandez* panel distinguished the case from *Lyons* by noting that "Hernandez (unlike Lyons) was engaged in an activity protected by the Constitution." *Id.* at 234.

The Plaintiffs here submit that they were engaged in activity protected by the First Amendment, that they would engage in such activity again in the future if not for the officers' actions, and that the LSP "employs policies, practices, and customs that violate the plaintiffs' First, Fourth, and Fourteenth Amendment rights." They contrast the behavior of police officials at the CCC protest to police behavior at "protests attended by largely White attendees," noting that

pro-confederate protests and anti-Covid-restriction protests were not met with tear gas or the like despite violations of state law. The Plaintiffs state that the LSP's actions have had "a chilling effect upon the rights of African American citizens (and those who directly and actively support them) to freely and lawfully protest without fear of police interference, harassment, intimidation or abuse." They contend, therefore, that they have adequately pleaded both that the policies in question are authorized by the superintendent and that the policies have chilled their speech. *See Laird v. Tatum*, 408 U.S. 1, 11, (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.").

Unlike the plaintiff in *Hernandez*, these Plaintiffs were not engaged in constitutionally protected activity. Certainly, the right to peacefully protest is protected by the First Amendment. But "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). One such reasonable restriction is a restriction on protesting on public highways, as the Louisiana Supreme Court has recognized. *See Doe v. McKesson*, 2021-00929 (La. 3/25/22), 339 So. 3d 524, 533. In their briefing, the Plaintiffs retort that they had been protesting in the same way the five days preceding the events on the CCC and that they had even protested on another "elevated roadway" the night before. It is unclear why prior misconduct should justify further misconduct. More compellingly, the Plaintiffs suggest

that they would "'lawfully' protest racial injustice and police misconduct in the future but for the discriminatory policies, practices, and customs of the [LSP.]" Had the Plaintiffs been "lawfully" protesting at the time of their confrontation with law enforcement, perhaps there would have been a different outcome. The allegation that they were undisturbed in the five days prior to the CCC encounter only further suggests that a lawful protest may have been addressed differently.

In fact, the only other evidence of the LSP's attitude towards protesting comes in a discussion about how the LSP "did not intervene at all" while monitoring an anti-Covid-restrictions protest outside the Governor's mansion. It is alleged that the LSP officers likewise declined to intervene during the protest on the CCC. Both protests were allegedly unlawful and the LSP responded passively to both. This comparison, far from bolstering Plaintiffs' case, helps demonstrate why their injury is at best speculative. Their own complaint seems to allege that the LSP responds more or less identically to unlawful protests involving "overwhelmingly white" attendees as it did to this protest on the CCC. Plaintiffs attempt to place this incident in the context of the LSP's allegedly "well-documented history of racism against Black people" and "discriminatory use of excessive force against [Black people]" by pointing to various instances involving LSP officers' use of excessive force against minorities. The LSP is not here, however, on excessive use of force grounds, and none of these Plaintiffs were subjected to any discriminatory conduct by the LSP. None of the incidents the Plaintiffs bring to the court's

attention which are alleged to show unconstitutional conduct by the LSP demonstrate an "actual or imminent" risk of "concrete and particularized" harm to these Plaintiffs by the LSP. *Lujan*, 504 U.S. at 560 (cleaned up).

The *Hernandez* panel comfortably distinguished *Lyons* by noting that "[t]he injury alleged to have been inflicted did not result from an individual's disobedience of official instructions and Hernandez was not engaged in any form of misconduct; on the contrary, he was exercising a fundamental Constitutional right." *Hernandez*, 913 F.2d at 234–35 (footnote omitted). Here, neither of those factors is present. Some individuals did indeed disobey official instruction and attempted to pass through the barricade and the Plaintiffs were certainly engaged in misconduct by protesting atop the CCC at all. A section of *Lyons* is particularly illustrative:

> Although Count V alleged that the City authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy. If, for example, chokeholds were authorized to be used only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to Lyons from the City's policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and

> again render him unconscious without any provocation.

Lyons, 461 U.S. at 106. Likewise, though the complaint alleges that the LSP authorizes unlawful passivity in the face of unlawful usage of force by other police officers, the future threat from the LSP for the Plaintiffs is "no more real than the possibility that [they] would again have an encounter with the police and that either [they] would illegally [protest] … or the officers would disobey their instructions." *Id.* This conclusion is especially strong given that the LSP officers are not alleged to have used excessive force themselves.

