No. 23-30694

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiff-Appellee,

v.

NICHOLAS DOWDLE & LAMAR A. DAVIS, in their individual capacities,

Defendants-Appellants.

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

APPELLEE'S OPPOSITION TO APPELLANT DOWDLE'S MOTION FOR STAY OF DISCOVERY ORDER PENDING APPEAL

Dana Foster
Alison Perry
Soraya Todd
WHITE & CASE
701 Thirteenth Street, N.W.
Washington, D.C. 20005-3807
Telephone: + 1 202 626 3600

Erika Murdoch
Aabir Das
WHITE & CASE
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

December 18, 2023

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

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

BACKGROUND 4

I. FACTUAL HISTORY 4

II. PROCEDURAL HISTORY 5

ARGUMENT 7

I. DOWDLE IS NOT ENTITLED TO QUALIFIED IMMUNITY 7

II. EVEN IF DOWDLE ENJOYED IMMUNITY FROM COMPLYING WITH HIS TRADITIONAL DISCOVERY OBLIGATIONS AS TO FEDERAL CLAIMS, THAT IMMUNITY DOES NOT EXTEND TO STATE-LAW CLAIMS 9

A. Dowdle Is Not Entitled To Immunity From His Discovery Obligations Because He Has Not Established Its Applicability To The Claims Against Him 9

B. Dowdle's Argument—That All Discovery Must Be Stayed Any Time A Defendant Appeals Their Initial Denial Of Qualified Immunity—Is Unsupported And Unsupportable 11

III. DOWDLE FAILS TO ESTABLISH THE REQUIREMENTS FOR A STAY OF THE DISTRICT COURT'S DISCOVERY ORDER 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Alice L. v. Dusek,
492 F.3d 563 (5th Cir. 2007) 12

Alston v. Town of Brookline,
997 F.3d 23 (1st Cir. 2021) 11

Arnold v. Garlock, Inc.,
278 F.3d 426 (5th Cir. 2001) 15

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 13, 14

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

Clinton v. Jones,
520 U.S. 681 (1997) 18

FTC v. Nat'l Bus. Consultants, Inc.,
376 F.3d 317 (5th Cir. 2004) 10

Gomez v. Toledo,
446 U.S. 635 (1980) 10

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56 (1982) 12

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 10

Hutcheson v. Dallas Cnty.,
994 F.3d 477 (5th Cir. 2021) 14

In re DeBerry,
945 F.3d 943 (5th Cir. 2019) 9

Jefferson v. Lias,
21 F.4th 74 (3d Cir. 2021) 11

Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.,
591 F.3d 458 (5th Cir. 2009) 16

McGinn v. El Paso Cnty.,
640 F. Supp. 3d 1070 (D. Colo. 2022)..18, 19

Nken v. Holder,
556 U.S. 418 (2009)..12, 16

Rogers v. Jarrett,
63 F.4th 971 (5th Cir. 2023) 7, 8

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

Skinner v. Ard,
No. 10-66, 2020 WL 2245179 (M.D. La. May 7, 2020) 14

Smith v. United States,
568 U.S. 106 (2013)..10

Stanton v. Elliott,
25 F.4th 227 (4th Cir. 2022) 11

T.O v. Fort Bend Indep. Sch. Dist.,
2 F.4th 407 (5th Cir. 2021) 10

Taylor v. Sterrett,
640 F.2d 663 (5th Cir. 1981)..12

Terwilliger v. Stroman,
No. 1:16-CV-599, 2020 WL 3490222 (W.D. Tex. June 26, 2020) ....passim

Triolo v. Nassau Cnty.,
24 F.4th 98 (2d Cir. 2022) 10

United States v. Cent. Gulf Lines, Inc.,
974 F.2d 621 (5th Cir. 1992) 10

Wearry v. Perrilloux,
No. 18-594, 2023 U.S. Dist. LEXIS 66501 (M.D. La. Apr. 17, 2023) 18

STATUTES AND RULES

1 U.S.C. § 1871 8

42 U.S.C. § 1983 ....passim

Fed. R. App. P. 8 ....2, 15, 16

Fed. R. Civ. P. 12(b) 5

MISCELLANEOUS

Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*,
111 Cal. L. Rev. 201 (2023) 8

