# United States Court of Appeals
*for the*
# Fifth Circuit

Case No. 23-30694

MALIKAH ASANTE-CHIOKE, individually, and on behalf of her father, Jabari Asante-Chioke,

*Plaintiff-Appellee,*

v.

NICHOLAS DOWDLE, in his individual capacity; LAMAR A. DAVIS, COLONEL, in his individual capacity,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS,
NO. 2:22-CV-4587 HONORABLE CARL J. BARBIER, U.S. DISTRICT JUDGE

## ANSWERING BRIEF OF PLAINTIFF-APPELLEE MALIKAH ASANTE-CHIOKE

DANA FOSTER
ALISON F. PERRY
SORAYA TODD
WHITE & CASE, L.L.P.
701 Thirteenth Street, NW
Washington DC 20005
(202) 626-3600
defoster@whitecase.com
alison.perry@whitecase.com
soraya.todd@whitecase.com

ERIKA MURDOCH
AABIR DAS
WHITE & CASE, L.L.P.
1221 Avenue of the Americas
New York, New York 10020
(212) 819-8200
erika.murdoch@whitecase.com
pablo.das@whitecase.com

E. BRIDGET WHEELER
NORA AHMED
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
1340 Poydras Street
New Orleans, Louisiana 70112
(225) 405-5525

*Attorneys for Plaintiff-Appellee*

COUNSEL PRESS (800) 4-APPEAL • (326337)

## CERTIFICATE OF INTERESTED PERSONS

Case No. 23-30694, *Malikah Asante-Chioke, Plaintiff-Appellee, v. Nicholas Dowdle and Lamar A. Davis, Defendants-Appellants*.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 that have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Malikah Asante-Chioke, Plaintiff-Appellee;

2. Nicholas Dowdle, Defendant-Appellant;

3. Lamar A. Davis, Defendant-Appellant;

4. Jonathon Downing, Defendant;

5. Gerard Duplessis, Defendant;

6. Officer John Does, of the Louisiana State Police or the East Jefferson Levee District Police Department, Defendants;

7. Supervisor John Doe, acting Police Superintendent of the East Jefferson Levee District Police Department at the time relevant to this action, Defendant;

8. Counsel for Plaintiff-Appellee Malikah Asante-Chioke: Erin Bridget Wheeler and Nora Ahmed of the ACLU of Louisiana, and Dana Foster, Alison Perry, Erika Murdoch, Soraya Todd, and Aabir Saran Das of White & Case LLP.

9. Counsel for Defendants-Appellants Lamar A. Davis and Nicholas Dowdle: Craig R. Watson, Guice A. Giambrone, and Bert J. Miller of Blue Williams, L.L.C.

10. Counsel for Defendants-Appellants Jonathon Downing and Gerard Duplessis: Mark E. Hanna, Trevor M. Cutaiar, and Dominic J. Carmello of Mouledoux, Bland, Legrand & Brackett.

/s/ *Dana Foster*
Attorney of Record for Plaintiff-Appellee

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee Malikah Asante-Chioke submits that the District Court's well-reasoned opinion can be affirmed without oral argument, but respectfully requests that the Court permit Appellee equal time to Appellants if the Court holds oral argument.

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS .................................................. i

STATEMENT REGARDING ORAL ARGUMENT ....................................... iii

TABLE OF AUTHORITIES ........................................................................ vi

JURISDICTIONAL STATEMENT .....................................................................1

STATEMENT OF THE ISSUES.........................................................................2

STATEMENT OF THE CASE............................................................................3

I. INTRODUCTION ........................................................................3

II. STATEMENT OF FACTS ...........................................................4

A. Mr. Asante-Chioke Is Observed Experiencing A Mental Health Crisis.........................................................................4

B. Officer Defendants Arrive On The Scene And Fail To De-Escalate ..........................................................................4

C. Officer Defendants Kill Mr. Asante-Chioke...........................6

D. Autopsy Confirms Failure To Deescalate...............................6

III. PROCEDURAL HISTORY ..........................................................7

IV. STANDARDS OF REVIEW.........................................................10

SUMMARY OF THE ARGUMENT ................................................................12

ARGUMENT ...................................................................................................14

I. DAVIS LACKS STANDING TO BRING THIS APPEAL ...........14

II. THIS COURT LACKS SUBJECT-MATTER JURISDICTION TO REVIEW THE DISTRICT COURT'S DISCOVERY RULING ...16

A. Courts Of Appeals Have Jurisdiction To Review Final Judgments And Certain Collateral Orders ............................17

B. Appellants' Reliance On Qualified Immunity To Provide Subject-Matter Jurisdiction Is Misplaced Given Their Concession That Plaintiff-Appellee's Allegations Are Well-Pled....18

III. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN DECLINING TO LIMIT THE SCOPE OF DISCOVERY.......21

A. The District Court's Denial Of The Request To Limit Discovery Is Consistent With This Court's Precedent For Ruling On A Qualified-Immunity Defense At The Motion To Dismiss Stage....21

B. The District Court Was Well Within Its Discretion To Deny Dowdle's Discovery Request....24

CONCLUSION....28

CERTIFICATE OF SERVICE....30

CERTIFICATE OF COMPLIANCE....31

## TABLE OF AUTHORITIES

**Page(s)**

## CASES

*A-Mark Auction Galleries, Inc. v. Am. Numismatic Ass'n*,
233 F.3d 895 (5th Cir. 2000) ....................................................11, 16, 18

*Backe v. LeBlanc*,
691 F.3d 648 (5th Cir. 2012) ....................................................26

*Brown v. Miller*,
519 F.3d 231 (5th Cir. 2008) ....................................................10

*Brown v. Miss. Valley State Univ.*,
311 F.3d 328 (5th Cir. 2002) ....................................................25

*Carroll v. Ellington*,
800 F.3d 154 (5th Cir. 2015) ....................................................19

*Carswell v. Camp*,
54 F.4th 307 (5th Cir. 2022) ....................................................passim