"[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *Id.* at 103. Plaintiffs may or may not have a stronger case against the officers and offices who were responsible for direct action, but against the LSP the Plaintiffs have not demonstrated more than a speculative future injury with little to no basis in past practice.

IV. Eleventh Amendment Immunity

Eleventh Amendment sovereign immunity generally "bars private suits against nonconsenting states in federal court." *City of Austin*, 943 F.3d at 997 (citing *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011)). Although this suit was brought against Davis rather than the state, "a suit against a state official in his or her official capacity … is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (citations omitted). In

order to maintain a suit against a state, a litigant must generally take advantage of a state waiver or a Congressionally created exception to state sovereign immunity. *See Va. Off. for Prot. & Advoc.*, 563 U.S. at 253–54. It is undisputed here that Louisiana has not waived sovereign immunity in this case and that no Congressional loophole applies.

The Supreme Court has provided one alternative means by which litigants may sue a non-consenting state: the *Ex parte Young* exception, so named for the seminal Supreme Court case which codified it. *See Ex parte Young*, 209 U.S. 123, 155-56 (1908). "[I]n order to fall within the *Ex parte Young* exception, a suit must: (1) be brought against state officers who are acting in their official capacities; (2) seek prospective relief to redress ongoing conduct; and (3) allege a violation of federal, not state, law." *Freedom from Religion Found. v. Abbott*, 955 F.3d 417, 424 (5th Cir. 2020) (citing *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 394–95 (5th Cir. 2015)). It is through this exception that the Plaintiffs seek to maintain this suit.

The suit is brought against Davis in his official capacity, so the first *Young* prong is satisfied. Although Davis contends that he cannot be sued under § 1983 because he is not a "person" under § 1983, the very case he cites for that proposition rejects that contention: "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

As is made clear in our analysis of standing, however, the Plaintiffs have not demonstrated that they "seek prospective relief to redress ongoing conduct." *Freedom from Religion Found*, 955 F.3d at 424 (citation omitted). The Plaintiffs have not pleaded any "ongoing conduct" on behalf of the LSP that can be redressed prospectively. At oral argument, counsel made clear that the theory of standing underlying Plaintiffs' claims is that of chilled speech – namely, that the LSP's failure to act to restrain or otherwise inhibit the NOPD's use of force on the CCC that night is part of "decades-long policies and patterns of conduct" wherein LSP officers fail to intervene to aid (or prevent harm from coming to) protestors who are either minorities or speaking out in favor of minorities. As we have already mentioned, this claim is unsupported by the complaint and is far too vague to support a continuation of the action under the *Ex parte Young* standard. The LSP allegedly failed to intervene at this protest. Plaintiffs do not and cannot adequately demonstrate the relation between this failure to act in a case in which they were engaged in misconduct and the chilling of their lawful First Amendment rights. As there is no "ongoing conduct" in the pleadings in this case, they have failed to satisfy the *Ex parte Young* standard and these claims are barred by sovereign immunity.

Several of the Plaintiffs' claims independently fail the third prong as they assert violations of state law rather than federal law. The district court indisputably erred in not dismissing the state law claims asserted against Davis. "[S]ince state law claims do not implicate federal rights or federal supremacy concerns,

the *Young* exception does not apply to *state* law claims brought against the state." *McKinley v. Abbott*, 643 F.3d 403, 406 (5th Cir. 2011) (emphasis in original) (citation omitted). Appellees do not contest that this was error. To the extent that the Plaintiffs' claims are for violations of state law they are barred by the Eleventh Amendment.

Conclusion

The Plaintiffs have failed to demonstrate that they have standing to bring this suit and have relatedly not met their burden to proceed with their federal law claims under the *Ex parte Young* standard. Accordingly, we REVERSE the district court's order and reasons and RENDER JUDGMENT in favor of Davis.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO: 21-852

SECTION: T(5)

[Filed: March 30, 2022]

REMINGTYN WILLIAMS, ET AL.	)
	)
VERSUS	)
	)
SHAUN FERGUSON, ET AL.	)
	)

ORDER

Before the Court is Defendant Lamar Davis's *Motion to Dismiss*.[1] The Plaintiffs, Remingtyn Williams, Lauren Chustz, and Bilal Ali-Bey, filed a response.[2] For the following reasons, the motion is **GRANTED IN PART** and **DENIED IN PART**.

