No. 24-

IN THE

Supreme Court of the United States

MALIKAH ASANTE-CHIOKE,

Petitioner,

v.

NICHOLAS DOWDLE, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a district court denies a government official's qualified immunity defense on a motion to dismiss, that official may seek immediate review of that decision under the collateral order doctrine, a narrow, judicially created exception to the final judgment rule. 28 U.S.C. § 1291; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996). Discovery orders, by contrast, are not generally appealable until final judgment. In the decision below, the court of appeals authorized interlocutory appellate review of a routine discovery order because the defendant asserted qualified immunity.

The question presented is whether the courts of appeals have jurisdiction to review routine discovery orders on an interlocutory basis in qualified immunity cases.

LIST OF PARTIES

Petitioner, Malikah Asante-Chioke, individually and on behalf of her father, Jabari Asante-Chioke, was the plaintiff-appellee below.

Respondents, Officer Nicholas Dowdle and Colonel Lamar Davis, were the defendants-appellants below.

There are three other defendants in the proceedings below who did not join Respondents in their interlocutory appeal to the Fifth Circuit: Officer Jonathon Downing, Officer Gerard Duplessis, and Captain Terry Durnin.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

> *Asante-Chioke v. Dowdle*, No. 23-30694 (5th Cir., June 5, 2024)

U.S. District Court for the Eastern District of Louisiana:

> *Asante-Chioke v. Dowdle*, No. 22-4587 (E.D. La., Aug. 31, 2023)

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The Fifth Circuit's opinion (Pet. App. 1a-12a) is reported at 103 F.4th 1126. The Eastern District of Louisiana's opinion (Pet. App. 13a-36a) is reported at 689 F. Supp. 3d 317.

JURISDICTION

The Fifth Circuit entered judgment on June 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1). On August 27, 2024, Justice Alito granted Petitioner's application to extend the time to file a petition for a writ of certiorari until October 3, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

24 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

28 U.S.C. § 1291 provides in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit)

> shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

INTRODUCTION

In the decision below, the Fifth Circuit ripped a hole in the tightly circumscribed collateral order doctrine when it ruled that courts of appeals have jurisdiction to immediately review discovery orders in qualified immunity cases. The court of appeals was not reviewing the denial of qualified immunity at the motion-to-dismiss stage. In fact, both the court of appeals and Respondents acknowledged that the district court correctly denied Respondents' motion to dismiss on qualified immunity grounds, and Respondents did not seek interlocutory review of that decision. Yet the Fifth Circuit followed the Tenth Circuit down a treacherous path of granting interlocutory review of everyday discovery orders in qualified immunity cases, deepening an existing circuit split with the First, Fourth, and Sixth Circuits. The decision below also contravenes the final judgment rule and opens the floodgates to serial interlocutory appeals by § 1983 defendants any time they are on the losing side of a discovery dispute.

For decades, this Court and Congress have confirmed that, as a general matter, only final judgments are appealable under 28 U.S.C. § 1291. While this Court has allowed interlocutory appeals of a "small class" of collateral orders, that class is "narrow and selective in its membership," and does not include routine discovery orders following a well-reasoned and correct decision denying qualified immunity at the motion-to-dismiss stage. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100,

106, 116 (2009); *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).[1] Indeed, in qualified immunity cases, this "small class" of immediately appealable orders includes only denials of qualified immunity that present purely legal issues at the pleading and summary judgment stages. *Behrens*, 516 U.S. at 307; *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

The Fifth Circuit's expansion of the "small class" of immediately appealable orders to include discovery orders deepens an existing circuit split on whether routine discovery orders in immunity cases are immediately appealable. The Fifth Circuit joins the Tenth Circuit in allowing the immediate review of routine discovery orders in such cases, while the First, Fourth, and Sixth Circuits have correctly found that they lack jurisdiction over appeals of discovery orders. Like the Tenth Circuit's rule, the Fifth Circuit's decision eschews this Court's warning that further judicial expansion of the collateral order doctrine would "swallow the general rule that a party is entitled to a single appeal." *Mohawk*, 558 U.S. at 106 (quoting *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)); *Will*, 546 U.S. at 350.

This case also presents an issue of exceptional importance for § 1983 cases around the country and

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1. Orders that fall under the collateral order doctrine "require only two hands to count." *Mohamed v. Jones*, 100 F.4th 1214, 1218 (10th Cir. 2024) (quoting *Belya v. Kapral*, 45 F.4th 621, 629 n.5 (2d Cir. 2022)). They include orders denying qualified, absolute, tribal, Eleventh Amendment, or another immunity and a small number of orders that would be moot following final judgment. *Id.* at 1218-19.

for the orderly administration of litigation in both the district courts and the courts of appeals. The Fifth Circuit's decision threatens to inundate appellate courts with interlocutory appeals of everyday discovery orders, obstruct the efficient resolution of disputes, and eviscerate the very purpose of § 1983 litigation: "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

If left in place, the court of appeals' decision will open the floodgates to near-infinite, one-sided interlocutory appeals of customary discovery orders, burdening appellate courts and placing yet another barrier in the path of plaintiffs seeking to vindicate their civil rights. Now, in the Fifth and Tenth Circuits, qualified immunity-asserting defendants may seek immediate, litigation-arresting review of every discovery order they deem too broad while plaintiffs must wait—like every other party in civil litigation—until the end of the case before receiving review of any discovery order they thought too narrow.

The Court should grant certiorari to resolve the circuit split and close the floodgates.

STATEMENT

I. Factual Background

On the night of November 21, 2021, a concerned citizen noticed Petitioner's father, Mr. Jabari Asante-Chioke, a 52-year-old Black man, walking along the side of a highway in Jefferson Parish, Louisiana. Pet. App.

2a, 14a. The observer believed that Mr. Asante-Chioke, who was carrying what were later identified as a gun and a knife, was experiencing a mental health crisis, and notified a nearby police officer who was directing traffic. Pet. App. 14a.

Shortly afterward, several officers, including Respondent Dowdle, arrived on the scene. Pet. App. 2a, 14a. Video footage shows that, as police officers approached Mr. Asante-Chioke, he began to slowly jog away from them down the highway. Pet. App. 14a. The officers followed him at a close distance. During the pursuit, as Mr. Asante-Chioke moved away from the officers with his back to them, the officers began screaming at him: "get on the ground," "you better fucking stop!" "get on the fucking ground! I swear to God I'll fucking shoot you!" and "I will fucking kill you!" Pet. App. 14a.

One of the officers advanced with his gun pointed at Mr. Asante-Chioke. He screamed, "Get on the ground!" Pet. App. 15a. Without making eye contact, Mr. Asante-Chioke raised his right arm, which held a gun, behind him at a forty-five-degree angle. Pet. App. 15a. The officers, including Respondent Dowdle, opened fire on him. Pet. App. 15a. Almost immediately, Mr. Asante-Chioke fell to the ground and dropped the gun. Pet. App. 15a.

The officers continued to shoot at Mr. Asante-Chioke as he lay on the ground, disarmed. Pet. App. 15a. In total, Respondent Dowdle and two other officers fired thirty-six rounds. Pet. App. 15a. His autopsy revealed a total of twenty-four gunshot wounds. Pet. App. 15a.

II. District Court Proceedings

Petitioner filed the initial complaint on November 18, 2022, individually and on behalf of her father, asserting claims under § 1983 and Louisiana state law against Respondents and the other defendants. Pet. App. 2a, 15a-16a.

On June 23, 2023, Respondents moved to dismiss Petitioner's Amended Complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6), asserting qualified immunity as to Respondent Dowdle. Pet. App. 3a. In the alternative to dismissal, Respondents requested, in one line in their motion to dismiss, that "the matter be open for limited discovery on the issue of qualified immunity." (Mem. in Supp. of Rule 12(b) Mot. to Dismiss at 19, ECF No. 36-1.)

On August 31, 2023, the district court denied in part Respondents' motion in a 21-page decision, holding that Petitioner's 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." Pet. App. 33a.

The district court also denied Respondents' alternative request for limited discovery. Pet. App. 35a. The district court explained that an order limiting discovery may issue when a plaintiff has pled facts that "allow the court to draw a reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity" if the court "remains unable to rule on the immunity defense without further

clarification of the facts." Pet. App. 35a (quoting *Zapata v. Melson*, 750 F.3d 481, 484 (5th Cir. 2014)). However, the court did not need further discovery to rule on the qualified immunity defense. Accordingly, the district court reasoned that, "[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[.]" Pet. App. 35a.

III. Fifth Circuit Appeal

On September 29, 2023, Respondents filed a notice of appeal of the district court's order denying their motion to dismiss and their request for limited discovery. (Defs. Col. Lamar A. Davis and Nicholas Dowdle's Notice of Appeal, ECF No. 52.) Respondents then moved to stay discovery pending appeal. (Mot. to Stay Disc., ECF No. 55.) The district court granted the motion to stay as to the § 1983 claim against Respondent Dowdle and issues related to his qualified immunity defense. (Order and Reasons, Nov. 29, 2023, ECF No. 66.) The district court allowed discovery to proceed as to the other claims not implicated by Respondent Dowdle's qualified immunity defense. (Order and Reasons, Nov. 29, 2023, ECF No. 66.)

But when Respondents filed their opening brief, they abandoned their appeal of the denial of the motion to dismiss on qualified immunity grounds. Instead, Respondents chose to seek review only of the district court's denial of Respondent Dowdle's request for limited discovery. (Appellants' Br. at 5 n.7.) Respondents conceded that the district court's denial of the motion to dismiss on qualified immunity grounds was correct. (Appellants' Br.

at 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.").)