*Cohen v. Beneficial Industrial Loan Corp.*,
337 U.S. 541 (1949)....................................................17

*Digital Equip. Corp. v. Desktop Direct Inc.*,
511 U.S. 863 (1994)....................................................20

*E.T. v. Paxton*,
41 F.4th 709 (5th Cir. 2022) ....................................................16

*Fielding v. Hubert Burda Media, Inc.*,
415 F.3d 419 (5th Cir. 2005) ....................................................25

*Firestone Tire & Rubber Co. v. Risjord*,
449 U.S. 368 (1981)....................................................11, 18

*Grant v. Gusman*,
No 17-cv-2797, 2018 WL 3869494 (E.D. La. 2018) ........................................27

*Grant v. LeBlanc*,
No. 21-30230, 2022 WL 301546 (5th Cir. Feb. 1, 2022)....................................27

*Hutcheson v. Dallas County*,
994 F.3d 477 (5th Cir. 2021)....................................................................23

*Johnson v. Jones*,
515 U.S. 304 (1995)..................................................................................20

*Jordan v. Comm'r, Miss. Dep't. of Corr.*,
947 F.3d 1322 (11th Cir. 2020)..................................................................12

*JP Morgan Chase Bank, N.A. v. Datatreasury Corp.*,
936 F.3d 251 (5th Cir. 2019)...............................................................12, 18

*Kean v. Jack Henry & Assocs.*,
557 F. App'x 342 (5th Cir. 2014)....................................................12, 18, 25

*Kelly v. Syria Shell Petroleum Dev. B.V.*,
213 F.3d 841, 855 (5th Cir. 2000)..............................................................18

*Kinney v. Weaver*,
367 F.3d 337 (5th Cir. 2004) (en banc).......................................................11

*Lion Boulos v. Wilson*,
834 F.2d 504 (5th Cir. 1987)...............................................................23, 24

*Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.*,
591 F.3d 458 (5th Cir. 2009)...............................................................11, 12

*Mitchell v. Forsyth*,
472 U.S. 511 (1985)...........................................................................1, 17, 19

*Mohawk Indus., Inc. v. Carpenter*,
558 U.S. 100 (2009)...........................................................................passim

*Morgan v. Huntington Ingalls*,
879 F.3d 602 (5th Cir. 2018)...............................................................15, 16

*Rogers v. Jarrett*,
63 F.4th 971 (5th Cir. 2023) ........................................................................28

*Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*,
32 F.3d 205 (5th Cir. 1994) ........................................................................15

*Roque v. Harvel*,
993 F.3d 325 (5th Cir. 2021) ........................................................................9

*Rushaid v. Nat'l Oilwell Varco, Inc.*,
814 F.3d 300 (5th Cir. 2016) ........................................................................20

*Seiferth v. Helicopteros Atuneros, Inc.*,
472 F.3d 266 (5th Cir. 2006) ........................................................................12, 29

*Tuttle v. Sepolio*,
68 F.4th 969 (5th Cir. 2023) ........................................................................15

*United States ex rel. Aldridge v. Corp. Mgmt.*,
78 F.4th 727 (5th Cir. 2023) ........................................................................11, 12, 25

*White v. City of Winnfield*,
No. 1:19-cv-01410, 2021 WL 2880522 (W.D. La. Mar. 5, 2021) .....................27

*White v. City of Winnfield*,
No. 1:19-cv-01410, 2021 WL 2879921 (July 8, 2021) .....................................27

*Wicks v. Mississippi State Emp. Servs.*,
41 F.3d 991 (5th Cir. 1995) ........................................................................24

*Wiwa v. Royal Dutch Petroleum Co.*,
392 F.3d 812 (5th Cir. 2004) ........................................................................25

*Zapata v. Melson*,
750 F.3d 481 (5th Cir. 2014) ........................................................................23, 24, 26

## STATUTES AND RULES

28 U.S.C. § 1291 .......... 11, 16, 17, 18

28 U.S.C. § 1292 .......... 17

28 U.S.C. §§ 1331 and 1343 .......... 1

28 U.S.C. § 1367 .......... 1

42 U.S.C. § 1983 .......... passim

Fed. R. App. P. 8 .......... 10

Fed. R. Civ. P. 12 .......... 8

## OTHER AUTHORITIES

Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 204 (2023) .......... 28

*15B C. Wright, A. Miller, & E. Cooper*, Federal Practice and Procedure § 3914.23 (2d ed. 1992) .......... 18

## JURISDICTIONAL STATEMENT

Plaintiff-Appellee Malikah Asante-Chioke filed this action under 42 U.S.C. section 1983 ("Section 1983") and under Louisiana state law. The District Court has original jurisdiction over the federal-law claims under to 28 U.S.C. sections 1331 and 1343, and supplemental jurisdiction over the state-law claims under 28 U.S.C. section 1367. On August 31, 2023, the District Court issued an order denying-in-part and granting-in-part Defendants Nicholas Dowdle and Col. Lamar Davis's motion to dismiss and denying their request to limit discovery to the issue of qualified immunity. ROA.399. On September 29, 2023, Defendants Davis and Dowdle noticed an appeal of that order. ROA.477. To the extent that it is before this Court—and it is not—this Court would have limited jurisdiction under the collateral order doctrine to review only the District Court's denial of qualified immunity and only to the extent that it turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985). Because the Defendants-Appellants have not sought this Court's review of the District Court's denial of Defendant Dowdle's assertion of qualified immunity at the pleadings stage, this Court lacks subject-matter jurisdiction over this appeal.

## STATEMENT OF THE ISSUES

1. Whether this Court lacks subject-matter jurisdiction to consider Appellants' appeal of the District Court's non-final discovery order, as that order is not subject to the collateral order doctrine.

2. If this Court reaches the merits, whether the District Court appropriately exercised its broad discretion in denying Defendants-Appellants' request to limit the scope of discovery to the issue of qualified immunity, after determining that Plaintiff-Appellee's allegations were sufficient to overcome Dowdle's assertion of qualified immunity at the pleading stage.