[1] R. Doc. 20.

[2] R. Doc. 27.

BACKGROUND

On the night of June 3, 2020, Remingtyn Williams, Lauren Chustz, and Bilal Ali-Bey, along with several hundred other protestors, gathered on the Crescent City Connection to demonstrate against the "death of George Floyd."[3] Around 9:30 p.m., the protestors marched up the westbound lanes of Highway 90 toward the bridge.[4] On the roadway, New Orleans Police Department ("NOPD") officers were waiting at a police barricade.[5] When the protestors reached the barricade, they asked the officers to "put down their shields [and] batons" in "solidarity" with the demonstration.[6] After a lengthy standoff, the officers declined and a "group of agitated demonstrators passed through an opening in the police line."[7] At that time, 10:25 p.m., the officers started firing tear gas and rubber bullets at the

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[3] R. Doc. 1 at 3, 17-18, 21; R. Doc. 27 at 3-4. The Plaintiffs, along with other protestors, had demonstrated in New Orleans for the "five days" prior. R. Doc. 1 at 17.

[4] R. Doc. 1 at 3, 17-18, 21; R. Doc. 27 at 3-4.

[5] *Id.* at 17-18. The Plaintiffs allege Louisiana State Police ("LSP") and Jefferson Parish Sheriff's Office ("JPSO") officers were on-scene or nearby, too. *Id*. at 18-19.

[6] *Id.* at 18-19.

[7] *Id.* at 20.

protestors.[8] The protestors largely dispersed and quickly withdrew from the bridge.[9]

Now, the Plaintiffs have brought suit against NOPD, LSP, and JPSO. Generally, the Plaintiffs contend the "Defendants had no legitimate basis to disperse the peaceful gathering on the night of June 3, 2020 with such extreme use of force" and without warning.[10] Specifically, the Plaintiffs raise nearly a dozen claims against the police officers and their supervisors: (1) aggravated assault and battery; (2) state law freedom of speech violations; (3) Equal Protection clause violations; (4) Substantive Due Process violations; (5) negligence; (6) intentional infliction of emotional distress; (7) negligent infliction of emotional distress; (8) *Monell* and Supervisory liability for First Amendment freedom of speech violations; (9) *Monell* and Supervisory liability for Fourth Amendment excessive force violations; (10) vicarious liability for aggravated assault and battery; and (11) Title VI violations.[11] The Plaintiffs have categorized the Defendants and their claims against them accordingly: the first claim is raised

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[8] *Id.* at 20-21. The protestors allege the officers did so without warning.

[9] *Id.* at 21-22.

[10] R. Doc. 1 at 7. The Plaintiffs contend their protest was peaceful, noting "[v]iolent and illegal conduct, e.g., rioting, is not constitutionally protected and is not something Plaintiffs and their counsel defend." *Id.*

[11] The Plaintiffs also request a class be formed.

against the "Defendant Officers," claims (2)-(7) are brought against "All Defendants," and the remaining claims target the "Defendant Supervisors" exclusively.

I. The Motion to Dismiss

Colonel Lamar Davis is the Superintendent of the Louisiana State Police and is categorized by the Plaintiffs as a "Defendant Supervisor." Therefore, the Plaintiffs raise ten claims, and four specifically, against Col. Davis including various forms of supervisory liability related to allegations that "officers of LSP's Troop N ...witnessed the excessive force being executed by [NOPD] officers" against protestors but "failed to intervene" due to LSP policies that promote, or are at least are indifferent, to constitutional violations and LSP's failure to supervise its officers.[12]

In the present motion, Col. Davis asks this Court to "dismiss all claims against him" for five reasons.[13] First, Col. Davis argues the Plaintiffs' Title VI claim must fail because "only public and private entities can be held liable" under Title VI, not an "individual."[14] Second, Davis contends any *Monell* claim against him must fail because *"Monell* does not apply to State officials," only municipalities and city officials.[15] Third, Col. Davis, as Superintendent of LSP, asserts Eleventh

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[12] *Id.* at 17, 61-66.

