No. 24-387

IN THE

Supreme Court of the United States

MALIKAH ASANTE-CHIOKE,

Petitioner,

v.

NICHOLAS DOWDLE, *et al.*,

Respondents

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

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

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INTEREST OF *AMICUS CURIAE*

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

Professor Solimine submits this brief to inform the Court of the broader constitutional and empirical context that militates against the Fifth Circuit Court of Appeals decision in this case. Professor Solimine has no personal interest in the outcome of this case.[1]

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost 40 years ago, Justice Brennan stated that this Court's decision allowing a government official to seek interlocutory review of a district court's decision denying the government official's qualified immunity defense on a motion to dismiss "will give government officials a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals," and "will result in denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the caseload of the appellate courts." *Mitchell v. Forsyth*, 472 U.S. 511, 556 (1985) (Brennan, J., concurring in part and dissenting in part) (footnote omitted). His words were true in 1985, and—after the United States Court of Appeals for the Fifth Circuit's recent decision in *Asante-Chioke v. Dowdle*, 103 F.4th 1126, 1131-32 (5th Cir. 2024) expanding of the scope of the collateral order doctrine to include discovery orders—are even truer now.

The Fifth Circuit's decision in *Asante* will exacerbate delay and expense costs to plaintiffs in 42 U.S. Code § 1983 ("Section 1983") cases. And while interlocutory review of denials of defense of qualified immunity drags out litigation thus imposing costs on plaintiffs, empirical research indicates that defendants do not receive a corresponding benefit in the form of reversals. The assumption of the existence of that benefit underpinned this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) giving defendants the right to file interlocutory appeals of these denials. Delay costs to plaintiffs resulting from

interlocutory appeals of denials of qualified immunity defense are increased when courts of appeal exercise pendent appellant jurisdiction over trial orders that are not ordinarily subject to the collateral order doctrine. These delay costs will be likewise exacerbated by the expanding the collateral order doctrine to include discovery orders. Lastly, the Fifth Circuit's decision in *Asante* is inconsistent with *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 108-109 (2009), in which this Court held that the collateral order doctrine does not extend to discovery orders, even those that implicate the attorney client privilege.

ARGUMENT

I. The Existing Delay Costs To Plaintiffs In Section 1983 Cases Caused By Interlocutory Appeals Will Be Exacerbated Post-*Asante*

In a 2024 study utilizing algorithms tested for reliability, the Institute of Justice analyzed federal appellate cases from 2010-2020 for the purpose of describing the "landscape of qualified immunity appeals in the federal appellate courts." Jason Tiezzi, et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill its Promises*, Inst. for Just., 4, 10 (Feb. 7, 2024). The data from this study indicates that interlocutory appeals comprise more than a third of appeals in qualified immunity litigation. *Id.* at 27. Furthermore, the average number of these appeals filed each year is growing. *Id.* at fn. 94 ("Interlocutory appeals of qualified immunity rose from an average of 165

during the first part of the study period (2010–2015) to 190 during the second half (2016–2020)—an increase of 15%."). Interlocutory appeals in general represented 96% of all appeals filed by defendants. *Id.*

The study reasonably posits that the prevalence (and growth) of such interlocutory appeals may "explain why the median duration of a qualified immunity lawsuit . . . [is] three years and two months, 23% longer" than the typical federal civil suit that is up on appeal. *Id.* Indeed, other empirical research has shown that interlocutory appeals contribute to the length of litigation, averaging more than one year (441 days) from filing to resolution. Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev., 1101, 1120 (2020).

In addition to broad-based data, the Institute of Justice focused on a particular case where the qualified immunity defense was raised at various stages of litigation to illustrate the delay costs to a plaintiff caused by interlocutory appeals of denials of the defense. In *Mathis v. County of Lyon,* No. 2:07-CV-00628 (D. Nev. May 14, 2007), defendants filed interlocutory appeals of the trial court's denials of qualified immunity defense at the motion to dismiss and summary judgment stages (both affirmed on appeal), and then filed an appeal of the final verdict awarding plaintiffs damages (raising the qualified immunity defense a third time), which was affirmed on appeal in 2018. The judgment was satisfied in May 2019, a staggering 12 years after the lawsuit commenced. Jason Tiezzi, et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights,*

and Fails to Fulfill its Promises, Inst. for Just. (Feb. 7, 2024), at 27-28.