INTRODUCTION

Dowdle's Motion to Stay seeks this Court's review of the District Court's straightforward application of Circuit precedent to an area in which the District Court enjoys broad discretion, i.e., the scope of discovery. As Dowdle concedes, the District Court stayed all discovery related to Ms. Asante-Chioke's section 1983 claim against Dowdle, i.e., the only claim to which he asserts a qualified-immunity defense. Dowdle also concedes—as he must—that the doctrine of qualified immunity does not apply to any other claims asserted against him and does not apply to claims brought against his colleague, Lamar Davis. In addition, Dowdle's co-defendants have not sought the dramatic remedy of a comprehensive stay of discovery related to Ms. Asante-Chioke's five state-law claims. These concessions should end this Court's inquiry.

On November 22, 2022, Malikah Asante-Chioke sued several defendants, including Dowdle, for causing the death her father, Jabari. She brought state-law claims for wrongful death, survival, battery, negligence, and federal civil rights claims under 42 U.S.C. section 1983. As to the federal claims, Dowdle asserts the defense of qualified immunity.

After Dowdle's motion to dismiss was denied-in-part, Dowdle sought a complete stay of discovery—as to all claims (even state-law claims) and as to all defendants (even defendants with no possible qualified-immunity defense)—while

he sought this Court's interlocutory intervention. In response, the District Court exercised its sound discretion in crafting a bespoke discovery plan, i.e., barring discovery as to Ms. Asante-Chioke's section 1983 claim and Dowdle's alleged qualified-immunity defense thereto and allowing discovery as to all other claims.

With his Motion to Stay, Dowdle seeks to forestall his own accountability and kneecap Ms. Asante-Chioke's efforts to gather evidence to support her well-pled claims. Dowdle requests that this Court second-guess the District Court's sound judgment, i.e., judgment well within its broad discretion on discovery issues. For several reasons, this Court should deny Dowdle's Motion to Stay.

First, Dowdle's purported entitlement to a discovery stay depends on the availability of qualified immunity. But the text of what became section 1983, as enacted by Congress, expressly decreed that qualified immunity should not be a bar to suit; therefore, this Court should not treat that doctrine as a bar to Ms. Asante-Chioke's section 1983 claim.

Second, even if qualified immunity were available, Dowdle's motion presumes he is entitled to such immunity. This is incorrect. Dowdle has failed to establish that this affirmative defense applies.

Finally, Dowdle has not demonstrated that any of the four factors that the Court must consider in ruling on a Rule 8 motion supports his Motion to Stay. Dowdle cites only *Carswell* to support his argument that he will prevail on the

merits, but his reading of *Carswell* is severely flawed; in fact, Dowdle has identified no authority supporting his argument that the District Court abused its discretion by allowing discovery to proceed as to Ms. Asante-Chioke's state-law claims.

Also, Dowdle has made no showing that he will be irreparably harmed by complying with his discovery obligations—like every other civil defendant following a Rule 12 motion denial—as to Ms. Asante-Chioke's state-law claims. As the District Court rightly found, Dowdle must defend those claims on the merits irrespective of what happens with his qualified-immunity defense.

As to the third factor, Ms. Asante-Chioke will be harmed by continued delay in her pursuit of justice. Dowdle blithely asserts that "the events at issue were captured on body cam and are preserved in that regard." Mot. 16-17. This encapsulates the inherent unfairness of what Dowdle is seeking: Dowdle has put this bodycam footage at issue in briefings before the District Court, and now before this Court, attempting to use this critical evidence to his advantage while refusing to produce it.

And as to the fourth factor, both Ms. Asante-Chioke and the public writ large have an interest in a prompt resolution of this litigation on the merits and accountability for the death of Jabari Asante-Chioke.

In sum, the District Court's decision to allow discovery as to Ms. Asante-Chioke's state-law claims is well-founded and within the District Court's

sound discretion to craft discovery orders. Dowdle cannot show that the District Court abused its discretion; therefore, this Court should deny the Motion to Stay.