[13] R. Doc. 20-1.

[14] *Id*. at 11.

[15] This argument is raised in Col. Davis's reply. R. Doc. 30 at 4-5.

Amendment immunity to suit. Col. Davis contends that, "in his official capacity as a state official, [he] is not a 'person' amenable to suit under Section 1983."[16] Additionally, Col. Davis argues *Ex parte Young* does not apply to the present case because the Plaintiffs "request no viable prospective relief" as required by the exception.[17] Col. Davis classifies each of the Plaintiffs' requested remedies as either injunctive or declaratory in nature, but argues neither is appropriate. Col. Davis contends any declaration that the Plaintiffs' rights were violated is "backwards-looking" and "tantamount to an award of damages for [a] past violation of law" as barred by the Fifth Circuit.[18] Further, as seen below, Col. Davis argues the Plaintiffs lack standing to seek an injunction.

Fourth, Col. Davis contends the Plaintiffs lack standing because they "assert[] no 'actual or imminent' or 'certainly pending' future injury which could be redressed [by] an injunction."[19] In support of his argument, Col. Davis relies on *City of Los Angeles v. Lyons*.[20] There, the plaintiff was injured by an allegedly unlawful police maneuver during a traffic stop. Ultimately, the Supreme Court found the plaintiff lacked standing because he failed to show a "real and

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[16] R. Doc. 20-1 at 5.

[17] *Id.*

[18] *Id.* at 8-9.

[19] *Id.* at 8.

[20] 461 U.S. 95 (1983). *See* R. Doc. 30 at 6-7.

immediate threat that [he] would again be stopped…by an officer who would illegally choke him into unconsciousness" once more.[21] To establish standing, the Supreme Court reasoned, the plaintiff would have had to "make the incredible assertion" that he "would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and again render him unconscious without any provocation."[22] Here, as in *Lyons*, Col. Davis argues it is "speculative and conjectural" for the Plaintiffs to assert "[they will] engage in misconduct by blocking off a highway, are met with resistance from the New Orleans Police Department, and LSP troopers respond to the scene but allegedly fail to intervene to prevent NOPD from using

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[21] *See Id*.

[22] *Id.* at 105-106 (emphasis in original). Additionally, Col. Davis argues the Plaintiffs' reliance on *Hernandez v. Cremer* to argue standing is misplaced. 913 F.2d 230 (5th Cir. 1990). *Hernandez* dealt with an American citizen who was being hassled upon reentry into the United States due to his Puerto Rican birth. The plaintiff requested an injunction to halt harassment for engaging in an "activity protected by the Constitution," namely asserting one's right to travel. There was a threat of future harm because the plaintiff expressly planned to travel outside of the country again in the future. Col. Davis argues the threat of future harm here, unlike *Hernandez*, is speculative. Further, Col. Davis argues the *Hernandez* court distinguished the plaintiff's actions from "misconduct" or "disobedience of official instructions." Col. Davis contends that, because Plaintiffs blocked a highway in violation of Louisiana laws, they were engaged in "misconduct," not a protected activity.

excessive force."[23] Consequently, Col. Davis argues the Plaintiffs' stated injuries, namely the existence of LSP policies that could cause harm at a future protest, are insufficient to meet the standing requirements.

Finally, and relatedly, Col. Davis argues this Court lacks subject matter jurisdiction over the state law claims brought against him.[24] Col. Davis contends that, under Supreme Court precedent, any exception to Eleventh Amendment immunity still does not allow state law claims to be brought in federal court.[25]

II. The Plaintiffs' Response

The Plaintiffs filed a response addressing Col. Davis's arguments.[26] First, the Plaintiffs contend that, under Title VI precedent, "individual defendants may be held personally liable" on official capacity claims because it is an "alternative" means of naming the State as a party.[27] The Plaintiffs argue that, "[i]n suing Davis in his official capacity, Plaintiffs and Class Members assert their Title VI claim against LSP—not

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[23] R. Doc. 30 at 7-8.

[24] R. Doc. 20-1 at 4.

[25] *Id.*; R. Doc. 30 at 3.

[26] R. Doc. 27.