## STATEMENT OF THE CASE

### I. INTRODUCTION

This is an interlocutory appeal of a non-final discovery order in an excessive force case filed, *inter alia*, under 42 U.S.C. section 1983. On November 21, 2021, Defendant-Appellant Nicholas Dowdle, alongside other officers, encountered Plaintiff's father, Jabari Asante-Chioke, in the midst of a mental health crisis. Instead of employing tactics that could ensure a safe resolution of the situation, Dowdle and his fellow officers shot and killed Mr. Asante-Chioke. The officers fired thirty-six bullets, many of them after Mr. Asante-Chioke fell to the ground, motionless and incapacitated. He died as a result of his injuries. Plaintiff Malikah Asante-Chioke sued the officers involved in the shooting and their supervisors, seeking compensation for her injuries.

Appellants challenge only the District Court's discretionary decision denying Dowdle's in-the-alternative request to limit discovery to his claimed qualified-immunity defense. *See* Appellants' Original Brief, Doc. 33-1 ("Br.") 5-6. The District Court held that Ms. Asante-Chioke's allegations were sufficient to overcome Dowdle's qualified immunity defense at the pleadings stage; therefore, such limitation was "not necessary in this case." ROA.419.

The District Court's discovery ruling is not immediately appealable, either by statute or under the collateral order doctrine; therefore, this Court lacks

subject-matter jurisdiction to consider Dowdle's arguments. But even if the Court could reach the merits, affirmance is warranted because the District Court followed the correct procedure under this Court's precedents for evaluating Dowdle's qualified-immunity defense and acted well within its broad discretion to issue discovery orders.

## II. STATEMENT OF FACTS

### A. Mr. Asante-Chioke Is Observed Experiencing A Mental Health Crisis

At approximately 10:00 p.m. on November 21, 2021, a concerned citizen spotted Mr. Asante-Chioke, a 52-year-old Black man, walking along the highway at the intersection of Airline Drive and North Causeway Boulevard in Jefferson Parish, Louisiana. ROA.170 ¶ 24. Mr. Asante-Chioke appeared visibly distressed and was carrying in his hands what was later identified to be a gun and knife. *Id.* ¶ 25. Louisiana is an open carry state and the carrying of firearms in many public places is expressly legal. ROA.164 ¶ 6. The concerned citizen believed Mr. Asante-Chioke could have been experiencing a mental health crisis and notified a police officer who was directing traffic around a nearby construction site. ROA.170 ¶ 26.

### B. Officer Defendants Arrive On The Scene And Fail To De-Escalate

Multiple officers, including Defendants Dowdle, Jonathan Downing, and Gerard Duplessis (the "Officer Defendants") arrived on the scene and located Mr. Asante-Chioke on the highway. *Id.* ¶¶ 27-28. The officers parked their vehicles

along the Airline Drive roadway and approached Mr. Asante-Chioke. *Id.* A witness who was in a car that was driving past the scene recorded a cellphone video of the ensuing interaction that led to Mr. Asante-Chioke's death. *Id.* ¶ 29.

The video shows the Officer Defendants pursuing Mr. Asante-Chioke, who jogged slowly westbound along the edge of the eastbound lane of the highway. ROA.171 ¶ 30. At one point, Mr. Asante-Chioke was observed pointing a gun at his own head. *Id.* The Officer Defendants ignored the obvious signs of Mr. Asante-Chioke's mental distress and pursued him with their guns drawn, while screaming continuously at him to "get on the ground." *Id.* ¶ 31. As Mr. Asante-Chioke continued to jog away one officer screamed, "you better fucking stop!" and "get on the fucking ground! I swear to God I'll fucking shoot you!" Another officer can be heard in the video screaming, "I will fucking kill you!" *Id.*

Mr. Asante-Chioke jogged past a white police truck parked in the middle of the eastbound lane with its emergency lights flashing. *Id.* ¶¶ 32-33. The video shows one officer exiting the driver's side of the vehicle and another officer standing at the back bed of the truck pointing his weapon at Mr. Asante-Chioke jogging past the vehicle. *Id.* ¶ 33. Both officers at the truck instructed Mr. Asante-Chioke twice to "get on the ground." *Id.* ¶ 34. A third officer came into the frame of the video jogging about twenty feet behind Mr. Asante-Chioke. *Id.* ¶ 35.

Eventually, Mr. Asante-Chioke slowed to a walk, continuing in the same direction, with his head down. *Id*. The third officer continued jogging toward Mr. Asante-Chioke from behind with his gun drawn and screamed again for Mr. Asante-Chioke to "Get on the ground!" ROA.172 ¶ 36.

**C. Officer Defendants Kill Mr. Asante-Chioke**

Without turning around or making any direct eye contact, Mr. Asante-Chioke lifted both of his arms parallel to the ground, dropped them, and then raised his right arm, holding a gun, in the general direction of the officer in pursuit. *Id.* ¶¶ 37-38. The officer in pursuit opened fire on Mr. Asante-Chioke. *Id.* ¶ 38. Almost immediately, Mr. Asante-Chioke dropped the gun and slumped down to the ground. *Id.* ¶¶ 39-40. Nevertheless, the officers continued to fire on Mr. Asante-Chioke. *Id.*

After these events, the bystander witness who recorded the cellphone footage later uploaded the video to Instagram, with an accompanying caption that stated, "Omg Be [sic] Could have been a Person With Mental Health Problems." ROA.170 ¶ 29.

**D. Autopsy Confirms Failure To Deescalate**

A subsequent investigation conducted by the Louisiana State Police (the "LSP") revealed that the Officer Defendants fired thirty-six rounds at Mr. Asante-Chioke. ROA.172 ¶ 41. Mr. Asante-Chioke's autopsy report revealed that he had suffered ten gunshot wounds to his torso, six gunshot wounds to his arms, and eight

gunshot wounds to his legs. *Id.* ¶ 42. The gunshots fractured his left leg, fractured his ribs, pierced his lungs, and caused multiple other fatal wounds. *Id.* ¶ 43.