BACKGROUND

I. FACTUAL HISTORY

This action arises from the killing of Jabari Asante-Chioke by the police. At approximately 10:00 p.m. on November 21, 2021, a concerned citizen alerted authorities that Mr. Asante-Chioke, a 52-year-old Black man, was walking along the highway in Jefferson Parish, Louisiana, appearing visibly distressed and carrying in his hands what were later identified to be a gun and a knife. ROA.163 ¶¶ 24-26. Multiple officers, including Dowdle and his co-defendants, arrived on the scene and approached Mr. Asante-Chioke. *Id.* ¶¶ 27-28. The officers yelled for Mr. Asante-Chioke to "get on the ground" and threatened, "I'll fucking shoot you!" and "I will fucking kill you!" *Id.* Eventually, Mr. Asante-Chioke slowed to a walk and, without turning around or making any direct eye contact, 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 officers 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.* A subsequent investigation revealed that the officers fired thirty-six rounds at Mr. Asante-Chioke. *Id.* ¶¶ 42-43.

II. PROCEDURAL HISTORY

On April 26, 2023, Ms. Asante-Chioke, filed her Amended Complaint, asserting claims of excessive force under 42 U.S.C. section 1983 and several state-law claims against several Defendants, including Dowdle, a Louisiana State Police ("LSP") officer. ROA.163. On June 23, 2023, Dowdle and one of his LSP co-defendants, Lamar A. Davis, moved to dismiss the Amended Complaint on several grounds, including *inter alia* for failure to state a claim upon which relief can be granted under Rule 12(b) of the Federal Rules of Civil Procedure. ROA.252. Dowdle also requested an order limiting discovery to qualified-immunity issues if the District Court denied defendants' motion. 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 . . . .").

On August 31, 2023, the District Court granted-in-part and denied-in-part defendants' motion. ROA.399. The District Court focused its analysis on whether Ms. Asante-Chioke's allegations were sufficient to overcome a defense of qualified immunity. ROA.413-419. Applying this Court's holding in *Roque v. Harvel*, 993 F.3d 325 (5th Cir. 2021), 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. The District Court also rejected Dowdle's argument that Ms. Asante-Chioke needed to specifically allege—at the pleading stage—details about the number and timing of shots fired by each defendant. ROA.418.

In addition, the District Court denied defendants' request for a limited discovery order. ROA.419. The District Court held, "Considering 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, Dowdle and Davis filed their notice of appeal. ROA.477. And on October 4, 2023, Dowdle and Davis 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 Dowdle and Davis's motion, staying discovery only to Ms. Asante-Chioke's section 1983 claim against Dowdle. ECF No. 66. In reaching its decision, the District Court noted that "several other claims [against Dowdle] that the qualified immunity defense does not apply to remain undecided while the interlocutory appeal is pending" and Ms. Asante-Chioke brought "several claims" which are also pending against "[d]efendants . . . who are not involved in the appeal." *Id.* at 5. The District Court held that none of Plaintiff's state-law claims against any of the defendants implicated qualified immunity. *Id.* at 7. That is, Dowdle could not assert qualified

immunity as to those claims, and discovery related to those claims would not impede any alleged right to qualified immunity or otherwise interfere with any aspect of Dowdle's appeal. *Id.* at 7-8. Finally, the District Court reasoned that staying discovery on issues "not related to the pending appeal would unnecessarily delay the resolution of this case." *Id.* at 8.

Before complying with any of his[1] discovery obligations—including ignoring all of Ms. Asante-Chioke's twenty-one interrogatories and eighteen document requests—on December 8, 2023, Dowdle filed the present Motion to Stay.

ARGUMENT

I. DOWDLE IS NOT ENTITLED TO QUALIFIED IMMUNITY

In his Motion to Stay, Dowdle relies on the same false premise that is at the heart of his appeal, i.e., that the District Court's rejection of his preferred approach to conducting discovery following his unsuccessful motion to dismiss "violates" an entitlement to immunity from suit. Mot. 1. Dowdle has no such entitlement.

The doctrine of qualified immunity that Dowdle invokes is "flawed — foundationally — from its inception," and this Court should not enforce it. *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willett, J., concurring); *see also* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 204 (2023). As Judge Willett recently explained, the original text of section

[1] To date, Davis has also ignored his discovery obligations.