[27] *Id.* at 18. The Plaintiffs admit, however, that in the Fifth Circuit the "question appears unsettled whether a plaintiff may bring a Title VI claim against a government official in his official capacity." *Id.*

against Davis personally."[28] Second, the Plaintiffs, in response to Col. Davis's assertion of Eleventh Amendment immunity, raise the *Ex parte Young* exception because they are "su[ing] Davis in his official capacity," the violation of their constitutional rights by LSP's polices is ongoing and can be cured by action of this Court.[29] Accordingly, the Plaintiffs argue their requests for injunctive and declaratory relief are prospective, not "backwards-looking," because they would change "the pattern and practice of law enforcement officers in Louisiana."[30]

Third, as for standing, the Plaintiffs contend that, under *Hernandez v. Cremer*, they have put forth a concrete and redressable injury.[31] Generally, to satisfy standing "when seeking prospective relief," a plaintiff must allege a "threat of *future* injury."[32] In *Hernandez*, the "theory of future injury was premised on [the plaintiff's] stated desire to again engage in constitutionally protected conduct," namely exercising the right to travel between Puerto Rico and the continental United States.[33] Here, the Plaintiffs assert their intent to engage in a "constitutionally protected

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[28] *Id.*

[29] *Id.* at 15-16.

[30] *Id.*

[31] 913 F. 2d 230 (5th Cir. 1990).

[32] *Id.* at 10 (emphasis added).

[33] *Id.* at 12.

activity," specifically peaceful assembly, but cannot do so out of fear of existing LSP policies.[34] The Plaintiffs argue Col. Davis and LSP promote policies and police responses that have had a "chilling effect on the exercise of their First Amendment rights," and an injunction would allow Plaintiffs to protest without fear of retaliation.[35]

Finally, the Plaintiffs assert their state law claims should weather Eleventh Amendment immunity as they are inextricably tied to the federal claims. Additionally, the Plaintiffs argue dismissal of the state law claims would be "premature."[36]

LAW & ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) provides that an action may be dismissed "for failure to state a claim upon which relief can be granted."[37] To survive a motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to

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[34] *Id*. "Plaintiffs have expressly alleged they wish to participate in future peaceful protests objecting to police misconduct—an exercise of their First Amendment rights to free speech, peaceable assembly, and petitioning state officials for redress of grievances—but they are fearful of doing so because of the threatened harm of LSP's ongoing unconstitutional policies, practices, and customs." *Id.*

[35] *Id*. at 12-13.

[36] *See id.*

[37] Fed. R. Civ. P. 12(b)(6).

relief that is plausible on its face.'"[38] Federal Rule of Civil Procedure 8 demands "simple, concise, and direct" allegations which "give the defendant fair notice of what the claim is and the grounds upon which it rests."[39] In reviewing a motion to dismiss, a court "must take the factual allegations … as true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff."[40] Accordingly, such motions are viewed with disfavor and rarely granted because "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[41]

Federal Rule of Civil Procedure 12(b)(1) is the initial vehicle for parties to raise a "lack of subject-matter jurisdiction" defense.[42] "The standard of

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[38] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[39] Fed. R. Civ. P. 8(d)(1); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005).

[40] *Jefferson v. Lead Indus. Ass'n, Inc.*, 930 F. Supp. 241, 244 (E.D. La. 1996); *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004) (citing *Herrmann Holdings Ltd. v. Lucent Techs., Inc.*, 302 F.3d 552, 558 (5th Cir. 2002)). However, the court is not obligated to accept, as true, legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

[41] *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982); *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

[42] Fed. R. Civ. P. 12(b)(1).

review applicable to...Rule 12(b)(1) is similar to that applicable to motions to dismiss under Rule 12(b)(6)," but the court may review a broader range of materials in considering subject-matter jurisdiction.[43] "Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[44]

I. The § 1983 Claims

Under 42 U.S.C. § 1983, any "person" who subjects a "citizen of the United States" to the "deprivation of any rights…secured by the Constitution and laws[] shall be liable to the party injured in an action at law." However, the Eleventh Amendment to the United States Constitution immunizes any State from "suits brought in federal courts by her own citizens as well as by citizens of another state."[45] "There may be a question, however, whether a particular suit in fact is a suit against a State" when the named defendants are

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[43] *Thomas v. City of New Orleans*, 883 F. Supp. 2d 669, 676 (E.D. La. Aug. 2, 2012) (citing *Williams v. Wynne*, 533 F.3d 360, 364–65 n. 2 (5th Cir. 2008).