Respondents claimed that the collateral order doctrine permitted appeal of the order denying limited discovery alone because the order allegedly denied Respondent Dowdle "any benefit of the asserted qualified immunity defense. . . ." (Appellants' Br. at 5-6.) Petitioner objected that routine discovery orders do not fall within the narrow class of collateral "final" decisions under 28 U.S.C. § 1291. (Appellee's Br. at 16-21.)

On June 5, 2024, the court of appeals vacated and remanded the district court's order denying limited discovery. The court of appeals acknowledged that the district court "was correct" in denying Respondent Dowdle's qualified immunity defense at the motion-to-dismiss stage. Pet. App. 10a.

Nonetheless, the court of appeals held that, under the Fifth Circuit's interpretation of the collateral order doctrine, it had jurisdiction to immediately review discovery orders related to qualified immunity. Pet. App. 12a. The court of appeals reasoned that the district court's order exceeded the requisite "narrowly tailored" scope of discovery orders mandated by circuit law in qualified immunity cases. Pet. App. 11a; *see also Zapata*, 750 F.3d at 485. The fact that Respondents declined to seek review of the denial of the *actual* qualified immunity defense presented no barrier to review, the court of appeals held, because the mere "failure to limit discovery was tantamount to the denial of qualified immunity." Pet. App. 11a.

In a footnote, rejecting Petitioner's argument that Respondent Davis lacked standing to seek review of the denial of the request for limited discovery, the court of appeals reasoned that the claims against Respondents were "inextricably intertwined." Pet. App. 11a n.1 (quoting *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1998)). The court concluded, therefore, that it had pendent appellant jurisdiction over Respondent Davis's appeal and that Respondent Davis had standing. Pet. App. 11a n.1. Even though only Petitioner's state-law claim against Respondent Davis remained, the court "extend[ed]" its order limiting discovery to Respondent Davis as well. Pet. App. 11a n.1.

The Fifth Circuit remanded to the district court for further limited discovery proceedings. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens An Existing Circuit Split On The Immediate Appealability Of Discovery Orders In Immunity Cases

The First, Fourth, and Sixth Circuits have held that courts of appeals lack subject-matter jurisdiction over interlocutory appeals of discovery orders, including in cases where a defendant asserts immunity from suit. By contrast, the Fifth Circuit and the Tenth Circuit hold the opposite, *i.e.*, that they enjoy jurisdiction to hear interlocutory appeals of everyday discovery orders in qualified immunity cases.

The appellate courts' inconsistent application of the collateral order doctrine in immunity cases results in vastly divergent litigation consequences for plaintiffs in different circuits. Plaintiffs in the First, Fourth, or Sixth Circuits may face an interlocutory appeal of a motion to dismiss, but they are then free to proceed with discovery like any other plaintiff in any other case. By contrast, plaintiffs in the Fifth and Tenth Circuits must not only contend with an interlocutory appeal at the motion-to-dismiss stage, but also face the daunting prospect of serial, litigation-freezing interlocutory appeals from every discovery dispute thereafter. That regime threatens to obstruct altogether civil rights plaintiffs' ability to pursue their claims, contravening Congress's intent in enacting both § 1983 and the final judgment rule in 28 U.S.C. § 1291.

Absent guidance from this Court on the immediate appealability of such customary orders, the scope of the collateral order doctrine in qualified immunity cases will become a product of its forum. The Court should grant certiorari and make clear that the mere fact that defendants have invoked qualified immunity does not give them the unilateral right to interlocutory review every time they lose a discovery dispute.

A. The Decision Below Conflicts With Decisions Of The First, Fourth, And Sixth Circuits On The Immediate Appealability Of Discovery Orders In Qualified Immunity Cases

The decision below conflicts with decisions of the First, Fourth, and Sixth Circuits. *See In re Flint Water Cases*, 960 F.3d 820, 830 (6th Cir. 2020); *Lugo v. Alvarado*, 819 F.2d 5, 8 (1st Cir. 1987); *District of Columbia v. Trump*,

959 F.3d 126, 130 (4th Cir. 2020) (en banc). Each of these courts correctly held that they lack jurisdiction to review discovery orders in immunity cases because such orders are neither final judgments nor the equivalent of final judgments under 28 U.S.C. § 1291.

In *In re Flint*, the Sixth Circuit held that it lacked jurisdiction to review a discovery order in a qualified immunity case, finding that defendants "are not entitled to appeal any number of discovery matters that they believe have some impact on their immunity interest." 960 F.3d at 830. The underlying order in *In re Flint* stayed discovery against state-officer defendants pending their appeal of the denial of their motion to dismiss on qualified immunity grounds, but it allowed the plaintiff to take discovery of them in their capacities as non-parties with knowledge of the facts in dispute. *Id.* at 824-25. The Sixth Circuit rejected the defendants' argument that the order was "tantamount to a denial of qualified immunity," emphasizing that discovery rulings are categorically non-final and do not fit within the two categories of decisions which *are* subject to immediate appeal, *i.e.*, denial of a motion to dismiss on the pleadings before discovery, and denial of summary judgment following discovery. *Id.* at 829-30.

In doing so, the Sixth Circuit observed that it "c[ould] only imagine the deluge of appeals that would descend upon [appellate courts] if standard discovery orders could so easily be rebranded as final judgments." *Id.* at 830. The court found no basis in precedent for such a radical expansion of the collateral order doctrine. *Id.* at 829-30.

In *Lugo*, the First Circuit likewise held that it lacked jurisdiction over an interlocutory appeal from a discovery

order in a qualified immunity case. 819 F.2d at 8. The defendant in *Lugo* sought interlocutory review of the district court's denial of his motion to stay all discovery pending determination of his assertion of qualified immunity. *Id.* at 5. The court explained, "[w]hen all is said and done what we have before us is a request for review of a pretrial discovery order. Such orders are not appealable before final judgment." *Id.* at 8.

In *District of Columbia v. Trump*, the en banc Fourth Circuit similarly held that it lacked jurisdiction over an interlocutory appeal from an order authorizing discovery in a case that implicated not qualified but absolute immunity. 959 F.3d at 132. The court's holding was premised on the fact that the order was non-final and therefore did not deny the President absolute immunity. *Id.* at 130. In *Trump*, the district court denied the President's motion to dismiss and allowed discovery on certain official-capacity claims brought against him. *Id.* at 129-30. The President argued that the order authorizing discovery violated his absolute immunity. *Id.* at 130. The Fourth Circuit rejected this argument, holding that "the district court did not deny the President's immunity" in relation to the individual-capacity claims, requiring dismissal of the appeal for lack of jurisdiction. *Id.* at 132. Like the First and Sixth Circuits, the Fourth Circuit in *Trump* held that a decision that does not deny immunity is non-final and therefore not immediately appealable.

B. The Tenth And Fifth Circuits Diverge From The First, Fourth, And Sixth Circuits On The Immediate Appealability Of Discovery Orders In Qualified Immunity Cases

In stark contrast to the First, Fourth, and Sixth Circuits, the Tenth and Fifth Circuits have held that

defendants claiming qualified immunity have a right to seek immediate review of any routine discovery order they assert affects their immunity from suit.

The Tenth Circuit has interpreted the qualified immunity defense to include the "freedom from overly broad discovery" and the entitlement to immediate review of any discovery order that may allow such discovery. *Maxey ex rel. Maxey v. Fulton*, 890 F.2d 279, 283-84 (10th Cir. 1989) (asserting jurisdiction "because of the impermissible infringement on [the defendant's] immunity interest in freedom from overly broad discovery"); *see also Garrett v. Stratman*, 254 F.3d 946, 953 (10th Cir. 2001) (holding that overbroad discovery orders "[p]rior to resolution of qualified immunity" are immediately appealable); *Lewis v. City of Fort Collins*, 903 F.2d 752, 754 (10th Cir. 1990) (asserting jurisdiction over order that "does not limit discovery to the resolution of the qualified immunity issue").

In the decision below, the Fifth Circuit adopted a similar position, holding that a qualified immunity-asserting defendant was *entitled* to narrow discovery only and any infringement of that right was "tantamount to the denial of qualified immunity" and therefore immediately appealable. Pet. App. 11a. But the Fifth Circuit went even further outside the bounds of the final judgment rule and the narrow collateral order exception. The court exercised jurisdiction over Respondents' discovery order appeal even after Respondents not only dropped their appeal of the order denying qualified immunity, but also conceded that their motion was *correctly denied*. (Appellants' Br. at 5 n.7.) By expanding its jurisdiction to include the immediate review of the subsequent discovery order, the Fifth Circuit allowed Respondents to obtain

the benefits concomitant with an appeal from a denial of qualified immunity—*i.e.*, the protection from burdensome discovery—without ever having to demonstrate that the district court's *actual* denial of qualified immunity was erroneous.

Had Petitioner's claims arisen in the First, Fourth, or Sixth Circuits, Respondents' appeal would have been dismissed for lack of jurisdiction. But because Petitioner's claims arose in the Fifth Circuit, her case has been unjustifiably delayed. This divergence among the circuits demonstrates the urgent need for this Court's review.

C. The Decision Below Is Wrong

Under this Court's precedents, a discovery order is not immediately appealable, even when other important rights are at stake. The court of appeals' ad hoc creation of a new, potentially limitless class of interlocutory appeals was erroneous.

In *Mohawk Industries, Inc. v. Carpenter*, this Court prohibited judge-made expansion of the collateral order doctrine to pretrial discovery orders, even where those orders implicate "important institutional interests." 558 U.S. at 108-09. The Court held that notwithstanding the importance of the attorney-client privilege, courts could not allow immediate appeal of orders to disclose potentially privileged material. In so holding, this Court found that its own rulemaking authority, not "expansion by court decision," is the appropriate avenue for any further expansion of the collateral order doctrine. *Id.* at 113 (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995)).