An LSP spokesperson stated publicly in a news broadcast that the officer who initially opened fired on Mr. Asante-Chioke had first attempted to tase him. ROA.173 ¶ 44. However, the autopsy revealed that Mr. Asante-Chioke's body did not have marks consistent with the use of a taser. *Id.*

## III. PROCEDURAL HISTORY

On November 18, 2022, Plaintiff filed her Complaint against two defendants who are employed by the LSP, Nicholas Dowdle and Col. Lamar Davis, and two defendants who are employed by the East Jefferson Levee District (the "EJLD") Police Department, Jonathon Downing and Gerard Duplessis, as well as unknown John Doe officer and supervisor defendants. ROA.10. On March 27, 2023, Dowdle and Davis moved to dismiss, and on March 31, 2023, Downing and Duplessis filed their Answers and Affirmative Defenses. ROA.93, 114. On April 26, 2023, Ms. Asante-Chioke filed her Amended Complaint, asserting claims of excessive force under Section 1983 and state-law claims against several defendants, including Dowdle. ROA.163. Additionally, the Amended Complaint contains claims of unlawful seizure under Section 1983 and negligent supervision and training against Davis and other unnamed supervisor officers. *Id.*

On June 23, 2023, Davis and Dowdle moved to dismiss the Amended Complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted under Rule 12 of the Federal Rules of Civil Procedure. ROA.252. In the alternative, they requested an order limiting discovery to qualified-immunity issues. ROA.272 ("Alternatively, should the court believe that there is enough alleged in the Amended Complaint to support a potential claim of excessive force against Dowdle, Defendants ask that the matter be open for limited discovery on the issue of qualified immunity."). That same day, Downing and Duplessis each filed Answers and Affirmative Defenses, implicitly acknowledging that they had no basis to claim that Plaintiff had not sufficiently pleaded claims against them. ROA.276, 309. On July 18, 2023, Plaintiff and Davis jointly stipulated to dismiss the unlawful seizure claim against Defendant Davis. ROA.365.

On August 31, 2023, the District Court granted-in-part and denied-in-part Davis and Dowdle's motion to dismiss. ROA.399. The District Court rejected their subject-matter jurisdiction challenges and held that Plaintiff properly brought claims against the Defendants in their individual capacities. ROA.403-407. The District Court also rejected Defendants' arguments that Ms. Asante-Chioke failed to state a claim against them and held that she pled sufficient facts with respect to her negligent supervision and training claim against Davis. ROA.410, 413. The District

Court dismissed a subset of Plaintiff's vicarious liability claims alleged against Davis. ROA.408, 419.

The District Court further held that Dowdle's assertion of qualified immunity did not necessitate dismissal at the pleading stage. ROA.413-419. The District Court explained that there is no heightened pleading standard on the issue of qualified immunity, and that Ms. Asante-Chioke's burden was merely to "plead facts allowing this Court to draw a reasonable inference[] as to Dowdle's liability and qualified immunity." ROA.415. Because Dowdle disputed only the first element of qualified immunity, *i.e.*, whether Plaintiff had alleged a violation of a clearly established federal right, the District Court focused its analysis on whether the allegations were sufficient overcome a defense of qualified immunity. ROA.413-419. Faithfully applying this Court's holding in *Roque v. Harvel*, 993 F.3d 325 (5th Cir. 2021)—an application Appellants "do not contest" (Br. 5 n.7)—the District Court concluded that the allegations were "sufficient to plead that the Officer Defendants violated Mr. Asante-Chioke's Fourth Amendment rights for the shots they fired after he was clearly incapacitated." ROA.417.

In addition, the District Court denied Defendants' request for a limited discovery order, *i.e.*, the sole portion of the District Court's order of which Appellants seek review. ROA.419. The District Court held, "[c]onsidering the circumstances of this case, the specificity of the facts pled in the Amended

Complaint, and the court's discretion in issuing this type of discovery order, such an order is not necessary." ROA.419.

On September 29, 2023, Davis and Dowdle filed a notice of appeal. ROA.477.

On October 4, 2023, Davis and Dowdle moved the District Court to stay all discovery as to all claims against all defendants. ROA.480. On November 29, 2023, the District Court granted-in-part and denied-in-part the motion, granting a limited discovery stay only as to Plaintiff's Section 1983 claim against Dowdle. ECF No. 66.[1] The District Court allowed discovery to proceed as to the other claims against all defendants. *Id.*

On December 8, 2023, Dowdle moved this Court to stay the District Court's November 29, 2023 discovery order under Rule 8 of the Federal Rules of Appellate Procedure. Doc. 36. That motion remains pending.

## IV. STANDARDS OF REVIEW

On an interlocutory appeal of a denial of qualified immunity, this Court "ha[s] jurisdiction to consider only whether 'a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law." *Brown v.*

---

[1] On December 12, 2023, the Court granted Appellants' unopposed motion to supplement the Record on Appeal with certain District Court documents filed after the Record on Appeal initially was compiled. Because these documents do not yet have ROA numbers, Appellee references their ECF numbers on the District Court docket.

*Miller*, 519 F.3d 231, 236 (5th Cir. 2008) (quoting *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (en banc)).

Discovery rulings, like the one Appellants condemn, generally are not subject to interlocutory appeal. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) and 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.23 (2d ed. 1992)) (noting that "we have generally denied review of pretrial discovery orders" and that "[t]he rule remains settled that most discovery rulings are not final"); *A-Mark Auction Galleries, Inc. v. Am. Numismatic Ass'n*, 233 F.3d 895, 898 (5th Cir. 2000) ("[D]iscovery orders are not generally considered final orders within the meaning of 28 U.S.C. § 1291.").

When properly before this Court (which this one is not), this Court reviews a district court's discovery decisions for abuse of discretion. *See United States ex rel. Aldridge v. Corp. Mgmt.*, 78 F.4th 727, 736, 750 (5th Cir. 2023) (affirming denial of post-trial discovery). This is a "highly deferential standard," *id.* at 750, which "poses a high bar" to reversal. *Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.*, 591 F.3d 458, 469 (5th Cir. 2009) (affirming denial of motion for additional discovery).

