No. 14-59

In the

Supreme Court of the United States

JOHN DARREN SCHULTZ, FRANKLIN GOMEZ, and GERARDO GUTIERREZ,

Petitioners,

v.

GAGE WESCOM, individually, and FRANK WESCOM, JR., parent and as Personal Representative of the Estate of Nikkolas Lookabill, deceased,

Respondents.

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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Unlike the Ninth Circuit, most courts of appeals would have permitted petitioners to appeal the district court's order, which refused to rule on qualified immunity and barred any further effort to obtain qualified immunity until after the discovery cutoff. *See*, *e.g.*, *Summers v. Leis*, 368 F.3d 881, 886 (6th Cir. 2004). In attempting to harmonize an irreconcilable divide between the circuits, respondents contend, in essence, that officials who assert qualified immunity can raise that defense at two *and only two* stages of the litigation: (1) at the pleading stage, and (2) after *all* discovery has been completed. And according to respondents, those are the only two instances when an official has a right to immediate appeal. That approach, which the Ninth and Seventh Circuits have embraced, is contrary to the other circuits around the nation and inconsistent with this Court's decision in *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1999).

In refusing to grant summary judgment, the district court conclusively decided that, notwithstanding the already established undisputed facts, respondents could still show that petitioners violated Nikkolas Lookabill's clearly established Fourth Amendment rights and respondents' clearly established First Amendment rights. Petitioners were entitled to an interlocutory appeal of that legal determination, and the Ninth Circuit's decision to the contrary warrants this Court's review and correction.

ARGUMENT

I. Respondents' effort to harmonize the circuits fails.

As explained in the petition (Pet. 11-13), most courts of appeals have concluded that a "district court's refusal to address the merits of a defendant's motion asserting qualified immunity constitutes a conclusive determination for purposes of allowing an interlocutory appeal." *Summers*, 368 F.3d at 887. In this case, the Ninth Circuit held to the contrary, concluding that it lacked jurisdiction over a district court order refusing to consider the merits of petitioners' motion for qualified immunity until after discovery was completed. That decision reflects a conflict among the circuits.

1. Respondents deny the existence of a circuit conflict (BIO 7-20), but their efforts to explain away the division in authority are unsuccessful. First, they point out (BIO 14-16) that a few of the cases from the majority circuits involved motions to dismiss, not motions for summary judgment. That is true but ultimately irrelevant because a defendant asserting qualified immunity may appeal at the summary-judgment stage *as well as* at the motion-to-dismiss stage. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2018-20 (2014); *Behrens*, 516 U.S. at 306-07. Despite the procedural differences between the two kinds of motions, both can be used to vindicate a defendant's claim of immunity, and the erroneous denial of either, if not corrected on appeal, can cause immunity to be "irretrievably lost." *Plumhoff*, 135 S. Ct. at 2019. When a court refuses to rule on either kind of motion while litigation continues, the effect on

immunity is the same: the entitlement to be free from litigation burdens has been denied.

Recognizing that many cases articulating the majority rule involved motions for summary judgment, respondents say that some involved "*de facto* denial[s]." BIO 16. Respondents' label for those decisions is not an explanation for the different outcomes but simply a description of them. What respondents call "*de facto* denial[s]" were not orders denying motions; they were orders refusing to rule on immunity. That is what happened below. But contrary to the Ninth Circuit, those courts nevertheless exercised appellate jurisdiction.

Respondents concede (BIO 18) that "[t]he Fifth, Sixth, and Tenth Circuits have stated that they have appellate jurisdiction to review at least *some* district court decisions deferring resolution of a defendant's motion for summary judgment pending further discovery." Each of those circuits has so stated in circumstances indistinguishable from those presented here. In *Summers*, for example, the district court had determined, just as in this case, "that any decision regarding qualified immunity was premature and should await the close of discovery," but the Sixth Circuit nevertheless exercised appellate jurisdiction and reversed. 368 F.3d at 884, 887; *accord Everson v. Leis*, 556 F.3d 484, 490-91 (6th Cir. 2009); *see also Lewis v. City of Fort Collins*, 903 F.2d 752, 759 (10th Cir. 1990) (exercising jurisdiction over district court decision "deferring a final ruling on defendants['] qualified immunity claim pending discovery"); *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (same). Respondents attempt to distinguish *Summers* and *Everson* (BIO 19 n.7) on

the ground that the plaintiffs in those cases failed to file a sufficient Rule 56(d) affidavit. While the filing of an affidavit may be relevant to the district court's decision, it is not relevant to the existence of appellate jurisdiction. Instead, as this Court has explained, "appealability determinations are made for classes of decisions, not individual orders in specific cases." *Behrens*, 516 U.S. at 309 n.3. The adequacy of respondents' Rule 56(d) affidavit is irrelevant to the appealability of the district court's order.

2. Respondents maintain (BIO 8) that "the Ninth Circuit's decisions are fully consistent with" the principles of qualified immunity applied by other courts. That is not so, as this very case demonstrates. The district court here announced that it was "defer[ring] consideration" of petitioners' motion for summary judgment, and that the motion would be stricken without prejudice to refiling "after discovery." Pet. App. 11. Whether characterized as a refusal to rule, as in some circuits, or as a de facto denial, as in others, that is the type of ruling that would be subject to immediate appeal under the majority approach.