In qualified immunity cases, this Court has permitted immediate appeals only of *actual* denials of qualified immunity, *i.e.*, at the motion-to-dismiss or summary-judgment stages. *Behrens*, 516 U.S. at 307; *Mitchell*, 472 U.S. at 526-27. The Fifth Circuit's decision contravenes this settled precedent. Indeed, the Fifth Circuit itself recognized the difference, but sidestepped this Court's direction by characterizing the district court's "failure to limit discovery" as "tantamount to the denial of qualified immunity"—even when the *actual* denial of qualified immunity was set forth in the preceding paragraph of the district court's decision and was not appealed. Pet. App. 11a, 35a.[2]

The Fifth Circuit's error is further confirmed by this Court's holding that even denials of qualified immunity are only immediately appealable if they present "purely legal issue[s]." *Johnson*, 515 U.S. at 313; *see also Ortiz v. Jordan*, 562 U.S. 180, 190 (2011) ("Cases fitting that bill typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law."). Interlocutory appeals requiring appellate courts to rule on factual disputes not yet resolved by district courts are not permitted. *Johnson*, 515 U.S. at 316-17. Interlocutory appeals of qualified immunity dismissals are therefore

2. The Fifth Circuit's exercise of jurisdiction over Respondent Davis's appeal also conflicts with this Court's decision in *Swint*, which outlawed "pendent party" jurisdiction. 514 U.S. at 51. Respondent Davis not only failed to appeal an *actual* denial of qualified immunity; because only a state-law claim against him remained, he was not able to assert federal qualified immunity as a defense at all. *See Davis v. Scherer*, 468 U.S. 183, 193-94 (1984) (holding violation of state law not actionable under § 1983).

expressly limited to cases presenting "neat abstract issues of law," even though doing so would "force public officials to trial." *Id.* at 317 (citation omitted).

The Fifth Circuit's rule—which invites serial qualified immunity appeals on a preliminary, incomplete factual record—conflicts with *Johnson*'s rejection of interlocutory appeals that involve "factual controversies." *Id.* at 316. Discovery disputes—and the routine orders that follow—are often fact-bound; they are also matters as to which "appellate judges enjoy no comparative expertise." *Id.* Indeed, the district court below denied Respondents' request to limit discovery based on a purely factual determination. The district court held that it did not require "further clarification of the facts" to rule on Respondents' immunity defense, "[c]onsidering the circumstances of this case [and] the specificity of the facts pled in the Amended Complaint." Pet. App. 35a (citation omitted). This illustrates why everyday discovery orders are simply not subject to appeal under *Johnson*.

The Fifth Circuit's decision permitting interlocutory appeals of routine discovery orders, even where the defendant has lost his motion to dismiss on qualified immunity grounds and chosen *not* to appeal it, is contrary to *Mohawk*, *Behrens*, and *Johnson*. It will mire appellate courts in repetitive, fact-bound appeals of run-of-the-mill discovery matters. And it would make it virtually impossible for a civil rights claimant to obtain a final resolution of his claim in any sort of reasonable time frame. It is plainly wrong, and this Court should grant review to say so.

II. The Question Presented Is Important

The question presented here is exceptionally important. The court of appeals' ruling threatens to turn every § 1983 case into a modern-day *Jarndyce and Jarndyce*, frustrating Congress's intent to provide civil rights plaintiffs with an avenue for relief. This Court warned in *Mohawk* that "[p]ermitting parties to undertake successive, piecemeal appeals" of discovery related orders "would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals." 558 U.S. at 112. This concern is no longer academic in civil rights cases in the Fifth and Tenth Circuits, which have dismantled the durable guardrails installed by Congress and this Court intended to strictly limit interlocutory appeals. Inevitable and substantial delays in § 1983 litigation will follow.

The issue is also exceptionally important for the orderly administration of the courts of appeals. Wherever it is adopted, this drastic expansion of the collateral order doctrine exception to the final judgment rule will flood appellate courts with discovery disputes of every shape and kind (*e.g.*, each set of interrogatories, every deposition notice, and potentially any question asked at a deposition). In the absence of this Court's intervention, appellate courts will improperly turn into litigation referees—asked to repeatedly reassess the factual record at intermediate, incomplete stages of litigation based on the parties' competing conjectures about what individual discovery requests may or may not reveal.

This Court has intervened in other cases presenting similar systemic concerns about appellate jurisdiction over

ongoing federal litigation. *See*, *e.g.*, *Mohawk*, 558 U.S. at 112 (holding that institutional costs of delays in district court litigation and increased burden on the courts of appeals outweigh limited benefits of extending collateral order doctrine to privilege-related disclosure orders). This Court should also intervene here and provide much-needed clarity on the scope of interlocutory appeals in immunity cases for three reasons.

First, interlocutory appeals significantly burden the courts of appeals and diminish the role of the district courts. *See Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989); *see also* Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 Mo. L. Rev. 1137, 1142 (2023) [hereinafter Lammon, *Reforming Qualified-Immunity Appeals*]; Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 74-75 (2017). This Court has observed that interlocutory appeals risk "additional, and unnecessary, appellate court work." *Johnson*, 515 U.S. at 309. This concern is exacerbated when it comes to discovery orders, which will result in "inordinate amounts of appellate time" being consumed by matters that fall squarely within the province of trial judges. *Id.* at 316-17; *see also In re Flint*, 960 F.3d at 830 ("We can only imagine the deluge of appeals that would descend upon us if standard discovery orders could so easily be rebranded as final judgments.").

Proliferating interlocutory appeals also "undermine the independence of the district judge" in conducting court proceedings. *Firestone Tire & Rubber Co.*, 449 U.S. at 374. Repeatedly interrupting the discovery process and inviting appellate courts to "second-guess prejudgment rulings" ignores Congress's judgment, "[i]mplicit in § 1291[,] . . .

that the *district judge* has primary responsibility to police the prejudgment tactics of litigants." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985). The Federal Rules, too, give district courts the responsibility for managing discovery, and promote the creation of a full factual record before summary judgment and any appeal. *See* Fed. R. Civ. P. 56(d) (permitting district court to defer or deny summary judgment if nonmovant shows discovery is incomplete). Because it jeopardizes the district judge's supervision of the discovery process, the Fifth Circuit's rule "carr[ies] with it much too high a systemic price in terms of disruption, delay, and diminished efficiency." *In re Insurers Syndicate for Joint Underwriting of Medico-Hosp. Pro. Liab. Ins.*, 864 F.2d 208, 210 (1st Cir. 1988); *see also* 15B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3914.23 (2d ed. 2024 update) ("Routine appeal from disputed discovery orders would disrupt the orderly progress of litigation . . . and substantially reduce the district court's ability to control the discovery process.").

Second, the delays introduced by discovery appeals will be severely prejudicial to civil rights plaintiffs and will undermine the purpose of § 1983 litigation. Interlocutory appeals already cause significant delays in § 1983 civil rights cases, with each appeal adding a year or more of delay. Bryan Lammon, *Sanctioning Qualified-Immunity Appeals*, 2021 U. Ill. L. Rev. 130, 138 (2021) ("Even when an appeal involves nothing but a challenge to the factual basis for the immunity denial, it can take a year or longer to resolve."); Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 Mich. J. Race & L. 251, 264 (2016) (referencing "twelve-month delay" relating to interlocutory appeals); *see also* United States Courts, *U.S. Court of Appeals Summary—12-Month Period Ending*

June 30, 2024, Federal Court Management Statistics, (June 30, 2024), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary0630.2024.pdf (noting that the median time from filing of notice of appeal to disposition was between 5.0 and 13.4 months for the twelve-month period ending June 30, 2024). In *Behrens*, for example, the first interlocutory appeal related to qualified immunity alone caused a four-year delay. 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). Naturally, such delays are compounded in cases involving multiple interlocutory appeals.

If the decision below is permitted to stand, defendants will have near-limitless opportunities to manufacture delays, even after a plaintiff survives a motion to dismiss. For example, a defendant could object to a single request for production, move for a protective order, and immediately appeal the denial of that protective order, adding a year of delay, or more. Then, after finally getting an order from the court of appeals, the defendant could object to a single interrogatory, kicking off another appeal *as of right* and causing yet further delay. Even if discovery were not stayed pending such appeals—stays are commonplace, as in this case—the potential for cascading delays is extraordinary and threatens to upend civil rights litigation. Moreover, depositions and responses to interrogatories would become bifurcated (at the least), potentially requiring multiple depositions and party certifications, wasting party and court resources.

As this Court noted in *Johnson*, interlocutory appeals introduce the "danger of denying justice" by contributing

to the loss of evidence and driving up costs. 515 U.S. at 315 (citation omitted); *see also Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (warning of "obstruction to just claims . . . from permitting the harassment and cost of a succession of separate appeals"). Defendants can use these appeals to "forc[e] a delay and impos[e] costs on the other side," pushing plaintiffs toward settling or abandoning their claims. 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); Lammon, *Reforming Qualified-Immunity Appeals*, *supra*, at 1159-60, 1176-77. Delays may also significantly obstruct the discovery process because, during appeal-induced delays, witnesses may forget crucial details, move away, or no longer be able to testify. *See Clinton v. Jones*, 520 U.S. 681, 707-08 (1997) (noting "danger of prejudice resulting from the loss of evidence"); *Apostol*, 870 F.2d at 1338 ("During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases)."). It is perhaps for these reasons that many district court judges view interlocutory appeals in qualified immunity cases "as a delaying tactic that hamper[s] litigation that would otherwise be tried or settled relatively quickly." Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1191 (1990).