A district court's discovery ruling therefore "will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse." *Id.* at 469 (quoting *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 276 (5th Cir. 2006)); *see also*

*JP Morgan Chase Bank, N.A. v. Datatreasury Corp.*, 936 F.3d 251, 255-56 (5th Cir. 2019) (citation omitted) ("A trial court enjoys wide discretion in determining the scope and effect of discovery, and it is therefore unusual to find an abuse of discretion in discovery matters."). Indeed, this standard of review is so "highly deferential" that this Court has upheld discovery rulings even where it may have disagreed with the outcome. *See, e.g.*, *Aldridge*, 78 F.4th at 750-51 (affirming discovery ruling although it was "somewhat incongruous"); *Kean v. Jack Henry & Assocs.*, 577 F. App'x 342, 346 (5th Cir. 2014) (quoting *Marathon*, 591 F.3d at 469) (explaining that even if a district court errs in its discovery rulings, this Court will only overrule such rulings if the "error affected the substantial rights of the parties").

## SUMMARY OF THE ARGUMENT

Appellants ask this Court to overturn the District Court's decision to decline to limit discovery to the issue of qualified immunity. Br. 5-6. Davis, who has no qualified-immunity defense because he faces only state-law claims, has suffered no injury in connection with the District Court's discovery ruling and therefore lacks standing in this appeal.

Although Dowdle has asserted a qualified-immunity defense, he notably concedes that the District Court's rejection of his motion to dismiss on qualified-immunity grounds was correct. *See* Br. 5 n.7 ("Defendants do not contest the ruling

insofar as it found that the Plaintiff alleged facts sufficient, if true, to defeat qualified immunity.").

***First***, unlike a determination on the applicability of qualified immunity itself, the District Court's discovery order is not subject to this Court's review under the collateral order doctrine. This Court therefore lacks subject-matter jurisdiction to consider Dowdle's appeal.

While Dowdle attempts to capitalize on the fact that a qualified-immunity ruling is immediately appealable, he has expressly foregone his opportunity to appeal that portion of the District Court's order. Attempting to shoehorn this appeal into the collateral order doctrine, Dowdle asks this Court to exercise jurisdiction based on the novel and unsupported theory that by not limiting discovery, the District Court somehow denied him "any benefit" of qualified immunity to which he might be entitled. This view is incorrect; in fact, courts in this Circuit do not recognize any corollary to the collateral order doctrine that sweeps in discovery orders merely because they relate to the issue of qualified immunity.

***Second***, even if the Court considers the merits of Dowdle's appeal, affirmance is required. The District Court precisely followed this Court's guidance in ruling on Dowdle's discovery request, which does not require district courts to limit the scope of discovery to the issue of qualified immunity after denying a motion to dismiss. Without permitting any pre-motion-to-dismiss discovery, the District Court

carefully evaluated the allegations in the Amended Complaint and Dowdle's arguments for dismissal, definitively concluded that Plaintiff's allegations, if true, would overcome Dowdle's qualified-immunity defense, and thus denied Dowdle's motion to dismiss. This is exactly the procedure set forth in this Court's most recent guidance in *Carswell v. Camp*, 54 F.4th 307 (5th Cir. 2022).

Dowdle does not cite a single case to support his unfounded contention that a district court is required to limit discovery to the issue of qualified immunity after denying a motion to dismiss. Given a district court's broad discretion to manage discovery, even if this Court concludes that it would have limited discovery in the manner Dowdle requested, it may not reverse the District Court's ruling unless it finds an abuse of discretion. Dowdle does not clear that high bar, nor could he.

For these reasons, this Court should dismiss Dowdle's appeal for lack of jurisdiction or, if it reaches the merits, affirm the District Court's discovery ruling in full.

## ARGUMENT

### I. DAVIS LACKS STANDING TO BRING THIS APPEAL

Because this appeal concerns only the District Court's denial of Dowdle's request to limit discovery, Davis lacks standing to participate. Davis faces no federal law claims and has not asserted a qualified-immunity defense. His appearance in

this appeal is a blatant attempt to avoid the same discovery obligations that the other defendants are facing now.

A party does not "automatically ha[ve] standing to appeal" a district court order "[m]erely because a party appears in the district court proceedings," nor may a party "appeal a district court's order to champion the rights of another." *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 208 (5th Cir. 1994). Instead, to have standing a party must have an "injury in fact" that is causally connected to the issue on appeal. *Morgan v. Huntington Ingalls*, 879 F.3d 602, 606 (5th Cir. 2018) (identifying standing requirements).

Davis cannot meet this standard given that the only issue on appeal is the District Court's decision not to limit discovery to the issue of qualified immunity as to Dowdle; indeed, Appellants acknowledge that the allegations against Davis "consist of purely state law claims" (Br. 13), and qualified immunity is not available for state-law claims. *See Tuttle v. Sepolio,* 68 F.4th 969, 976 (5th Cir. 2023) ("Federal qualified immunity does not apply to state-law claims."). Appellants include a cursory assertion, without citing any authority, that the District Court's discovery ruling is "prejudicial and legal error as to Col. Davis" and that "if Dowdle is entitled to qualified immunity, the allegations against Col. Davis . . . would likewise fail." Br. 13. Yet as the District Court correctly explained in denying Appellants' motion to stay discovery, "even though the factual basis underlying all

these claims is the shooting death of Mr. Asante-Chioke," "Plaintiff's claims against Davis and the other defendants, as well as Plaintiff's state-law claims against Dowdle, do not implicate qualified immunity issues." ECF No. 66 at 7.