1983, as enacted by Congress, included a clause that "explicitly displace[d] common-law defenses" recognized at the time of enactment, among them qualified immunity. *Id.* Under the "Notwithstanding Clause" of the 1871 Civil Rights Act, state actors—including police officers—who violate a citizen's federal rights should face liability, "any [State] law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." *Id.* at 979-980 (quoting Section 1 of the Civil Rights Act of 1871 as passed by Congress).

Judge Willett observed that "[f]or reasons lost to history," this "critical" language was "inexplicably omitted from the first compilation of federal law in 1874." *Id.* at 980. But the act of compiling the law has no power to alter the language Congress enacted, and thus does not change what the law says. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. at 207-08.

This "game-changing" enactment history (*Rogers*, 63 F.4th at 980), eviscerates the premise of judge-made qualified immunity, i.e., that state actors enjoy some baseline (and complete) immunity from section 1983 suits under certain (or any) judge-designed conditions. The clause also destroys any claim by Dowdle that he is somehow entitled to avoid entirely his discovery obligations—obligations that every other defendant has when facing post-Rule 12 federal civil litigation—related to Ms. Asante-Chioke's state-law claims. This Court is bound to follow the

text of the law as Congress enacted it. *See, e.g.*, *In re DeBerry*, 945 F.3d 943, 947 (5th Cir. 2019) ("In matters of statutory interpretation, text is always the alpha.").

If Professor Reinert's scholarship is correct and section 1983 precluded common law defenses, then alleged qualified immunity should have no bearing on the District Court's discovery order. For this reason alone, this Court should deny Dowdle's Motion to Stay.

II. EVEN IF DOWDLE ENJOYED IMMUNITY FROM COMPLYING WITH HIS TRADITIONAL DISCOVERY OBLIGATIONS AS TO FEDERAL CLAIMS, THAT IMMUNITY DOES NOT EXTEND TO STATE-LAW CLAIMS

Even if qualified immunity were available as a shield against discovery related to Ms. Asante-Chioke's section 1983 claim, Dowdle cannot also use that shield to avoid all discovery. Because the District Court was within its discretion to allow discovery related to Ms. Asante-Chioke's state-law claims, this Court should deny the Motion to Stay.

A. Dowdle Is Not Entitled To Immunity From His Discovery Obligations Because He Has Not Established Its Applicability To The Claims Against Him

Dowdle's Motion to Stay presumes that qualified immunity is an absolute benefit to which he already is entitled. *See, e.g.*, Mot. 3 ("The district court's ruling upends the benefits of Dowdle's qualified immunity defense."). This presumption is incorrect. In fact, Dowdle has failed at the first step by not establishing that qualified immunity applies at all.

The general rule is that "[a]n affirmative defense places the burden of proof on the party pleading it." *FTC v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004) (citing *United States v. Cent. Gulf Lines, Inc.*, 974 F.2d 621, 629 (5th Cir. 1992)) (rejecting statute-of-limitations defense because defendant "fails to meet its burden of proof"); *see Smith v. United States*, 568 U.S. 106, 112 (2013) ("As with other affirmative defenses, the burden is on [the defendant]."). "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)).

Although this Court is bound by Circuit precedent to require a plaintiff to rebut a defendant's *prima facie* assertion of qualified immunity, *see, e.g.*, *T.O v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 413 (5th Cir. 2021) ("Once the defense of qualified immunity has been asserted, the plaintiff has the burden of demonstrating that (1) the official violated a statutory or constitutional right, and (2) the right was clearly established at the time." (quotations omitted)), Ms. Asante-Chioke makes this argument to preserve it for U.S. Supreme Court review given the disagreement among the Courts of Appeal, *see e.g.*, *Triolo v. Nassau Cnty.*, 24 F.4th 98, 107 (2d Cir. 2022) ("A defendant has the burden of proving the affirmative defense of qualified immunity."); *Alston v. Town of Brookline*, 997 F.3d 23, 50 (1st Cir. 2021) (same); *Jefferson v. Lias*, 21 F.4th 74, 80 (3d Cir. 2021) (same); *Stanton v. Elliott*,

25 F.4th 227, 233 (4th Cir. 2022) (stating that a defendant must prove that the violated constitutional right was not clearly established at the time of the conduct).