Indeed, the interlocutory appeal in this case—potentially the first of many—has already caused substantial delay. Although more than a year has passed since Petitioner served her initial discovery requests and two years since bringing this lawsuit, the case remains in the preliminary stages of discovery. This

is even more striking considering that Respondent Dowdle expressly declined to appeal the district court's decision actually denying his qualified immunity defense at the motion-to-dismiss stage. And not only will Petitioner's qualified immunity-dependent claim incur delay, but so too has her state-law claim against Respondent Davis. *See id.* (explaining that district court judges viewed interlocutory appeals in qualified immunity cases as causing unreasonable delay where such appeals "tend to be closely bound to the factual merits of the case").

Defendants in qualified immunity cases already have the right to appeal the denial of a motion to dismiss. At some point, under the rules enacted by Congress and interpreted by this Court, a defendant's interest in avoiding the burdens of litigation must yield to the plaintiff's interest in testing her claims through discovery and eventually, summary judgment. That certainly must be the case after a plaintiff's complaint survives a motion to dismiss based on qualified immunity and the defendant chooses not to appeal that ruling. This Court has already once rejected authorizing multiple interlocutory appeals in such cases. *See Johnson*, 515 U.S. at 317-18 (acknowledging the policy concerns that "militate[] in favor of immediate appeals" but concluding that "countervailing considerations," including the final judgment rule, "are too strong to permit the extension of *Mitchell*"). The Fifth Circuit's decision flouts *Johnson*, deepening a circuit split, and it has paved the way for potentially limitless appeals by qualified immunity-asserting defendants so long as they say the magic words that the order is "tantamount to the denial of qualified immunity." Pet. App. 11a.

This Court has repeatedly held that the mere assertion of a qualified immunity defense does not justify

discarding fundamental principles of civil procedure. *See Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (refusing to impose higher burden of proof of improper motive on plaintiffs in qualified immunity cases and cataloging decisions "declin[ing] to revise established rules that are separate from the qualified immunity defense"). This is true, for example, for the standards that apply at summary judgment. *Tolan v. Cotton*, 572 U.S. 650, 659-60 (2014) (summarily vacating Fifth Circuit judgment for failing to view evidence in light most favorable to non-moving party in qualified immunity case). It is also true, as here, for "settled rules of interlocutory appellate jurisdiction." *Crawford-El*, 523 U.S. at 595. Fundamentally, any issues with such rules are "most frequently and effectively resolved either by the rulemaking process or legislative process," not by the courts of appeals. *Id.*; *see also Mohawk*, 558 U.S. at 113-14 (discussing Congress's preference for "rulemaking" as means of "determining whether and when prejudgment orders should be immediately appealable").

Third, collateral appeals generally do not further the purpose of qualified immunity (*i.e.*, shielding defendants from the burdens of avoidable discovery and trial) as they vastly increase the parties' costs and frequently are unsuccessful. *See* Schwartz, *supra*, at 11, 74-75 (finding that "interlocutory appeals of qualified immunity denials infrequently serve [the] function" of "shielding defendants from burdens of discovery and trial," such that "[q]ualified immunity may, in fact, increase the costs and delays associated with constitutional litigation"); Chen, *supra*, at 100 ("[T]he pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense."); *Apostol*, 870 F.2d at 1338 ("Most deferments will be unnecessary" because the "majority of [interlocutory qualified immunity] appeals—like the bulk of all appeals—end in affirmance.").

Moreover, because district courts have broad discretion with respect to discovery, appeals from discovery orders are especially unlikely to yield "error-correcting benefits." *Johnson*, 515 U.S. at 316; *see also Mohawk*, 558 U.S. at 110 ("Most district court rulings on these matters . . . are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm."); Lammon, *Reforming Qualified-Immunity Appeals*, *supra*, at 1158 (noting that about 60% of interlocutory appeals from denials of the qualified immunity defense from 2017-2020 resulted in partial affirmance or dismissal and that at least 20% of appeals involved an issue that the court of appeals held it lacked jurisdiction to review).

III. This Case Presents A Clean Vehicle To Resolve The Important Question Presented

This case cleanly presents an important jurisdictional question: whether courts of appeals have interlocutory jurisdiction under 28 U.S.C. § 1291 to review routine discovery orders in qualified immunity cases. The parties fully briefed this question at the Fifth Circuit, and the Fifth Circuit directly answered it in a published opinion, conflicting with the decisions of three other circuits. Pet. App. 6a.

There are no obstacles to this Court's review. The question presented is a pure question of law. Because Respondents' appeal immediately followed their motion to dismiss, there are no disputed factual questions. And Respondents' appeal explicitly sought review of the discovery order only, making this case ideally suited to answering the narrow question presented.

Resolution of the question presented will be outcome-determinative here and provide clarity to the courts of appeals. The Fifth Circuit recognized that jurisdiction was a "threshold" issue. Pet. App. 5a. Nonetheless, it held that it could review discovery orders permitting more than "limited discovery," and ordered the court to limit discovery to the issue of qualified immunity. Pet. App. 11a. Because jurisdiction is logically antecedent to the merits, the Fifth Circuit's decision cannot survive a decision by this Court rejecting the Fifth Circuit's jurisdictional holding.

This case presents an ideal opportunity for this Court to resolve an important, disputed question that plaintiffs in similar cases have few incentives to raise with this Court. After all, each successive appeal adds further delay and cost—and Respondents' appeal may be only the first of many. Until this Court resolves the question presented, plaintiffs such as Petitioner face a dilemma: they can either accede to defendants' demands for narrow discovery or wade through a costly cascade of appeal after appeal after appeal. This is the very outcome that the final judgment rule was designed to avoid. It makes this Court's review particularly urgent, and this case is an appropriate vehicle for doing so.

Interlocutory appeals have an important, but limited role to play in § 1983 litigation. Ignoring these limits has profound, harmful consequences for litigants and our legal system, contrary to Congress's intent in enacting both 42 U.S.C. § 1983 and 28 U.S.C. § 1291's final judgment rule. In the decision below, the Fifth Circuit did exactly that, flouting this Court's precedents and deepening an existing circuit split. This Court's intervention is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 3, 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 5, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-30694

MALIKAH ASANTE-CHIOKE, INDIVIDUALLY, AND ON BEHALF OF HER FATHER, JABARI ASANTE-CHIOKE,

Plaintiff—Appellee,

versus

NICHOLAS DOWDLE, IN HIS INDIVIDUAL CAPACITY; LAMAR A. DAVIS, COLONEL, IN HIS INDIVIDUAL CAPACITY,

Defendants—Appellants.

June 5, 2024, Filed

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:22-CV-4587

Before KING, HO, and ENGELHARDT, *Circuit Judges.*

KURT D. ENGELHARDT, *Circuit Judge*:

Defendants-Appellants Nicholas Dowdle and Colonel Lamar Davis, an officer for the Louisiana State Police

and the superintendent of the Louisiana State Police, respectively, seek review of a district court order denying their request that discovery should be limited to issues of qualified immunity in anticipation of a ruling on qualified immunity at the summary judgment stage. Defendants asserted qualified immunity in a motion to dismiss in response to Plaintiff-Appellee's section 1983 claims, and the district court denied the motion based on the well-pled complaint. The district court also denied Defendants' request for limited discovery, and after the instant appeal was filed, stayed discovery only as to claims against Dowdle and issues regarding his qualified immunity on appeal. For the following reasons, we VACATE the district court's order and REMAND.

I.

This appeal arises from the death of Jabari Asante-Chioke wherein police officers shot and killed Asante-Chioke after a report that he was visibly distressed, on foot at the intersection of Airline Drive and North Causeway Boulevard in Jefferson Parish, Louisiana, and carrying what was later identified as a gun and knife. The amended complaint alleges that the officers, including Dowdle, attempted to apprehend Asante-Chioke but subsequently shot and killed him when he allegedly raised his gun in the direction of one of the officers. An autopsy revealed thirty-six rounds were fired by the officers. Twenty-four of those rounds hit Asante-Chioke—six gunshot wounds on his right and left arms, eight gunshot wounds on his right and left legs, and ten gunshot wounds on his torso.

Appendix A

Plaintiff-Appellee is Asante-Chioke's daughter. She brought a lawsuit against the police officers at the scene—two Louisiana State Police officers, including Dowdle, and two East Jefferson Levee District Police officers—as well as Col. Davis, in his individual capacity, related to the supervision and training of Dowdle, and other state defendants, under 42 U.S.C. §§ 1983 and 1988, and asserted various state law claims. Plaintiff alleges in her amended complaint claims of unlawful seizure and excessive force against the defendant officers when they continued firing their weapons even after her father was incapacitated, motionless on the ground. She claims that video footage captured the event.

Officer Dowdle and Col. Davis moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. In the alternative, the Defendants moved the district court for discovery limited to whether qualified immunity applies in order to reassert qualified immunity in a summary judgment motion.

On August 31, 2023, the district court issued its order denying Defendants' motion to dismiss. Regarding Col. Davis's Rule 12(b)(6) claim, the district court held that Plaintiff pled sufficient facts with respect to her state law negligent supervision and training claim against Col. Davis. The district court dismissed a subset of Plaintiff's vicarious liability claims alleged against Col. Davis, leaving only state law claims. The district court also denied Dowdle's assertion of qualified immunity at the pleading stage. Dowdle claims that Plaintiff did not

specify how many shots he fired after it was clear that Asante-Chioke no longer posed a threat, and that the allegations did not show a clear violation. The district court disagreed, noting a lack of "authority requiring an accounting of each officer's shots on a motion to dismiss." The district court determined that the allegations, taken as true, were enough to state a valid claim and overcome the defense of qualified immunity. The district court stated:

> [T]he Amended Complaint alleged that four officers, including Dowdle, fired 36 shots at Mr. Asante-Chioke, and the officers fired the majority of those shots after Mr. Asante-Chioke dropped his gun, fell to the ground, and was incapacitated. . . . Accepting all the well-pled facts in the Amended Complaint as true, these facts raise a reasonable expectation that discovery will reveal evidence that Dowdle fired shots after Mr. Asante-Chioke no longer posed a threat.