Davis therefore should be dismissed from this appeal for lack of standing. *See Morgan,* 879 F.3d at 607 (dismissing one appellant for its failure to show a concrete and particularized injury in fact establishing its standing on appeal)

## II. THIS COURT LACKS SUBJECT-MATTER JURISDICTION TO REVIEW THE DISTRICT COURT'S DISCOVERY RULING

Before turning to the merits of an argument, a court must first establish jurisdiction over the claim. *E.T. v. Paxton*, 41 F.4th 709, 714 (5th Cir. 2022) (explaining, "Article III jurisdiction is always first" and dismissing appeal for lack of subject-matter jurisdiction). Here, Dowdle concedes that Ms. Asante-Chioke pled sufficient facts to rebut his qualified-immunity defense. *See* Br. 5 n.7 ("Defendants do not contest the ruling insofar as it found that the Plaintiff alleged facts sufficient, if true, to defeat qualified immunity."). Dowdle only seeks this Court's review of the last paragraph of the District Court's decision, in which it denied Appellants' request to limit discovery. *See* Br. 5-6. But such discovery orders are not subject to the collateral order doctrine; indeed, discovery orders are the paradigmatic district court determinations that typically cannot be appealed before entry of final judgment. *See A-Mark Auction Galleries, Inc.*, 233 F.3d at 898-99 (holding that discovery orders are neither appealable as final orders under 28 U.S.C. § 1291 nor

as collateral orders under the *Cohen* exception recognized in the case law). This Court therefore should dismiss this appeal for lack of subject-matter jurisdiction.

### A. Courts Of Appeals Have Jurisdiction To Review Final Judgments And Certain Collateral Orders

This Court lacks subject-matter jurisdiction to review the last paragraph of the District Court's order because it does not fall within the narrow class of collateral, "final" decisions under 28 U.S.C. section 1291 ("Section 1291").

Federal courts of appeals have limited jurisdiction over "final decisions of the district courts of the United States," Section 1291, as well as select interlocutory orders as provided in 28 U.S.C. section 1292. The Supreme Court has given a "practical rather than a technical construction" to the phrase "final decision," holding that Section 1291 "encompasses not only judgments that 'terminate an action,' but also a 'small class' of collateral rulings that, although they do not end the litigation . . . resolve important questions separate from the merits" and therefore "are appropriately deemed 'final.'" *Mohawk Indus., Inc.*, 558 U.S. at 106 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-46 (1949)).[2]

[2] An order denying qualified immunity is one such order, but only "to the extent that it turns on an issue of law." *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision.'"). Because Dowdle made the strategic decision not to seek this Court's review of the portion of the District Court's order denying Dowdle's qualified-immunity defense at the pleadings stage (Br. 5 n.7), that decision provides no basis for this Court's jurisdiction over the discovery ruling.

Decisions related to the scope of civil discovery are within the sound discretion of trial courts. *See Kean*, 577 F. App'x at 342 (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 855 (5th Cir. 2000)) ("A district court has broad discretion in all discovery matters."); *JP Morgan Chase Bank, N.A.*, 936 F.3d at 255 (citation omitted) ("A trial court enjoys wide discretion in determining the scope and effect of discovery."). Such decisions are almost never subject to interlocutory appeal. *See Mohawk Indus., Inc.*, 558 U.S. at 108 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), and 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.23 (2d ed. 1992)) (noting that "we have generally denied review of pretrial discovery orders" and that "[t]he rule remains settled that most discovery rulings are not final"); *A-Mark Auction Galleries, Inc.*, 233 F.3d at 898-99 ("[D]iscovery orders are not generally considered final orders within the meaning of 28. U.S.C. § 1291.").

### B. Appellants' Reliance On Qualified Immunity To Provide Subject-Matter Jurisdiction Is Misplaced Given Their Concession That Plaintiff-Appellee's Allegations Are Well-Pled

Dowdle is not seeking this Court's review of the District Court's qualified-immunity decision; yet, he repeatedly claims that such decision provides a basis for this Court's review. Dowdle cannot have it both ways.

A denial of qualified immunity is immediately appealable because "qualified immunity includes immunity from suit — a right not to stand trial that would be

‘effectively lost if a case is erroneously permitted to go to trial.’” *Carroll v. Ellington*, 800 F.3d 154, 167 (5th Cir. 2015) (quoting *Mitchell*, 472 U.S. at 526-27). But where, as here, a defendant has failed to convince a district court that he is entitled to qualified immunity at the motion to dismiss stage and has expressly foregone the opportunity to seek appellate review of that determination, there is no support for an additional right to be excused from discovery. The mere fact that a defendant may seek immediate appellate review of a denial of qualified immunity does not mean that any adverse ruling in a case involving a qualified-immunity defense can be immediately appealed. *See, e.g.*, *Mohawk Indus., Inc.*, 558 U.S. at 109 (holding that discovery order implicating attorney-client privilege was not immediately appealable under the collateral order doctrine merely because it involved an “important interest”).

Dowdle does not and cannot identify any precedent for treating a ruling on the scope of discovery as an order on qualified immunity subject to the collateral order doctrine. He cites to *Carswell* for the proposition that an order “tantamount to” a denial of qualified immunity may immediately be appealed. Br. 2. But that only underscores the distinction between an order that denies a defendant the potential benefit of qualified immunity, as in *Carswell*, and one that does not, as in this case. In *Carswell*, the district court declined to make any ruling whatsoever on the issue of qualified immunity while ordering full discovery, thus depriving the defendant of

a pre-discovery ruling on qualified immunity. 54 F.4th at 310. Here, by contrast, as Dowdle acknowledges (Br. 5 n.7) and as the District Court held, Ms. Asante-Chioke's allegations are sufficient to overcome his qualified-immunity defense, so he was not entitled to dismissal at the pleading stage.