B. Dowdle's Argument—That All Discovery Must Be Stayed Any Time A Defendant Appeals Their Initial Denial Of Qualified Immunity—Is Unsupported And Unsupportable

Although Ms. Asante-Chioke brought both state and federal-law claims against Dowdle and his co-defendants, Dowdle seeks interlocutory review only of whether the District Court abused its discretion by permitting discovery to proceed as to the non-section-1983 claims. *See generally* Appellant Opening Br. 5-6.[2]

Under these circumstances, the District Court was well-within its discretion to deny Dowdle's motion to stay all discovery. *See* ECF No. 66 at 4-8. The District Court rightly allowed discovery to proceed as to Ms. Asante-Chioke's state-law claims because "Dowdle cannot assert qualified immunity against Plaintiff's state-law claims, and discovery disclosures relating to those claims would not impede any right to qualified immunity or otherwise interfere with any aspect of Dowdle's appeal." *Id.* at 7-8.

In this Circuit, "where an appeal is allowed from an interlocutory order, the district court may still proceed with matters not involved in the appeal." *Alice L. v. Dusek*, 492 F.3d 563, 564-65 (5th Cir. 2007) (quoting *Taylor v. Sterrett*, 640 F.2d

[2] Although Defendant Lamar A. Davis purports to participate in the appeal, he has no claim of qualified immunity and thus has suffered no injury with respect to the District Court's handling of Dowdle's qualified immunity defense.

663, 667-68 (5th Cir. 1981) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982))). "A stay is not a matter of right," but "an exercise of judicial discretion," and "the party requesting the stay bears the burden of showing that the circumstances justify the stay." *Terwilliger v. Stroman*, No. 1:16-CV-599, 2020 WL 3490222, at *3 (W.D. Tex. June 26, 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). It simply is not correct that a "blanket stay" of discovery is required when a defendant appeals issues that relate in some way to qualified immunity.

Dowdle's argument to the contrary rises and falls with this Court's decision in *Carswell v. Camp*, 54 F.4th 307 (5th Cir. 2022). For several reasons, Dowdle's reliance is misplaced.

First, *Carswell* is inapposite because the scope of the stay of discovery pending appeal was not at issue. 54 F.4th at 311. There, the district court deferred its ruling on immunity at the motion-to-dismiss stage, "postponed" the question until summary judgment, and allowed discovery against the defendants to proceed in the meantime. *Id.* at 310-11. That is, *Carswell* focused on pre-dismissal discovery. *Id.* at 312 ("Today we only hold that where the pleadings are insufficient to overcome QI, the district court must grant the motion to dismiss without the benefit of pre-dismissal discovery. Similarly, where the pleadings are sufficient to overcome QI, the district court must deny the motion to dismiss without the benefit of pre-dismissal discovery.").

Second, the District Court followed *Carswell*'s core holding, *i.e.*, that a district court "may not permit discovery against the immunity-asserting defendants before it rules on their defense." *Carswell*, 54 F.4th at 311. In fact, the District Court found that Ms. Asante-Chioke's well-pled allegations were sufficient to allow the District Court to rule on Defendant's qualified-immunity defense at the "earliest possible stage of the litigation." ROA.415, 417, 419; *see Carswell*, 54 F.4th at 312.

Third, contrary to Dowdle's assertion (Mot. 10), *Carswell*'s citation to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), did not "specifically address[]" whether a district court is required to stay all discovery pending an interlocutory appeal on qualified immunity. Instead, *Carswell* invoked *Iqbal* to explain that "even 'minimally intrusive discovery' against official defendants before a ruling that plaintiff had met his burden to overcome the qualified immunity defense at the pleading stage" was not allowed. 54 F.4th at 313 (quoting *Iqbal*, 556 U.S. at 686). But again, the District Court ruled that the allegations in the Amended Complaint survived Dowdle's assertion of qualified immunity at the motion-to-dismiss stage. ROA.417.