The district court also denied Dowdle's request to limit discovery. Citing *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014), the district court stated that, although it could "issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim,'" such an order was "not necessary" here.

On September 29, 2023, Defendants filed the instant appeal only as to the denial of limited discovery. Previously, on September 14, Plaintiff issued discovery requests to

all defendants, and Defendants moved to stay discovery. The district court granted in part Defendants' motion, staying discovery only as to claims against Dowdle and issues regarding his qualified immunity defense on appeal.

II.

The parties disagree as a threshold matter about jurisdiction. Under 28 U.S.C. § 1291, the court has jurisdiction to review "final decisions" of the district courts. *Backe v. LeBlanc*, 691 F.3d 645, 647 (5th Cir. 2012). Generally, these types of decisions "do[] not include discovery orders." *Id.* at 647-48 (citing *Lion Boulos v. Wilson*, 834 F.2d 504, 506 (5th Cir. 1987)). "However, the Supreme Court has interpreted § 1291 to include a grant of authority to review a 'small class' of collateral orders traditionally considered non-final." *Hinojosa v. Livingston*, 807 F.3d 657, 663 (5th Cir. 2015) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)). Such orders include orders denying qualified immunity. *Carswell v. Camp*, 54 F.4th 307, 310 (5th Cir. 2022) (citing *Backe*, 691 F.3d at 647-49) ("[W]e have jurisdiction to review orders denying qualified immunity."). This is because qualified immunity is more than a "mere defense to liability." *Carswell*, 54 F.3d at 310 (quoting *Pearson v. Callahan*, 555 U.S. 223, 237, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)). "It's also an immunity from suit. And one of the most important benefits of the qualified immunity defense is protection from pretrial discovery, which is costly, time-consuming, and intrusive." *Carswell*, 54 F.3d at 310 (citation and internal quotation marks omitted); *see also Helton v. Clements*, 787 F.2d

1016, 1017 (5th Cir. 1986) (per curiam) (a "refusal to rule on a claim of immunity" deprives a defendant of his "entitlement under immunity doctrine to be free from suit and the burden of avoidable pretrial matters"). Another immediately appealable order is an order "declin[ing] or refus[ing] to rule on a motion to dismiss based on a government officer's defense of qualified immunity." *Zapata*, 750 F.3d at 484. These orders are "tantamount" to orders denying qualified immunity, and courts have jurisdiction to consider appeals of such orders "because a defendant's entitlement to qualified immunity must be determined 'at the earliest possible stage of the litigation.'" *Carswell*, 54 F.4th at 310 (citing *Zapata*, 750 F.3d at 484; and then quoting *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (per curiam)).

The district court here cited *Zapata* in support of denying Defendants' limited discovery request. This court has jurisdiction to review discovery orders under the collateral order doctrine that do not follow *Zapata*'s "careful procedure." *Zapata*, 750 F.3d at 485 (citation omitted).

In *Zapata*, the district court deferred ruling on the defendants' threshold qualified immunity defense raised in their motion to dismiss, instead issuing an order allowing the plaintiffs pre-dismissal limited discovery on the issue of qualified immunity. *Id.* at 484. The defendants appealed, contending that the district court failed "to rule on their immunity claim before permitting discovery pertaining to qualified immunity." *Id.* This court recognized the "careful procedure" under which a district court may defer its

qualified immunity ruling if further factual development is necessary to ascertain that defense: *first*, the district court must "find 'that the plaintiffs [sic] pleadings assert facts which, if true, would overcome the defense of qualified immunity.'" *Id.* (quoting *Wicks v. Miss. State Emp. Servs.*, 41 F.3d 991, 994 (5th Cir. 1995)). "Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Zapata*, 750 F.3d at 485 (quoting *Backe*, 691 F.3d at 648). And *second*, "[a]fter the district court finds a plaintiff has so pleaded, if the court remains unable to rule on the immunity defense without further clarification of the facts, it may issue a discovery order narrowly tailored to uncover only those facts needed to rule on the immunity claim." *Zapata*, 750 F.3d at 485 (quoting *Backe*, 691 F.3d at 648; and then quoting *Lion Boulos*, 834 F.2d at 507-08). The *Zapata* court held it had jurisdiction to review the district court's order and vacated it because the district court did not follow the procedure set forth above. *Zapata*, 750 F.3d at 485.

Zapata and *Backe* apply the "careful procedure" to cases prior to a ruling on a motion to dismiss. In both cases the district courts *refused* to rule or *deferred* ruling on the defense of qualified immunity at the motion to dismiss stage. *Zapata*, 750 F.3d at 484 ("The district court deferred ruling on the defendants' threshold qualified immunity defense, instead issuing an order allowing the plaintiffs limited discovery on the issue of qualified immunity."); *Backe*, 691 F.3d at 648 ("The district

court refused to rule on Appellants' threshold qualified immunity defense . . . [and] denied Appellants' motion to dismiss pending general discovery."). And in *Hutcheson v. Dallas County*, this court applied the "careful procedure" to the plaintiffs' motion for limited discovery, wherein plaintiffs sought to contradict the defendants' defense of qualified immunity in a motion that was converted by the district court from a motion to dismiss to summary judgment. 994 F.3d 477, 479-81 (5th Cir. 2021). In ruling on summary judgment, the district court had the benefit of relying on video evidence showing that there was no dispute of material fact as to whether the defendant officers used unreasonable force. *Id.* at 480-81. The plaintiffs reasoned that they needed limited discovery to rebut defendants' defense of qualified immunity because of uncertainty surrounding the decedent's death due to the lack of sound in the video. *Id.* at 481. This court held that, for purposes of qualified immunity, further discovery was not necessary because "plaintiffs faltered at the first step of our two-step procedure." *Id.* (citing *Backe*, 691 F.3d at 648).

Most recently, *Carswell* clarified the use of this "careful procedure." In *Carswell*, the plaintiff sought to depose defendants who had asserted qualified immunity in their motion to dismiss by relying on the district court's scheduling order that allowed limited discovery "if the plaintiff believes discovery is necessary to resolve" the qualified immunity defense. 54 F.4th at 310. The court held that the scheduling order was an abuse of discretion because it allowed discovery against defendants while deferring resolution of their qualified immunity defense.

Id. at 311. The court explained that "[t]he Supreme Court has now made clear that a plaintiff asserting constitutional claims against an officer claiming [qualified immunity] must survive the motion to dismiss without *any* discovery." *Id.* (emphasis in original). The court emphasized that a defendant's entitlement to immunity "should be determined at the earliest possible stage of the litigation—full stop." *Id.* at 312 (citation and internal quotation marks omitted). The only exception to this rule was the "careful procedure" explained above "to uncover only those facts needed to rule on the immunity claim." *Id.* (quoting *Wicks*, 41 F.3d at 994); *see also Zapata*, 750 F.3d at 485.

Notably, *Carswell* directs defendants to two choices *after* a motion to dismiss is denied: (1) "the defendant can immediately appeal the district court's denial under the collateral order doctrine" or (2) "—à la *Lion Boulos* and its progeny—the defendant can 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." *Carswell*, 54 F.4th at 312 (citing *Hutcheson*, 994 F.3d at 481 ("Before limited discovery is permitted, a plaintiff seeking to overcome [qualified immunity] must assert facts that, if true, would overcome that defense.")).

Carswell, Zapata, and *Backe* follow the reasoning set forth in *Lion Boulos*, that is, a party asserting the defense of qualified immunity is immune from discovery that is "avoidable or overly broad," and that when the district court is "unable to rule on the immunity defense without

further clarification of the facts" and when the discovery order is "narrowly tailored to uncover those facts needed to rule on the immunity claim," an order allowing such limited discovery is neither avoidable nor overly broad. *Lion Boulos*, 834 F.2d at 507-08. "If the complaint alleges facts to overcome the defense of qualified immunity, the district court may then proceed under *Lion Boulos* to allow the discovery necessary to clarify those facts upon which the immunity defense turns." *Wicks*, 41 F.3d at 995 (citing *Lion Boulos*, 834 F.2d at 507-08).

Here, the defense of qualified immunity turns on whether Dowdle continued using deadly force by firing shots at Asante-Chioke after he became incapacitated. The district court was correct in recognizing that to have continued shooting is a clear violation under this circuit precedent. *See Roque v. Harvel*, 993 F.3d 325, 336-39 (5th Cir. 2021). But there were multiple alleged shooters from at least two different law enforcement agencies, thirty-six rounds fired, and a dispute as to whether a single defendant (Dowdle) used deadly force after Asante-Chioke became incapacitated. On the present record, it is not known whether Dowdle fired any shots; how many if so; and when, in relation to Asante-Chioke's actions and death. Through limited discovery, this information may well be discernable. Yet the district court denied Defendants' request for limited discovery in light of Plaintiff's issued discovery requests—which include requests for information and documents not limited to the defense of qualified immunity—staying only discovery as to claims against Dowdle and issues regarding his qualified immunity on appeal.