Not only is Dowdle's position unsupported by precedent, but it also risks inviting a flood of piecemeal appellate litigation on narrow, discretionary discovery determinations, which would fly in the face of the final judgment rule. *See Mohawk Indus., Inc.*, 558 U.S. at 112-13 (expressing concern that "[p]ermit[ting] parties to undertake successive, piecemeal appeals" of discovery orders impacting the attorney-client privilege "would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals"). Such a rule would permit any defendant asserting a qualified-immunity defense to appeal a discovery ruling simply by claiming that the decision prejudiced them and somehow deprived them of "any benefit" of qualified immunity. This is a transparent attempt to establish jurisdiction in a case where Supreme Court and Fifth Circuit precedent prohibit it. *See Johnson v. Jones*, 515 U.S. 304, 309 (1995) ("[P]ermitting too many interlocutory appeals can cause harm."); *Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016) (quoting *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 868 (1994) ("The collateral order doctrine is a 'narrow exception that

should stay that way and never be allowed to swallow the general rule.'") (internal quotation marks omitted)).

For these reasons, this Court should dismiss this appeal for lack of subject-matter jurisdiction.

## III. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN DECLINING TO LIMIT THE SCOPE OF DISCOVERY

Even if this Court finds that it has subject-matter jurisdiction to review a routine discovery order (it does not), it should affirm the District Court's ruling in full. While Dowdle erroneously argues that the District Court was "required" to limit discovery to the issue of qualified immunity (Br. 10, 20), there is no such requirement. The District Court's ruling was consistent with the procedure that this Court articulated for addressing qualified immunity at the motion to dismiss stage in *Carswell v. Camp* and was not otherwise an abuse of the District Court's discretion.

### A. The District Court's Denial Of The Request To Limit Discovery Is Consistent With This Court's Precedent For Ruling On A Qualified-Immunity Defense At The Motion To Dismiss Stage

This Court explained in *Carswell* that, on a motion to dismiss based on a qualified-immunity defense, a district court must determine whether a plaintiff's allegations, if true, would overcome qualified immunity "without the benefit of pre-dismissal discovery." 54 F.4th at 312. If a court denies such a motion, the defendant can either "immediately appeal the district court's denial under the collateral order doctrine" or "move the district court for discovery limited to the

factual disputes relevant to whether [qualified immunity] applies, then reassert [qualified immunity] in a summary judgment motion." *Id.* If a defendant chooses the latter, the court may issue such an order if it cannot rule on the immunity defense "without further clarification of the facts." *Id.* at 311.

The District Court followed this procedure, and Dowdle chose to move the District Court for limited discovery. The District Court's ultimate denial of Dowdle's request does not diverge from the procedure set forth in *Carswell*.

Indeed, nothing in this Court's jurisprudence requires a district court to limit the scope of discovery in this manner. Dowdle incorrectly contends that a court is "required" (Br. 10, 20) to grant such a request for limited discovery, invoking a "requisite 'narrowly tailored' scope" of discovery from now-overruled Fifth Circuit case law (*id.* at 3), suggesting that the "only allowable discovery after the motion to dismiss should be limited and narrowly tailored to qualified immunity" (*id.* at 19-20). Without support for this contention, Dowdle muddies the water with a misreading of *Carswell* and citations to overruled cases that were decided on materially different procedural postures. *Id.* at 17-20.

***First***, *Carswell* lays out the procedure for ruling on a qualified-immunity defense raised on a motion to dismiss, holding only that a district court must rule on a motion to dismiss asserting qualified immunity "without the benefit of pre-dismissal discovery." *Carswell*, 54 F.4th at 312. *Carswell* does not impose any

requirement to limit the scope of discovery after a denial of a motion to dismiss on qualified-immunity grounds.

***Second***, the other cases on which Dowdle relies were either overruled by *Carswell* or involved procedural facts materially different from those present in this case.

Dowdle points to *Hutcheson v. Dallas County*, 994 F.3d 477 (5th Cir. 2021), to argue that the "required" procedure is for a court to issue limited discovery. Br. 10, 19-20. But *Hutcheson* is procedurally inapposite. There, this Court considered an appeal of a motion for summary judgment, not a motion to dismiss, and thus did not address the question of whether a district court must limit the scope of discovery after rejecting a qualified-immunity defense at the motion to dismiss stage, or whether it simply "may" do so. *See Hutcheson*, 994 F.3d at 478. And in fact, the district court denied the defendant's request for limited discovery, and this Court affirmed that decision, indicating that courts are not "required" to grant limited discovery requests. *Id.* at 481.

Dowdle also relies on *Wicks v. Mississippi State Employment Services*, *Zapata v. Melson*, and *Lion Boulos v. Wilson* for the proposition that Fifth Circuit procedure mandates limited discovery. Br. 6, 11-12. As a preliminary matter, *Wicks* and *Lion Boulos*, which addressed the question of whether a limited discovery order was justified before a ruling on a motion to dismiss, were overruled in part by *Carswell*.

*See Wicks v. Mississippi State Emp. Servs*, 41 F.3d 991, 997 (5th Cir. 1995); *Lion Boulos v. Wilson*, 834 F.2d 504, 505 (5th Cir. 1987); *Carswell*, 54 F.4th at 312 (stating that a court must decide a motion to dismiss "without *any* discovery") (emphasis in original). Similarly, *Zapata* held that a district court may not *defer* a ruling on a motion to dismiss pending additional discovery, which is not at issue here; instead, the District Court considered and denied Dowdle's motion to dismiss without discovery. *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014).

In sum, Dowdle cites no authority that even suggests that a court is required to grant a request for limited discovery following a denial of a motion to dismiss on qualified-immunity grounds. The District Court adhered to the procedure set forth in *Carswell*, which did not mandate limited discovery.

### B. The District Court Was Well Within Its Discretion To Deny Dowdle's Discovery Request

Even if the Court were to conclude that limiting discovery might have been permissible, Dowdle does not come close to demonstrating the clear abuse of discretion that he acknowledges is required for reversal. Br. 13. Under this standard, this Court is "highly deferential" to the decisions of a district court. *Aldridge*, 78 F.4th at 750. A district court's determination on the scope of discovery should not be reversed unless it is "arbitrary or clearly unreasonable, and the appellant demonstrates prejudice resulting from the decision." *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 428 (5th Cir. 2005) (internal citations and quotation

marks omitted) (holding that the district court did not abuse its discretion in denying request for additional discovery); *see also Kean*, 577 F. App'x at 346 (quoting *Marathon*, 591 F.3d at 469) (explaining that even if a district court errs in its discovery rulings, this Court will only overrule such rulings if the "error affected the substantial rights of the parties").