[44] *Clark v. Tarrant Cty., Texas*, 798 F.2d 736, 741 (5th Cir. 1986).

[45] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984) (quoting *Employees of Dept. of Public Health and Welfare v. Dept of Public Health, Missouri*, 411 U.S. 279, 280 (1973). This does not apply when the State or Congress has expressly waived the Eleventh Amendment's protections.

state officials.[46] When "the state is the real, substantial party in interest" or the case is "nominally against an officer" of the State, the suit is barred.[47]

However, a "suit challenging the constitutionality of a state official's actions is not one against the State."[48] This exception, known as *Ex parte Young*, holds that when a state official acts in violation of the United States Constitution, "any immunity from responsibility to the supreme authority of the United States" is lost.[49] To fall within the *Ex parte Young* exception, a petitioner must sue "state officers who are acting in their official capacities" and seek redress of an ongoing violation of federal law.[50] Also, the "relief sought must be declaratory or injunctive in nature and prospective in effect."[51] Monetary relief, as well as "backwards-looking, past-tense declaratory judgment[s]" that are "tantamount to an award of damages for a past violation of law," is prohibited.[52] Ultimately, a court should look to the "substance rather than to the form of

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[46] *Id.* at 100.

[47] *Id.* at 100-101.

[48] *Id.* at 101-102.

[49] *Id.* at 102 (quoting *Ex parte Young*, 209 U.S. 123, 160 (1974).

[50] *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 424 (5th Cir. 2020).

[51] *Saltz v. Tennessee Dep't of Emp. Sec.*, 976 F.2d 966, 968 (5th Cir. 1992).

[52] *Abbott*, 955 F. 3d at 425.

the relief sought" to determine the nature of the petitioner's request and whether *Ex parte Young* applies.[53]

A plaintiff must always have standing to bring suit in federal court. Standing requires an injury in fact, namely a "concrete and particularized" harm, that can be redressed by action of a federal court.[54] By their very nature, requests for injunctive or declaratory relief, the two permissible remedies under § 1983 and *Ex parte Young*, can only redress a "continuing injury or threatened future injury."[55] Ultimately, a future injury "must be certainly impending," not based on "allegations of possible" injury, a "speculative chain of possibilities," or the plaintiff's own "subjective apprehensions."[56]

After reviewing the parties' filings and the applicable law, the Court finds the Plaintiffs have, under 12(b)(6), sufficiently pled factual allegations that (1) grant them standing and (2) support their § 1983 claims. First, for standing, the Plaintiffs must show a "continuing injury or [a] threatened future injury" that may be remedied by prospective relief. Here, the

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[53] *Id*.

[54] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[55] *Crawford*, 1 F.4th at 376 (citing *Lyons*, 461 U.S. at 102).

[56] *Barber v. Bryant*, 860 F.3d 345, 357 (5th Cir. 2017) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2012)); *Lyons*, 461 U.S. at 107, n. 8. Notably, past instances of injury can be evidence of a "real and immediate threat of repeated injury." *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019).

Plaintiffs have alleged an intent to protest in the future.[57] The Plaintiffs' contentions, when viewed in their favor as required by law, allege that LSP officers were on-scene the night of June 3rd and failed to intervene in NOPD's allegedly excessive show of force.[58] Additionally, the Plaintiffs allege Col. Davis and LSP failed to supervise their officers and developed policies that encouraged the use of excessive force, or at least discouraged intervention.[59] Specifically, the "Complaint includes a detailed discussion of numerous instances in which officers from… LSP…disproportionally responded to protests" similar in nature to the Plaintiffs' demonstrations.[60] Finally, the Plaintiffs allege Col. Davis, as superintendent of LSP, "has not curtailed these unconstitutional practices" and policies, "making it reasonably certain they will occur again if this Court

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[57] "Plaintiffs stated they would protest again…but for LSP's demonstrated pattern and practice of engaging in or allowing unconstitutionally excessive and unprovoked force" against minority protestors." R. Doc. 1 at 14. The Plaintiffs also noted the "chilling" effect LSP's policies and lack of supervision has had on their right to protest.