As for *Iqbal* itself, the issue that the Supreme Court addressed (Mot. 10-11) was whether it should "relax the pleading requirements" in an instance where discovery was expected to be "minimally intrusive," in response to which the Supreme Court found limited discovery "is no answer." 556 U.S. at 685-86. This

language has no bearing on Dowdle's appeal. Indeed, courts widely acknowledge that "*Iqbal* does not stand for the idea that *all discovery* for *all defendants* must be stayed while waiting for resolution of qualified immunity." *Terwilliger*, 2020 WL 3490222, at *3; *see also id.* at *2 (collecting cases).

Dowdle's other authorities are not to the contrary. Unlike here, the court in *Skinner v. Ard* (cited at Mot. 14) had not yet ruled on defendants' motions to dismiss based on qualified immunity, and therefore held that a stay was appropriate "pending resolution of the qualified immunity defenses." No. 10-66, 2020 WL 2245179, a *5 (M.D. La. May 7, 2020). In *Hutcheson* (cited at Mot. 9), the district court converted the defendant's motion to dismiss based on qualified immunity into a motion for summary judgment and granted summary judgment on that issue, while denying the plaintiff's motion for limited discovery. *Hutcheson v. Dallas Cnty.*, 994 F.3d 477, 479 (5th Cir. 2021). On appeal, the Fifth Circuit considered an appeal of the motion for summary judgment, not a motion to stay discovery. *See id.*

In sum, Dowdle has not identified a single authority supporting a requirement to issue a blanket stay of discovery as to claims for which qualified immunity is unavailable during the pendency of his interlocutory appeal.

III. DOWDLE FAILS TO ESTABLISH THE REQUIREMENTS FOR A STAY OF THE DISTRICT COURT'S DISCOVERY ORDER

Dowdle has not—and cannot—satisfy the requirements of a stay of the District Court's order allowing discovery to proceed on Ms. Asante-Chioke's non-section-1983 claims.

This Court considers four factors in ruling on a motion to stay a district court's order under Rule 8 of the Federal Rules of Appellate Procedure: (1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the stay; (3) the potential harm to opposing parties if the stay is issued; and (4) the public interest. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 439-442 (5th Cir. 2001) (denying request for stay pending appeal). To justify entry of a stay, a movant must show that "each part" of this test is met. *Id.* at 439. Here, Dowdle meets none of them.

First, Dowdle has not shown a likelihood that he will succeed on the merits. Importantly, Dowdle is not appealing the District Court's decision to deny his motion to dismiss on qualified-immunity grounds (which he could have tried to do). *Carswell*, 54 F.4th at 312 (Noting that "after his motion to dismiss is denied" a defendant-official "can immediately appeal the district court's denial under the collateral order doctrine" or he "can move the district court for discovery limited to the factual disputes relevant to whether QI applies . . . ."). Instead, Dowdle made the strategic decision to seek this Court's review of the discovery order only (App.

Br. 5-6, 5 n.7), for which his burden is much higher. That is, Dowdle must prove that the District Court abused the wide discretion it enjoys in discovery matters. *See, e.g.*, *Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.*, 591 F.3d 458, 469 (5th Cir. 2009) (affirming denial of motion for additional discovery and explaining that the abuse of discretion standard "poses a high bar" to reversal); *see also Terwilliger*, 2020 WL 3490222, at *3 ("The party requesting the stay bears the burden of showing that the circumstances justify the stay.") (citing *Nken*, 556 U.S. at 434).

Dowdle's only argument regarding any likelihood of success hinges on his flawed interpretation of *Carswell*. *See* Mot. 16. But *Carswell* does not help Dowdle because, on its face, it applies only to cases in which the district court is contemplating discovery before ruling on a motion to dismiss. *Carswell*, 54 F.4th at 311-12. Because Dowdle fails to show a likelihood of success on the merits of his appeal, he does not satisfy the first factor under Rule 8, and his Motion to Stay must be denied.

Second, Dowdle will not be irreparably injured absent a stay. Dowdle's characterization of discovery as "unlimited and unfettered" (Mot. 16) is incorrect. The District Court explicitly held that "[d]iscovery is stayed [] as to the § 1983 claims against Dowdle and issues regarding his qualified immunity defense on appeal." *See* ECF No. 66 at 8. Ms. Asante-Chioke has also offered to pause any depositions until after the resolution of Dowdle's appeal. ECF No. 56 at 2 n.1. The

District Court's decision and Ms. Asante-Chioke's offer means that Dowdle is subject only to written discovery as to the state-law claims against him, i.e., claims for which Dowdle has no qualified-immunity protection.