Our court may review an order under the collateral order doctrine that exceeds the requisite "narrowly tailored" scope. *Backe*, 691 F.3d at 648 ("[I]f the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'. . . . [W]e may review the order under the collateral order doctrine . . . when the court's discovery order exceeds the requisite 'narrowly tailored' scope.'") (quoting *Lion Boulos*, 834 F.2d at 507-08). This is because one of the most important benefits of the qualified immunity defense is the "protection from pretrial discovery, which is costly, time-consuming, and intrusive." *Carswell*, 54 F.4th at 310 (citation and internal quotation marks omitted). In this case, the district court's failure to limit discovery was tantamount to the denial of qualified immunity. And our jurisprudence strongly favors limited discovery in a case like this where a plaintiff alleges facts to overcome the defense of qualified immunity. *See*, *e.g.*, *Carswell*, 54 F.4th at 312; *Lion Boulos*, 834 F.2d at 507-08.[1]

* * *

1. Plaintiff also argues that Col. Davis lacks standing in this case. Because the Plaintiff's claims against Col. Davis are "inextricably intertwined" with the claims against Dowdle, our ruling likewise extends to Col. Davis. *See Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1998) ("Pendant appellate jurisdiction is only proper . . . where a final appealable order is 'inextricably intertwined' with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order.") (citation omitted).

For the foregoing reasons, this court has appellate jurisdiction over the district court's discovery order. The district court is directed to limit discovery to uncover only the facts necessary to rule on qualified immunity. We VACATE and REMAND in line with this opinion.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED AUGUST 31, 2023

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 22-4587
SECTION "J"(5)

MALIKAH ASANTE-CHIOKE,

VERSUS

NICHOLAS DOWDLE, *et al.*

August 31, 2023, Decided;
August 31, 2023, Filed

ORDER AND REASONS

Before the Court is a *Rule 12(b) Motions to Dismiss* **(Rec. Doc. 36)** filed by Defendants, the State of Louisiana through the Department of Public Safety and Corrections, Col. Lamar A. Davis, and Nicholas Dowdle. The motion is opposed by Plaintiff, Malikah Asante-Chioke (Rec. Doc. 40), and Defendants filed a reply (Rec. Doc. 44). Having considered the motion and memoranda, the record, and the applicable law, the Court finds that the motion should be **GRANTED IN PART AND DENIED IN PART**.

Appendix B

FACTS AND PROCEDURAL BACKGROUND

This case arises from the death of Jabari Asante-Chioke. On November 21, 2021, Louisiana State Police Officer Nicholas Dowdle, East Jefferson Levee District Police Officers Jonathon Downing and Gerard Duplessis, and other officers ("John Does") serving LSP or EJLD (together, the "Officer Defendants") shot and killed Mr. Asante-Chioke after a citizen notified a nearby police officer that Mr. Asante-Chioke was visibly distressed, on foot on the side of Airline Highway, and carrying what were later identified as a gun and knife. Plaintiff, Malikah Asante-Chioke ("Plaintiff" or "Mr. Asante-Chioke") is Mr. Asante-Chioke's daughter, and she brings this action individually and on behalf of her father. (Rec. Doc. 22).

After the passerby notified the nearby police officer, two Louisiana State Police Department ("LSP") officers and two East Jefferson Levee District officers, including Defendants Dowdle, Downing, and Duplessis, located Mr. Asante-Chioke and parked their vehicles along the roadway. *Id.* at 8. Video from a witness (as described in the pleadings) shows that the officers attempted to approach and apprehend Mr. Asante-Chioke as he jogged slowly away from them, westbound along the eastbound lane. *Id.* at 8-9. At one point, Mr. Asante-Chioke put the gun he was carrying to his own head. *Id.* at 9. As Mr. Asante-Chioke jogged away, the officers screamed, "get on the ground," "you better fucking stop!" "get on the fucking ground! I swear to God I'll fucking shoot you!" and "I will fucking kill you!" *Id.*

One officer began jogging behind and toward Mr. Asante-Chioke, and Mr. Asante-Chioke slowed to a walk. *Id.* That officer stopped about ten feet from Mr. Asante-Chioke and advanced with his weapon drawn and pointed at him, screaming "get on the ground." *Id.* at 10. Mr. Asante-Chioke, without turning or making eye contact, "raised his arms parallel to the ground and then dropped them before raising his right arm with the gun in hand in the direction of the third officer. When Mr. Asante-Chioke's right arm reached a forty-five-degree angle the third officer opened fire on Mr. Asante-Chioke." *Id.* "Almost immediately," Mr. Asante-Chioke dropped the gun. *Id.*

After he dropped the gun, the officers continued to shoot at him, and after several bullet wounds, Mr. Asante-Chioke fell to the ground. *Id.* Defendants Dowdle, Downing, and Duplessis fired a total of thirty-six rounds at Mr. Asante-Chioke, and his autopsy revealed that he was shot twenty-four times (six gunshot wounds on his arms, eight on his legs, and ten on his torso), causing fatal wounds. *Id.* An LSP spokesperson stated on a news broadcast that the first officer who shot Mr. Asante-Chioke attempted to tase him, but the autopsy revealed no marks consistent with taser use. *Id.* at 11.

Plaintiff filed her original complaint on November 18, 2022, individually and on behalf of her father, including § 1983 claims, wrongful death claims, survival claims, and battery claims against the Officer Defendants. (Rec. Doc. 1). The original complaint also included claims for negligent supervision against the Supervisor Defendants

and training and supervisory liability against the State of Louisiana. *Id.* Movants previously filed motions to dismiss in response to Plaintiff's Complaint. However, after Plaintiff filed an Amended Complaint (Rec. Doc. 22), the Court denied the motions as moot, without prejudice. (Rec. Doc. 23). Plaintiff argued that the Amended Complaint corrected the deficiencies, added an additional supervisor defendant (Doe), and added an additional claim against the Supervisor Defendants under 42 U.S.C. § 1983, alleging unlawful seizure. (Rec. Doc. 20).

On June 21, 2023, Plaintiff voluntarily dismissed her claims as to the State of Louisiana through the Department of Public Safety & Corrections. (Rec. Doc. 35). Three Defendants (the State of Louisiana through the Department of Public Safety & Corrections, Col. Lamar A. Davis, and Nicholas Dowdle) filed the instant motion on June 23, 2023. (Rec. Doc. 36). Movants seek dismissal under Rules 12(b)(1) and 12(b)(6).

EJLD officers Downing and Duplessis filed answers on June 23, 2023 (Rec. Docs. 37, 38), but they also filed a "response" in support of the instant motion on July 17, 2023. (Rec. Doc. 39). On July 18, 2023, Plaintiff filed her response to the instant motion (Rec. Doc. 40), and Plaintiff and Defendant Lamar A. Davis also stipulated to dismiss Plaintiff's 42 U.S.C. § 1983 Unlawful Seizure claim against Davis. (Rec. Doc. 41). Movants filed their reply on July 27, 2023.

Appendix B

LEGAL STANDARD

In deciding a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), "the district court is 'free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case.'" *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005). The party asserting jurisdiction must carry the burden of proof for a Rule 12(b)(1) motion to dismiss. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). The standard of review for a motion to dismiss under Rule 12(b)(1) is the same as that for a motion to dismiss pursuant to Rule 12(b)(6). *United States v. City of New Orleans*, No. 02-3618, 2003 U.S. Dist. LEXIS 16765, 2003 WL 22208578, at *1 (E.D. La. Sept. 19, 2003). If a court lacks subject matter jurisdiction, it should dismiss without prejudice. *In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 209 (5th Cir. 2010). When "a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Id.* (internal quotation marks and citation omitted).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that

the defendant is liable for the misconduct alleged." *Id.* The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[D]etailed factual allegations" are not required, but the pleading must present "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. The court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009) (citation omitted).

DISCUSSION

Because Plaintiff voluntarily dismissed the State of Louisiana through the Department of Public Safety and Corrections, the Court will only address the arguments regarding claims against the remaining movants: Davis and Dowdle.

I. Subject Matter Jurisdiction

First, Davis argues that this Court lacks subject matter jurisdiction for Plaintiffs' claims against him in his official capacity, even though the Amended Complaint only named him in his individual capacity. (Rec. Doc. 36-1, at 5). The Amended Complaint names Colonel Davis, the Superintendent of the Louisiana State Police, "in his individual capacity" as "vicariously liable under state law

for the negligent acts and omissions of the defendants operating under his supervision." (Rec. Doc. 22, at 6). The Amended Complaint goes on to allege that Davis, in his official capacity, is the political subdivision with authority to supervise LSP. *Id.* at 22. Relatedly, Count II, a *Monell* claim against Davis and EJLD Supervisor Doe, alleges that Davis and EJLD Supervisor Doe, "in their official capacity, are the political subdivisions with authority to supervise officers of LSP and EJLD, respectively," and are therefore the "final policymakers." *Id.* at 22. Plaintiff has since dismissed the claim in Count II. (Rec. Doc. 41).

Davis argues that, in his individual capacity, he cannot be held vicariously liable for those under his supervision, because that claim is actually a thinly-veiled official capacity claim, which is a claim against the State. (Rec. Doc. 36-1, at 5). Next, he contends that the Eleventh Amendment bars this suit against him as a state official acting in his official capacity. *Id.* at 7-8. Finally, Davis and Dowdle assert that, whether brought against them in their individual or official capacities, Plaintiff's Louisiana state law claims are barred because the state of Louisiana is the real substantial party in interest. *Id.* at 8.

In response, Plaintiff first argues that Davis has no basis for converting her claims against him in his individual capacity into official-capacity claims. (Rec. Doc. 40, at 13). Instead, Plaintiff brought these claims against Davis in his individual capacity because they pertain to his individual conduct: he was personally on notice of the need to train and supervise LSP officers, and he personally acknowledged that he had personal responsibility not

to wait to address deficiencies at LSP. *Id.* at 15 (citing Jim Mustian, Louisiana State Police Undergo Review After String of Beatings of Black Motorists, AP (Mar. 14, 2022), https://www.wwltv.com/article/news/crime/la-state-police-undergo-outside-review/289-d40aaa9c-91a3-49e2-8f3a-3cb2c7883dcb).