Relatedly, the United District Court for the Northern District of Ohio has noted that "an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal," given that "the [Sixth Circuit Court of Appeals] affirm district courts' denials of immunity at astoundingly high rates." *Wheatt v. City of E. Cleveland*, No. 1:17-CV-377, 2017 U.S. Dist. LEXIS 200758, at *10 (N.D. Ohio Dec. 6, 2017) (citing Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 40 (2017));[2] *see also Abel v.*

[2] More broadly, Schwartz's dataset consisting of interlocutory appeals made to the Third, Fifth, Sixth, Ninth and Eleventh Circuit Courts of Appeal from district court cases filed between January 1, 2011 to December 31, 2012 shows that only 12.2% of these appeals resulted in reversals. *Id.* at 19, 40. Of the 5 interlocutory appeals made to the Fifth Circuit Court of Appeals from the United States District Court for the Southern District of Texas during this period, none resulted in reversal. *Id.* Even more broadly, in analyzing all cases in her dataset in which the defense of qualified immunity could be raised—whether at the motion to dismiss stage, the summary judgment stage, and/or on interlocutory appeal—Schwartz found that the defense terminated just 3.9% of cases even though defendants raised the defense in more than 37% of these cases. *Id.* at 60. But even if raising the defense of qualified immunity resulted in more dismissals, it still would not be clear if that immunity from suit saved the parties and the courts' time because the time and effort necessary to resolve qualified immunity motions and

Miller, 904 F.2d 394, 396 (7th Cir. 1990) (internal citation omitted) ("Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail."); David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives,* 93 Denv. L. Rev. 629, 673 (2021) ("[S]imply filing the interlocutory appeal wins at least a battle for the defense by forcing a delay and imposing costs on the other side . . . ."). As I noted in my previous work, district court judges with whom I have spoken all believed that defendants used interlocutory appeals of denials of qualified immunity as a "delaying tactic that hampered litigation that would otherwise be tried to settled relatively quickly." Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1191 (1990).

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

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appeals is so substantial that the pretrial costs incurred by invoking the defense may be more than the trial cost saved by the defense. *Id.* at 60-61 (citing Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law,* 47 Am. U. L. Rev. 1, 100 (1997)).

that there were only 4 instances of sanctions being granted in connection with interlocutory appeals of denials of qualified immunity defense at summary judgment stage that improperly challenged the factual basis of the denial in violation of *Johnson v. Jones*, 515 U.S. 304 (1995)).

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

also works to leverage a settlement with the plaintiff."). Indeed, plaintiffs' attorneys have also reported that the availability of interlocutory appeal of denials of the defense of qualified immunity may discourage them from taking on a Section 1983 case in the first instance because such an appeal normally stays discovery pending appeal, and while the stay is in place, "evidence may become stale" and "witnesses may disappear." Alexander Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 493-94 (2011).

Arguably, in terms of avoiding the burden of discovery and trial, there is little benefit to defendants that corresponds with the delay and expense cost to plaintiffs. This Court's interest in protecting government officials from the imposition of the burdens of discovery and trial serves as one of the bases for its decision to allow interlocutory appeals of denials qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). However,

> interlocutory appeals of qualified immunity denials infrequently serve that function. Defendants filed interlocutory appeals of 21.7% of decisions denying qualified immunity in whole or part. Of the appeals that were filed, just 12.2% of the lower court decisions were reversed in whole, and just 9.8% of the interlocutory appeals filed resulted in case dismissals. Interlocutory appeals may have prompted case resolutions in another way—39.0% of interlocutory appeals

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

Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 74-75 (2017). Thus, the practical reality of interlocutory appeals of denials of qualified immunity defense is that plaintiffs pay a delay and expense cost. On the other hand, defendants rarely receive a corresponding benefit in the form of a reversal, even though this benefit to defendants was one of the assumptions this Court made in deciding to give defendants the right to make these interlocutory appeals in the first place.

Given that there is substantial empirical evidence of the delay and expense costs incurred by plaintiffs resulting from interlocutory appeals of denials of the defense of qualified immunity at the pleading and summary judgment stages, it is highly likely that the Fifth Circuit Court of Appeal's expansion of the collateral order doctrine to allow interlocutory appeal of discovery orders will exacerbate these delay and expense costs.

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

While defendants have a right to seek interlocutory review of a denial of qualified immunity defense, plaintiffs do not have a right to seek interlocutory review of a grant of qualified immunity defense. As such, this right is one-sided benefit in favor of defendants. However, the benefit extends further. The right of interlocutory review may discourage plaintiffs from pursuing meritorious claims because the cost associated with interlocutory appeals is too expensive. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 61-62 (2017); Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 491-495 (2011) (describing conversations with more than forty attorneys and law firms, each of which had experience with multiple *Bivens* actions from 2006 to 2017, and reporting that the availability of interlocutory appeal or the likelihood of stays of discovery pending resolution of the qualified immunity defenses, among other factors, affected counsel's case-screening decisions). In this way, interlocutory review may not be carrying out the intended function of qualified immunity, i.e., shielding defendants from discovery and trial costs by screening out insubstantial cases or coercing settlement of them. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 61-62 (2017); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982) (discussing qualified

immunity's goal of preventing "insubstantial claims" from proceeding to trial). Instead, defendants are receiving the extra benefit of not having to defend meritorious claims.

This chilling effect attributable in part to defendants' right to interlocutory review will be exacerbated by the Fifth Circuit's "supercharging" this right by allowing defendants to seek interlocutory review of discovery orders. Plaintiffs may already be deterred from pursuing meritorious claims by defendants' right to seek interlocutory review of denials of the defense of qualified immunity, but Plaintiffs will be even more discouraged now that defendants' right to seek interlocutory review extends to discovery orders.