For several reasons, this Court should give no weight to Dowdle's claim of "irreparabl[e] injur[y]." Mot. 16. As an initial matter, Dowdle provides no details as to how or how much he will be injured absent a stay of the discovery order. This alone merits denial.

Moreover, Dowdle laments that because Ms. Asante-Chioke's state-law claims—to which he has no possible immunity argument—arise from the same incident as her section 1983 claim, any discovery as to the former "inarguably" "implicate[s] qualified immunity issues." Mot. 12. This is an odd argument given that Dowdle is asking that discovery be limited to the latter. App. Br. 22. That is, if discovery concerning Ms. Asante-Chioke's state-law claims is indistinguishable from discovery concerning Dowdle's qualified-immunity defense, then Ms. Asante-Chioke will be entitled to the same discovery regardless of the outcome of this appeal. For this additional reason, this Court should deny the motion.

Third, a stay of discovery would severely injure Ms. Asante-Chioke. She has a compelling interest in seeking justice for the injuries her father suffered, the

deprivations of his civil rights, and her own irreparable loss upon his passing.[3] Additional delay in the ability to prosecute her claims harms Ms. Asante-Chioke by preventing her from both obtaining justice promptly and being able to effectively present her case. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 707-08 (1997) (delaying litigation "would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts"); *McGinn v. El Paso Cnty.*, 640 F. Supp. 3d 1070, 1076-77 (D. Colo. 2022) (declining to stay discovery in a § 1983 case in part because "the case concerns events over two years old, and because the memories of parties and witnesses are likely to fade — or otherwise be unavailable — the longer time passes"); *Wearry v. Perrilloux*, No. 18-594, 2023 U.S. Dist. LEXIS 66501, at *10-11 (M.D. La. Apr. 17, 2023) (denying motion to stay and holding discovery delays caused plaintiff additional harm and prevented him from obtaining justice); *Terwilliger*, 2020 WL 3490222, at *4-5 (explaining that a delay could significantly impact the likelihood of witnesses' abilities to recall specific details).

To support his argument for a discovery stay, Dowdle (again) inappropriately references unproduced bodycam footage. Mot. 17. This is not the first time Dowdle

[3] Ironically, Dowdle complains that Ms. Asante-Chioke offers only "vague considerations of delay with no specific showings made" (Mot. 16), while he provides no basis—not even "vague considerations of delay"—to support his baseless assertion of irreparable harm. *Id.*

has referenced evidence solely in the defendants' control in support of blocking discovery. *See* ECF No. 59 at 1 n.1; App. Br. 16 n.30. Because this evidence has not been produced and is not before this Court, this Court should give Dowdle's self-serving statements no weight.

Fourth, public interest favors proceeding with discovery. *See Terwilliger*, 2020 WL 3490222, at *4 ("[T]he public interest disfavors the grant of a stay where it would hinder the speedy adjudication of constitutional claims.") (citation omitted). Dowdle cites no authority for his argument that "violation of the rights of a defendant-official to the benefits of qualified immunity should outweigh the consideration of any potential delay." Mot. 17. There is none. And of course, the public has a substantial interest in seeing public officials who have violated the rights of citizens brought to justice promptly. *See McGinn*, 640 F. Supp. 3d at1077 (D. Colo. 2022) ("[T]he public indeed . . . has an interest in moving matters forward and a more substantial interest in learning about the policies and practices of [public officials] to ensure it is 'operating within the bounds of the law.'").

CONCLUSION

For all of these reasons, this Court should deny Dowdle's Motion for Stay of Discovery Order Pending Appeal.

Date: December 18, 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 18, 2023, the foregoing was electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Firth Circuit 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

Date: December 18, 2023

CERTIFICATE OF COMPLIANCE

I certify that the foregoing response complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 4,437 words, excluding those parts exempted by Fed. R. App. P. 32(f).

I further certify that this response complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) 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

Date: December 18, 2023