[58] "Upon information and belief, LSP Bystander Officers were also in and/or near the police barricade on the CCC on the night of June 3. LSP's 'Troop N units responded to [the CCC] providing assistance to the NOPD units until the protest peacefully disbursed from the location.'" (R. Doc. 1 at 19).

[59] *Id.* at 61-66.

[60] *Id.* at 13.

does not enjoin them."[61] In short, the Plaintiffs allege their constitutional rights have been violated, such violations are ongoing or may occur again at a later protest, and this Court can remedy those risks with prospective relief, namely injunctions curtailing LSP's policies.[62] Therefore, at this time, the Plaintiffs have standing to bring this suit.

Second, as for § 1983 and *Ex parte Young*, the Plaintiffs satisfy the exception's three requirements under 12(b)(6). The Plaintiffs sued Col. Davis in his official capacity, "allege[] ongoing violations of federal law by LSP," and seek prospective relief.[63] Specifically,

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[61] *Id*. at 13-14. The Plaintiffs contend various instances of bystander liability.

[62] When viewed in a light most favorable to the Plaintiffs, they sufficiently allege "concrete and particularized" risks of "future harm," namely threats to the Plaintiffs' constitutional rights to assemble and to be free from the use of excessive force. "Like the plaintiff in *Hernandez*, Plaintiffs seek to enjoin LSP from again engaging in unconstitutional policies, practices, or customs that will continue to either place a chilling effect on the exercise of their First Amendment rights or actually deter Plaintiffs and Class Members from engaging in constitutionally protected activity. In this case, Plaintiffs have expressly alleged they wish to participate in future peaceful protests objecting to police misconduct—an exercise of their First Amendment rights to free speech, peaceable assembly, and petitioning state officials for redress of grievances—but they are fearful of doing so because of the threatened harm of LSP's ongoing unconstitutional policies, practices, and customs… Plaintiffs also allege that LSP (Davis's office) failed to supervise and train their employees and agents with respect to constitutionally protected activity." R. Doc. 27 at 12-13.

[63] R. Doc. 27 at 15-16.

the Plaintiffs state "they would participate in future peaceable protestors" but for LSP policies that prevent them from doing so and violate their First, Fourth, and Fourteenth Amendment rights.[64] To remedy these alleged harms, the Plaintiffs ask this Court for "prospective relief to address the ongoing systemic policies and customs" that will lead to further harm, namely a "permanent injunction barring Defendants from engaging in the unconstitutional conduct alleged" and various forms of declaratory relief.[65] Under 12(b)(6), such relief would constitute forward-looking resolutions of the Plaintiffs' injuries. Therefore, when viewed in a light most favorable to the Plaintiffs, the Court finds they have pled sufficient factual allegations to posit § 1983 claims at this time. Accordingly, in regard to the § 1983 claims brought against Col. Davis, the motion is **DENIED**.[66]

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[64] *Id.* at 15. The Plaintiffs allege several harms, including that LSP has a policy or practice of using excessive force on the basis of race that has had a "disparate impact" upon them, that LSP has failed to train or supervise its officers on crowd control, and that LSP generally exhibits a deliberate indifference to the Plaintiffs' rights. *Id.* at 12-16.

[65] *Id.* at 16-17; R. Doc. 1 at 36-41. At this time, the Court finds the Plaintiffs' request for declarations of constitutional injury are not the "backwards-looking" type barred by binding precedent. *Abbott*, 955 F. 3d at 425. Instead, these requests are prospective in nature as they ask this Court to declare the Defendants" conduct violated their rights and institute injunctions to bar such declared violations in the future.

[66] The Court notes that Rule 12(b)(6) motions are not dispositive in regard to a suit's ultimate merits.

II. *Monell* Liability Under § 1983

While the Eleventh Amendment bars certain suits against the States, "Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[67] Therefore, under *Monell*, "[l]ocal governing bodies" can be sued for policies "adopted and promulgated by that body's officers."[68] However, *Monell* applies only to municipalities and "local" officers, not agents of the State. Col. Davis is the Superintendent of the Louisiana State Police, one of the State's law enforcement agencies, and is appointed by the Governor. Therefore, he is a state actor, not a local actor. Further, the Plaintiffs have already put forth the proper vehicle for bringing claims against Col. Davis: § 1983 and *Ex parte Young*. Accordingly, in regard to the Plaintiffs' *Monell* claims against Col. Davis, the motion is **GRANTED,** and the claims are **DISMISSED WITH PREJUDICE**.