III. Pendent Appellant Jurisdiction Over Claims and Parties Not Subject To Qualified Immunity Allows Defendants Who Are Not Entitled To The Defense To Nonetheless Benefit From It

As noted in the Petition, the Fifth Circuit in *Asante* rejected Petitioner's argument that Respondent Davis lacked standing to seek review of the denial of the request for limited discovery because that court found that the claims against Respondents were "inextricably intertwined" and thus concluded it had pendent appellant jurisdiction over Respondent Davis's appeal even though only state law claims against Respondent Davis remained. Petition at 9.

This Court has recognized that several courts of appeal authorize pendent appellate jurisdiction, which this Court has described as the authority of "a

court of appeals with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." *Swint v. Chambers County Com'n*, 514 U.S. 35, 50-51, (1995); Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 Green Bag 2d 199, 205 (2013) (noting that "pendent appellate jurisdiction" is the power of appellate courts to resolve those questions that are "inextricably intertwined" with the issue over which their appellate jurisdiction directly extends).

In *Swint*, this Court objected to the possibility that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type[3] collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 49-50. However, under pendent appellate jurisdiction in the context of the collateral order doctrine, Defendants' right to seek interlocutory review of denials of qualified immunity defense would effectively not be limited to claims that are subject to the defense. Riyaz A. Kanji, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L.J. 511, 523 (1990) ("The exercise of pendent appellate jurisdiction constitutes . . . an extension in the reach of the collateral order doctrine. Determinations are brought within its ambit that would not, by themselves, comport with its requirements for expedited review.").

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[3] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (decisions that are conclusive, that resolve important questions apart from the merits of the underlying action, and that are effectively unreviewable on appeal from final judgment may be appealed immediately under the collateral order doctrine).

Thus, notwithstanding this Court's language in *Swift*, this type of jurisdiction effectively creates a "backdoor" to appellate review of interlocutory decisions that would not normally fit within the narrow exception of the collateral order doctrine. *See* Stephen I. Vladeck, Pendent *Appellate Bootstrapping*, 16 Green Bag 2d 199, 204-205 (2013).

Bootstrapping a decision not subject to the collateral order doctrine onto the appealable decision via pendent appellate jurisdiction is problematic. As Professor Vladeck noted, "as long as a defendant's appeal of a denial of qualified immunity isn't frivolous, *Hartman, Wilkie, and Iqbal*[4] can fairly be read to suggest that courts of appeals can then be seized of pendent appellate jurisdiction over virtually any other legal issue, not matter its relation to the merits or to the basis for interlocutory appellate review." Stephen I. Vladeck, Pendent *Appellate Bootstrapping*, 16 Green Bag 2d 199, 210 (2013). The consequence of this bootstrapping is added substantial cost to suits against officers (whether federal or state), "especially those in which the plaintiff ought to prevail on the

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[4] Professor Vladeck argues that, through pendent appellate jurisdiction, this Court has "shoehorn[ed]" into interlocutory appellate review of a trial court's contested denial of official immunity: (1) whether the plaintiff's complaint satisfies the applicable pleading standards (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 672-75 (2009) (pleading)); (2) the elements of the plaintiff's cause of action (citing *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007) (existence of cause of action)); and (3) the very *existence* of such a cause of action (citing *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006) (elements of cause of action)). Stephen I. Vladeck, Pendent *Appellate Bootstrapping*, 16 Green Bag 2d 199, 202 (2013).

merits," "i.e., those in which these added costs ultimately shouldn't have any bearing on the outcome." *Id.*

The Fifth Circuit's expansion of the collateral order doctrine to include discovery orders will create even more opportunities for this type of problematic bootstrapping, and exacerbate the costs to plaintiffs who bring Section 1983 claims.

IV. Regardless Of Post-*Asante* Exacerbation Of Delay And Expense Costs Incurred By Plaintiffs, *Asante* Violates *Mohawk Industries* And This Court Should Grant The Petition To Bring The Fifth Circuit In Line With This Court's Precedent

In *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 108-109 (2009), this Court held that the collateral order doctrine does not extend to discovery orders, even those that implicate the attorney client privilege. The Fifth Circuit's expansion of the collateral order doctrine to include discovery orders is thus inconsistent with this Court's holding in *Mohawk Industries*. Indeed, the discovery order at issue in *Asante* did not implicate the attorney-client privilege, and thus the argument for treating the discovery order in *Asante* as an order subject to the collateral order doctrine is even weaker than the argument made in *Mohwak Industries*—rejected by this Court—that discovery orders requiring the disclosure of attorney-client privileged information are subject to the collateral order doctrine and thus should be reviewable on an interlocutory basis. Therefore, on this ground alone, this Court should grant the Petition, reverse the Fifth Circuit's decision in *Asante*

and bring that court in line with this Court's binding precedent.

CONCLUSION

For these reasons, the Court should grant the Petition.

Respectfully submitted,

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