***First***, Dowdle cannot show that the district court's decision was "arbitrary or clearly unreasonable." *Fielding*, 415 F.3d at 428. This standard is typically only met where a district court fails to provide any reasons or explanation for its decision whatsoever, or fails to consider and apply any relevant law. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818-19 (5th Cir. 2004) (finding court abused its discretion in quashing subpoena where it issued order "without providing oral or written reasons for doing so"); *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 334 (5th Cir. 2002) (holding that court abused its discretion by granting summary judgment based on insufficient evidence of liability, despite having issued orders preventing the plaintiff from obtaining discovery of such evidence).

Dowdle attempts to create the impression that the District Court overlooked relevant law, asserting that this Court should vacate a district court's order which "refuses to rule on, or defers ruling on, an assertion of qualified immunity or which orders discovery" without following the "two-step process" for ruling on qualified immunity at the motion to dismiss stage. Br. 14 (citing *Zapata*, 750 F.3d at 485-86;

*Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2021)). But as explained *supra*, the District Court followed this Circuit's applicable precedents. The District Court considered and rejected Dowdle's qualified-immunity defense, holding that Plaintiff's "allegations, taken as true, are sufficient to plead that the Officer Defendants violated Mr. Asante-Chioke's Fourth Amendment rights for the shots they fired after he was clearly incapacitated." ROA.417. The District Court then considered the request to narrow the scope of discovery but found that because of "the circumstances of this case, the specificity of the facts pled . . . and the court's discretion in issuing this type of discovery order, such an order is not necessary in this case." ROA.419 (citing *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014)). The latter ruling simply is not arbitrary or unreasonable.

The District Court's ruling was consistent with analogous rulings by numerous other courts in this Circuit that have declined to limit discovery to the issue of qualified immunity after denying a motion to dismiss. For example, in *White v. City of Winnfield*, the court denied defendants' motion to dismiss a Section 1983 claim on qualified-immunity grounds, and also denied their motion for limited discovery on qualified immunity. No. 1:19-cv-01410, 2021 WL 2880522, at *8, 14 (W.D. La. Mar. 5, 2021), R. & R. adopted, 2021 WL 2879921 (July 8, 2021). There, as here, "the parties agree[d] the pleadings are sufficient to survive a qualified immunity defense" and "due to the pendency of claims not subject to qualified

immunity," the court "concluded [Plaintiff's] claims require[d] complete discovery not limited to the issue of qualified immunity." *Id.* at *8 n.10. Similarly, in *Grant v. Gusman*, the district court noted it "may" limit discovery to qualified-immunity issues after denying dismissal on qualified immunity but declined to do so. No. 17-cv-2797, 2018 WL 3869494, at *6 (E.D. La. Aug. 14, 2018). Following the denial of defendants' motion to dismiss, the parties engaged in "extensive discovery," as this Court noted on an appeal of an unrelated issue. *Grant v. LeBlanc*, No. 21-30230, 2022 WL 301546, at *3 (5th Cir. Feb. 1, 2022).

***Second***, Dowdle does not demonstrate that he suffered prejudice as a result of the District Court's order. Dowdle perplexingly contends that the District Court's discovery order "essentially ruled that the plaintiff's pleadings alone defeat[] any assertion of qualified immunity on the part of Dowdle" and that this deprives Dowdle of "any benefit" of qualified immunity. Br. 2, 3-4, 5-6, 10-11, 17-18. This is plainly incorrect. While Plaintiff has explained in other submissions, and maintains here, that qualified immunity is categorically unavailable as a defense to the Section 1983 claim against Dowdle, *see* Doc. 58 at 7 (citing *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willett, J., concurring), *and* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 204 (2023)), if that defense is available at all, Dowdle may raise it again at a later stage in this litigation. *See* ECF No. 66 at 6 ("[S]everal additional opportunities exist for Dowdle to litigate

the issue of qualified immunity once and for all, including on summary judgment, appeal, or at trial."). Thus, the potential benefits of qualified immunity are still available to Dowdle to the extent qualified immunity is available to him and in the unlikely event that he can show an entitlement to qualified immunity on the facts of this case.

Dowdle made a strategic decision to forego interlocutory review of the District Court's denial of his motion to dismiss; any short-term consequences he may suffer at this stage before summary judgment resulting from that decision (*i.e.*, having to participate in the full scope of discovery deemed appropriate by the District Court) do not establish an abuse of discretion that justifies reversal.

Because Dowdle has failed to demonstrate that the District Court's order was arbitrary or clearly unreasonable, or that he suffered prejudice, he has failed to meet the "high bar" posed by the abuse of discretion standard. *Seiferth*, 472 F.3d at 276.

## CONCLUSION

For the foregoing reasons, Malikah Asante-Chioke respectfully submits that this Court should dismiss Davis from this appeal for lack of standing, dismiss the appeal for lack of subject-matter jurisdiction, or else affirm the District Court's ruling in full.

Date: December 22, 2023

Respectfully Submitted,

/s/ *Dana Foster*

Dana Foster
Alison Perry
Soraya Todd
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, DC 20005
Telephone: + 1 202 626 3600

Aabir Das
Erika Murdoch
WHITE & CASE LLP
1221 Avenue of The Americas
New York, NY 10020
Telephone: + 1 212 819 8200

Erin Bridget Wheeler
Nora Ahmed
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
LOUISIANA
1340 Poydras Street
New Orleans, LA 70112-0000
Telephone: +1 225 405 5525

*Counsel for Plaintiff-Appellee*
*Malikah Asante-Chioke*

## CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2023, the foregoing was electronically filed through this Court's CM/ECF system, and a copy was electronically served through the CM/ECF system on all registered counsel of record.

/s/ *Dana Foster*
Dana Foster

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) as the brief contains 6,428 words, excluding those parts exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ *Dana Foster*
Dana Foster