Because Plaintiff has since voluntarily dismissed her *Monell* claim against Davis in his official capacity as a final policymaker for LSP, only her state law claims against Davis in his individual capacity remain.[1] Davis and Dowdle argue that, whether in their individual or official capacities, Plaintiff's five state law claims are barred because they were acting within the course and scope of their employment with the State at the time of the alleged negligence. (Rec. Doc. 36-1, at 10). Therefore, Plaintiff's claims for wrongful death, survival, battery, negligence, and negligent supervision and training will inevitably

1. Davis argues in his reply that, despite the dismissal of this claim, in paragraph 86 of the Amended Complaint (which was not stricken by the dismissal), Plaintiff also identifies Davis in his official capacity in her claims regarding his alleged negligent supervision and training of officers in Count VII, so she also has claims against him in his official capacity. (Rec. Doc. 44, at 2). Count VII of the Amended Complaint claims that Davis (along with Supervisor Doe, of the EJLD) failed to sufficiently supervise and train officers, and that failure to act was negligent under Louisiana law. (Rec. Doc. 22, at 27-28). Paragraph 86 alleges that Davis developed and maintained the policies, customs, and practices that caused violations of Mr. Asante-Chioke's constitutional rights. (Rec. Doc. 22, at 22). This language refers to Plaintiff's *Monell* claim, which she dismissed, and the Court concludes that the negligent training and supervision claim in Count VII is alleged against Davis in his individual capacity.

involve the Louisiana public treasury, so the claims must be dismissed for lack of subject matter jurisdiction under the Eleventh Amendment. *Id.*

Claims against government officials in their individual capacities "seek to impose individual liability upon a government officer for actions taken under color of state law." *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). "The Eleventh Amendment does not erect a barrier against suits to impose individual and personal liability on state officials under § 1983." *Id.* at 30-31 (internal quotation marks omitted). In an individual capacity suit, government officials "come to court as individuals, and the real party in interest is the individual, not the sovereign." *Lewis v. Clarke*, 581 U.S. 155, 163-64, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017) (internal citations and quotation marks omitted). However, the Eleventh Amendment bars suits against state officials when the state is the real, substantial party in interest. *Reyes v. Sazan*, 168 F.3d 158, 162 (5th Cir. 1999) (internal citation omitted).

In *Reyes*, the Fifth Circuit affirmed a district court ruling that the Eleventh Amendment afforded no defense to state law claims asserted against officers personally. *Id.* at 163. Because the plaintiff in *Reyes* did not assert that personal liability of state officials would be imputed to the employer, the Court found that "there is at least a fact issue concerning whether the officers here acted intentionally or with gross negligence" and "the officials might not receive indemnification" from their state employer. *Id.*; *see also Downing v. Williams*, 624 F.2d

612, 626 (5th Cir. 1980) (vacated on other grounds) ("an indemnity statute is only an agreement between the state and these individuals and cannot thereby be converted into an extension of Eleventh Amendment immunity by the state").

Plaintiff cites to *Lewis v. Clarke*, where the Supreme Court held that an "indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." 581 U.S. at 164-65. In that case, the defendant argued that because a sovereign tribe, rather than the defendant, would be required to pay any successful claims from its own funds, the sovereign was the real party-in-interest. *Id.* at 164. Noting that the Supreme Court had never held that a § 1983 suit against a state officer in his individual capacity implicates the Eleventh Amendment and a State's sovereign immunity from suit, the Court explained that "the critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Id.* at 165.

Here, Davis and Dowdle do not respond to this binding precedent, but instead argue that Plaintiff's complaint is contradictory, alleging both that the Defendants are individually responsible for damages and that the State of Louisiana (through the Department of Public Safety and Corrections) is ultimately responsible for the same conduct. Considering the question of who may be legally bound by this Court's adverse judgment, the Court finds that, like the plaintiff in *Reyes*, Plaintiff here has not alleged any indemnification provision requiring the state

to pick up the tab, and fact issues remain so to whether Louisiana's indemnification statute would even cover the officers' alleged conduct. Further, even if Plaintiff had alleged a relevant indemnification statute, doing so would not necessarily extend sovereign immunity to Dowdle and Davis as a matter of law, because fact issues remain concerning their actions. Accordingly, as to Defendants' 12(b)(1) arguments that Plaintiffs' state law claims must be dismissed under the Eleventh Amendment, the motion must be denied.

II. Failure to State a Claim

a. Claims against Col. Davis

Defendants argue that, in the alternative to dismissal for lack of subject matter jurisdiction, this Court should dismiss Plaintiffs' state law claims against Davis for failure to state a claim. "Insofar as the allegations against Col. Davis concern supervisory liability predicated on a theory of vicarious liability," they argue that it is well settled law that liability under § 1983 cannot be imposed on the basis of respondeat superior. (Rec. Doc. 36-1, at 10). Plaintiff does not dispute this argument, and the Court agrees that "under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987). However, in addition to her vicarious liability claim, Plaintiff also alleges a claim against Davis for negligent supervision and training.

Davis contends that the Amended Complaint fails to sufficiently state a negligent supervision and training

claim and that he is entitled to discretionary immunity under Louisiana law. *Id.* at 13-14. A supervisor may be liable for failure to supervise or train if "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011). "To establish deliberate indifference, 'a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.'" *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009) (quoting *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003)). Furthermore, "for a supervisor to be liable for failure to train, the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform." *Id.* (quoting *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir.2005)). Moreover, "for liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective." *Id.*

Plaintiff's negligent supervision and training claim against Davis in his individual capacity notes that, over the past several decades, public letters and media coverage has revealed that "it has become public knowledge that LSP's training of its officers is deeply racist, 'discriminatory,' and 'repugnant.' (Rec. Doc. 22, at 26). Plaintiff specifically alleges that LSP fails to properly train officers on "de-escalation tactics and on how to approach incidents involving individuals suffering

from mental health issues," including how to negotiate the situation and approach those experiencing mental health crises, the difference between verbal and non-verbal communication, and how to select a response in potentially violent situations. *Id.* at 27. Plaintiff also alleges that LSP's failure to supervise and discipline officers for excessive force has allowed a significant number of cases in the past decade where LSP officers used excessive force and subsequently covered up their use of excessive force. *Id.* As to Davis, Plaintiff notes that Davis himself acknowledged LSP's deficiencies and that he supports hiring an outside consultant to assess LSP's culture and policies on use of force, hiring, and training, indicating that he knew or should have known that the officers under his supervision were receiving insufficient training and supervision regarding de-escalation tactics and use of deadly force. *Id.* at 27-28. Finally, Plaintiff alleges that the lack of supervision and training existed because Davis exhibited deliberate indifference to the problem, and this failure to act was negligent. *Id.* at 28.

For the purpose of withstanding the motion to dismiss, these allegations are sufficient. Plaintiff has alleged facts showing that Davis was aware of the defective training and supervision at LSP, specifically regarding use of force at issue in this case. Plaintiff claimed that Mr. Asante-Chioke was outwardly experiencing a mental health crisis, and she has alleged facts that a bystander was concerned that Mr. Asante-Chioke was experiencing a mental health crisis. Plaintiff has also alleged, with specificity, that LSP's de-escalation training for such crises, like the circumstance at issue here, was defective, because

LSP's training does not include information on how to approach individuals experiencing mental health crises and selecting appropriate communication and responses in potentially violent situations. Accordingly, Plaintiff has stated a claim against Davis in his individual capacity for negligent supervision and training because she sufficiently alleged that he implemented unconstitutional policies that causally resulted in the constitutional injury. *See Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 435 (5th Cir. 2008).

Next, Davis argues that, even if Plaintiff stated a claim for negligent supervision and training, he has discretionary immunity related to his policy decisions on training and supervision. Louisiana's discretionary immunity statute provides that "[l]iability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." La. Rev. Stat. § 9:2798.1(B). In determining whether immunity applies, Louisiana courts employ the two-step test set out by the United States Supreme Court in *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), for determining immunity under the Federal Tort Claims Act. *Commerce & Indus. Ins. Co. v. Grinnell Corp.*, 280 F.3d 566, 571 (5th Cir. 2002). The first step requires that the action at issue be discretionary. *Id.* Conduct cannot be discretionary unless it involves an element of judgment or choice. Thus, immunity does not apply "when a federal statute, regulation, or policy specifically prescribes a

course of action for an employee to follow." *Id.* (quoting *Berkovitz*, 486 U.S. at 536).

If there is no statutory, regulatory, or procedural policy directive dictating the employees' course of conduct, then the court proceeds to the second step of the test. The second step requires a court to "determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 572 (quoting *Berkovitz*, 486 U.S. at 536-37). The discretionary immunity statute was designed to protect governmental actions and decisions based on considerations of public policy. *See id.* Thus, the statute immunizes a public entity or employee from suit "[o]nly if the discretionary act was grounded in social, economic, or political policy." *Id.*

The immunity offered by Louisiana's discretionary immunity statute is in the nature of an affirmative defense which must be specifically pleaded in the defendant's answer. *White v. City of New Orleans*, 806 So. 2d 675, 677 (La .App. 4 Cir. 2001). As such, the defendant bears the burden of proving that this statutory immunity applies. *Johnson v. Orleans Par. Sch. Bd.*, 975 So.2d 698, 710 (La. App. 4 Cir. 2008).