III. The Title VI Claim

Under Title VI of the Civil Rights Act of 1964, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

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[67] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978).

[68] *Id.* at 690-691.

activity receiving Federal financial assistance."[69] However, although the law uses the term "persons," Title VI "permits suits only against public or private entities receiving funds and not against individuals."[70]

After reviewing the parties' filings and the applicable law, the Court concludes that Col. Davis "is not a proper defendant under Title VI."[71] The Plaintiffs admit "the question appears unsettled whether a plaintiff may bring a Title VI claim against a government official in his official capacity," but ask this Court to settle that matter.[72] There is no case in the Fifth Circuit allowing an individual to be sued in their official capacity, but there are cases dismissing Title VI suits against individuals sued in their individual capacity.[73] Accordingly, this Court will rely on related

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[69] 42 U.S.C. § 2000.

[70] *Muthukumar v. Kiel*, 478 Fed. Appx. 156, 159 (5th Cir. 2012); *see also Price v. La. Dep't of Educ.,* 329 Fed. Appx. 559, 560 (5th Cir. 2009).

[71] *Mayorga Santamaria ex rel. Doe Child. 1-3 v. Dallas Indep. Sch. Dist.*, 2006 WL 3350194, at *48 (N.D. Tex. Nov. 16, 2006) ("Plaintiffs have pointed the court to no cases, and the court has found none on its own, holding that an individual may be sued under Title VI. Accordingly, based on the above-cited law, the court concludes that Defendant Principal Parker, sued in her individual capacity, is not a proper defendant under Title VI.").

[72] R. Doc. 27 at 18.

[73] *Muthukumar*, 478 Fed. Appx. 156 (holding suit against individual professor under Title VI, which prohibits discrimination

Fifth Circuit precedent, and the Title VI claim against Col. Davis is **DISMISSED WITH PREJUDICE**.

IV. The State Law Claims

The Court finds that, because the Plaintiffs have sufficiently pled one or more federal claims against Col. Davis, it is not necessary at this time to address whether the Plaintiffs' state law claims are properly intertwined with the Plaintiffs' pending federal claims.[74] Accordingly, in regard to the state law claims brought against Col. Davis, the motion is **DENIED**.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that the motion is **DENIED IN PART** and **GRANTED IN PART**.

IT IS FURTHER ORDERED that, in regard to the § 1983 claims brought against Col. Davis, the motion is **DENIED**.

IT IS FURTHER ORDERED that, in regard to the Plaintiffs' *Monell* claims against Col. Davis, the motion is **GRANTED,** and the claims are **DISMISSED WITH PREJUDICE**

IT IS FURTHER ORDERED that, in regard to the Title VI claim against Col. Davis, the motion is

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under program or activity receiving federal financial assistance, was not permitted); *see also Smith v. Amedisys Inc.*, 298 F.3d 434, 448 (5th Cir. 2002).

[74] 28 U.S.C. § 1367.

GRANTED, and the claim is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that, in regard to the state law claims brought against Col. Davis, the motion is **DENIED**.

New Orleans, Louisiana, this 30th day of March, 2022.

/s/ Greg Gerard Guidry
Hon.Greg Gerard Guidry
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NUMBER 21-CV-00852

JUDGE GREG G. GUIDRY

MAGISTRATE JUDGE MICHAEL NORTH

[Filed: April 12, 2022]

REMINGTYN WILLIAMS, ET AL.	)
Plaintiffs	)
	)
VERSUS	)
	)
SHAUN FERGUSON, ET AL.	)
Defendants	)
	)

NOTICE OF INTERLOCUTORY APPEAL

PLEASE TAKE NOTICE that Defendant Lamar A. Davis, named solely in his official capacity as the Superintendent of the Louisiana State Police, will appeal this Court's order dated March 30, 2022 [R.Doc. 72] denying his claim of Eleventh Amendment sovereign immunity to the U.S. Fifth Circuit Court of Appeals. An order denying a State or State agent's motion to dismiss on Eleventh Amendment grounds is immediately appealable under the collateral order

doctrine. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

Respectfully Submitted,

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