Here, instead of proving that this statutory immunity applies, Davis argues that the complaint provides nothing alleged with specificity sufficient to overcome the application of discretionary immunity. (Rec. Doc. 36-1, at 15). Specifically, Davis argues that Plaintiff did not allege what specific training or supervision was warranted and not provided. *Id.* This is not quite true; the Amended

Complaint provides a list of tactics for de-escalation in approaching individuals suffering from mental health issues. (Rec. Doc. 22, at 27). Next, he argues there is lack of factual support in the complaint that the interaction with Mr. Asante-Chioke suggested he was suffering from mental illness. (Rec. Doc. 36-1, at 15). This is also not quite true; the Amended Complaint states that Mr. Asante-Chioke was "visibly distressed and was traveling along the highway on foot," and "a passer-by who saw Mr. Asante-Chioke thought he might be experiencing a mental health crisis and subsequently flagged down a police officer." (Rec. Doc. 22, at 8). Third, Davis argues that the "allegations fail to consider that, whether suffering from mental illness or not, Chioke was armed and raised his gun in the direction of an officer." (Rec. Doc. 36-1, at 15). This is also not exactly true; the Amended Complaint states, under the heading "The Failure to Deescalate," when Mr. Asante-Chioke's right arm (holding the gun) reached a forty-five degree angle, an officer started shooting at him, and he dropped the gun almost immediately. (Rec. Doc. 22, at 10). After he dropped the gun, the officers continued to fire at him, resulting in twenty-four gunshot wounds. *Id.* Plaintiff alleges with specificity that both before and after he dropped the gun, "no de-escalation tactics were used by the Officer Defendants before they killed Mr. Asante-Chioke:" they did not attempt to speak to him in a calm manner, attempt non-lethal force, and instead approached him with their guns drawn, screaming at him. *Id.* at 19.

Further, it is not apparent on the face of the pleadings in this case that, in training and supervising, Davis exercised any discretion grounded in social, economic,

or political policy. In the instant motion, Davis has not provided any detail as to how his actions constitute policy decisions, rather than operational decisions, so he has not carried his initial burden of demonstrating that discretionary immunity applies. Accordingly, for the purposes of the motion to dismiss, Plaintiff has pleaded sufficient allegations to state a claim against Davis in his individual capacity. Davis may raise the defense of discretionary immunity again in a summary judgment motion, after suitable discovery.

b. Claims against Dowdle

Plaintiff alleges a § 1983 claim against the Officer Defendants, including Officer Dowdle, for the use of excessive force for each of their shots that struck Mr. Asante-Chioke after he was incapacitated, disarmed, and no longer a threat. Dowdle, an LSP officer, does not dispute that he was one of the officers who shot Mr. Asante-Chioke. However, Dowdle argues that because Plaintiff did not specify how many shots Dowdle fired after it was clear to him that Mr. Asante-Chioke no longer posed a threat, that the allegations do not show a clear violation and that he is entitled to qualified immunity. (Rec. Doc. 36-1, at 17-19).

First, Davis argues that, because he asserted the defense of qualified immunity, the Plaintiff must satisfy a heightened pleading standard, including why the defendant-official cannot successfully maintain the defense of immunity. (Rec. Doc. 36-1) (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d

572 (1980)). However, Davis mischaracterizes the pleading standard in this case. To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must plead "two—and only two—allegations . . . First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980). "Section 1983 claims implicating qualified immunity are subject to the same Rule 8 pleading standard set forth in *Twombly* and *Iqbal* as all other claims; an assertion of qualified immunity in a defendant's answer or motion to dismiss does not subject the complaint to a heightened pleading standard." *Arnold v. Williams*, 979 F.3d 262, 267 (5th Cir. 2020) (citing *Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016)). To overcome qualified immunity, a plaintiff must plead facts, with the minimal specificity to satisfy *Twombly* and *Iqbal*, "that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Id.* (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)). Thus, at this stage, Plaintiff need not explain why Dowdle cannot maintain a qualified immunity defense with any greater specificity than the rest of her claims, and must instead simply plead facts allowing this Court to draw a reasonable inferences as to Dowdle's liability and qualified immunity.

Second, Dowdle argues that Plaintiff fails to state a claim because she does not allege any delay between the first and subsequent shots that the Officer Defendants

fired at Mr. Asante-Chioke. (Rec. Doc. 36-1, at 17). Thus, Dowdle does not challenge the second element required to plead a § 1983 claim (whether an alleged deprivation was committed by a person acting under the color of state law), but he does dispute the first element: whether Plaintiff alleged a violation of a federal right.

In this case, Plaintiff brought a § 1983 claim against Dowdle for excessive force in violation of the Fourth Amendment's right to be free from unreasonable seizures. (Rec. Doc. 22, at 20). To prove an excessive-force claim, "a plaintiff must show (1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009). Deadly force is excessive and unreasonable "unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018). And force that is "reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle v. Bexar Cnty.*, 560 F.3d 404, 413 (5th Cir. 2009).

In *Roque v. Harvel*, the Fifth Circuit confirmed that, after incapacitating a suspect who posed a threat, an officer cannot continue using deadly force. 993 F.3d 325, 336 (5th Cir. 2021). In that case, police shot and killed Jason Roque, a man who was experiencing a mental health crisis while holding a pistol, which was later determined to be a BB gun. *Id.* Roque and his mother both called 911, and multiple officers responded. *Id.* at 330. Roque

pointed the gun at his head and turned away from the officers, and one officer yelled for him to put the gun down. *Id.* Roque then turned to face the officers with the gun pointed in the air, and Officer Harvel shot Roque with a semi-automatic rifle. *Id.* Roque immediately doubled over and dropped the gun, and two seconds after the first shot, Harvel fired a second shot that missed Roque, and then a third shot that killed Roque. *Id.* Harvel maintained that he took each shot because he thought Roque was a threat to his mother's life and safety, and Roque's parents sued Harvel under § 1983. Harvel raised the defense of qualified immunity, and the district court granted his motion as to the first shot but denied the motion as to the second and third shots. *Id.* at 331.

In affirming the district court's conclusion, the Fifth Circuit explained that excessive force claims are fact-intensive, and courts must examine the totality of the circumstanced to determine whether an officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. *Id.* at 333. Because it was clearly established "and possibly even obvious" on the date of the incident that an officer cannot continue using deadly force after incapacitating a suspect who posed a threat, and resolving all factual disputes in the plaintiffs' favor, the Court held that Officer Harvel was not entitled to qualified immunity. *Id.* at 339.

Dowdle highlights an earlier case: *Plumhoff v. Rickard*, where police officers fired fifteen shots in ten seconds to prevent a suspect (Rickard) from fleeing in his car. (Rec. Doc. 36-1, at 18) (citing 572 U.S. 765, 134 S. Ct. 2012, 188

L. Ed. 2d 1056 (2014)). In that case, the Court found that Rickard's "outrageously reckless driving posed a grave public safety risk," and the high-speed chase continued after the officers shot at him—in fact, he managed to drive away after the police tried to block his path. *Plumhoff*, 572 U.S. at 777. Although the petitioner argued that the sheer number of shots rendered the force excessive, the Supreme Court concluded that, during the 10-second span when all the shots were fired, Rickard never stopped trying to flee. *Id.* The Court ultimately held that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. *Id.* However, "this would be a different case if petitioners initiated a second round of shots after an initial round had clearly incapacitated Ricard and had ended any threat of continued flight, or if Rickard had clearly given himself up." *Id.*

Indeed, the case here is the type of case that the Supreme Court anticipated: Plaintiff alleged that officers initiated a second round of shots after an initial round clearly incapacitated Mr. Asante-Chioke. The Amended Complaint states that Mr. Asante-Chioke dropped the gun in his hand "almost immediately" after one of the Officer Defendants fired the first shot, and at that point, Mr. Asante-Chioke was "no longer armed or a threat." (Rec. Doc. 22, at 10). These 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.

Third, Dowdle argues that Plaintiff's allegations are insufficient because they do not provide "a specific or clear

allegation against Dowdle of how many shots he fired, the time frame of the shots, or whether any shots were specifically fired by him after it was clear from his vantage point that [Mr. Asante-Chioke] became incapacitated to the threat that he would no longer represent a threat to an officer under the circumstances." (Rec. Doc. 36-1, at 19). Dowdle does not cite any authority requiring an accounting of each officer's shots on a motion to dismiss, instead arguing again that "because qualified immunity is involved . . . there is a heightened pleading standard." *Id.*

As the Court explained above, Dowdle is incorrect about this "heightened" pleading standard in the face of a potential qualified immunity defense. A pleading's factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 555 (citation omitted). The complaint "must allege facts 'plausibly suggesting' illegal conduct such that the allegations are no longer in 'neutral territory.'" *Armstrong v. Ashley*, 60 F.4th 262, 270 (5th Cir. 2023) (citing *Twombly*, 550 U.S. at 557). Plausible grounds to infer illegal conduct "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of the illegal conduct. *Twombly*, 550 U.S. at 556.

Here, the Amended Complaint alleged that four officers, including Dowdle, fired 36 shots at Mr. Asante-Chioke, and the officers fired the majority of those shots after Mr. Asante-Chioke dropped his gun, fell to the ground, and was incapacitated. (Rec. Doc. 22, at 10).

Accepting all the well-pled facts in the Amended Complaint as true, these facts raise a reasonable expectation that discovery will reveal evidence that Dowdle fired shots after Mr. Asante-Chioke no longer posed a threat.

Finally, Dowdle requests that, if the Court denies the motion, that discovery should be limited to issues of qualified immunity. If a court finds that a plaintiff has pled facts that "allow the court to draw a reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity," a court may issue a discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim," if the court "remains unable to rule on the immunity defense without further clarification of the facts." *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014). 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 in this case.

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that filed the *Rule 12(b) Motions to Dismiss* **(Rec. Doc. 36)** is **GRANTED IN PART AND DENIED IN PART**. Plaintiff's vicarious liability claims against Col. Davis are dismissed. All other requested relief is denied.

New Orleans, Louisiana, this 31st day of August, 2023.

Appendix B

/s/ Carl J. Barbier
CARL J. BARBIER
UNITED STATES DISTRICT JUDGE