The Ninth Circuit's refusal to exercise jurisdiction in this case is consistent with circuit precedent, especially *Moss v. United States Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009), in which the court held that it lacked jurisdiction over an appeal of what it characterized as "the district court's deferral of [defendants'] alternative motion for summary judgment." Respondents contend (BIO 9) that an appeal of the summary judgment order there would have been barred by *Johnson v. Jones*, 515 U.S. 304 (1995), because it turned on disputed factual issues.

But *Moss*'s reasoning was broader than that. The Ninth Circuit refused to accept the government's argument that "where qualified immunity is at issue, a district court may not defer ruling on the question of whether an official's actions violated clearly established law, and that orders deferring such a ruling should therefore be immediately appealable." *Moss*, 572 F.3d at 973. It explained that it had "squarely rejected" an analogous argument in the context of absolute immunity, *id.*, quoting from *Miller v. Gammie*, 335 F.3d 889, 894 (9th Cir. 2003) (en banc). Respondents point out (BIO 11-12) that absolute immunity involves different considerations from qualified immunity. But as demonstrated by *Moss*—and by this case, in which the court also cited *Miller*—the Ninth Circuit does not treat those distinctions as significant. Pet. App. 2.

The Seventh Circuit has also held that a defendant may not appeal a district court order declining to rule on qualified immunity. *Khorrami v. Rolince*, 539 F.3d 782 (7th Cir. 2008). Respondents argue (BIO 12) that the court has not "categorically" so held, but in fact *Khorrami* deemed appellate jurisdiction lacking for the sole reason that the "[t]he district court … did not reject the qualified immunity defense" but instead "set the claim aside to be adjudicated later." *Id.* at 786. Respondents emphasize that the court also suggested that a refusal to rule might be appealable if "the district court delays so long that the delay becomes a *de facto* denial." *Ibid.* But *Khorrami* never explained what would constitute a "*de facto* denial," and the decision makes clear that the Seventh Circuit's standard for "*de facto* denials" is extremely demanding—certainly more so than its sister circuits. The court expressly rejected

the proposition that "qualified immunity is the right to be free from all burdens of litigation," *id.* at 787, and it opined that even mistakenly allowing a case to go to trial would not irreparably harm a defendant because, "if the court belatedly realizes that immunity should have been granted, it can still spare the defendant from the burden of damages," *id.* at 788.

Khorrami is not an outlier decision, and the principle it establishes has been applied in other Seventh Circuit cases. For example, in *Mercado v. Dart*, 604 F.3d 360, 362-63 (7th Cir. 2010), the court restated the rule that "[w]hen a district court postpones resolution until it has received additional submissions from the litigants, it has not made a decision that is 'final' in *Mitchell*'s sense." Respondents argue (BIO 13) that the Seventh Circuit permits appeals "where the district court's actions *were* the functional equivalent of rejecting a qualified immunity defense," but every one of the cited cases involved a district court's express denial of a motion, not a decision to defer ruling. *Chriswell v. O'Brien*, 570 Fed. Appx. 617, 617 (7th Cir. 2014) (district court "denied O'Brien's motion outright."); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 668 (7th Cir. 2012) ("[T]he district court here actually ruled on the defendants' motions to dismiss."); *Hanes v. Zurick*, 578 F.3d 491, 493 (7th Cir. 2009) (the "denial of the motion to dismiss necessarily included a denial of the defense of qualified immunity.").

In sum, there remains a divide between the circuits, and certiorari is necessary to resolve it.

II. The Ninth Circuit's decision is erroneous.

As explained in the petition (Pet. 15-22), the rationale for allowing immediate appeal of orders denying qualified immunity is fully applicable to orders refusing to rule on immunity. This Court has repeatedly emphasized the interest in resolving immunity claims "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). When a district court fails to address immunity, it frustrates that interest just as surely as if it had erroneously rejected the claim.

1. Respondents make only a limited attempt to defend the Ninth Circuit's judgment on the merits. They argue (BIO 21-22) that *Johnson* supports the Ninth Circuit's decision, but that is incorrect. As explained in the petition (Pet. 19-21), petitioners' claim of immunity rests on purely legal issues, not a factual dispute.

Respondents also try to justify the Ninth Circuit's decision by mischaracterizing the district court's order. According to respondents, after they asked to conduct only limited discovery, the district court opened the door just wide enough to permit "[such] discovery." BIO 6 (alteration in brief) (quoting Pet. App. 11). But the unaltered language of the district court's order makes clear that it did not limit discovery at all. Instead, in analyzing whether to grant respondents' Rule 56(d) request, the district court highlighted that the discovery cutoff was just four months later, clearly indicating its intent to require discovery through a predetermined "deadline" governing *all* pre-trial discovery. Pet. App. 8. And contrary to what respondents claim, the court did not merely defer consideration of

petitioners' request for qualified immunity; it ordered that the motion be "stricken," and simultaneously erected a barrier to any further motions for qualified immunity until "after discovery" (without employing the word "such") and only "if appropriate." Pet. App. 11 (emphasis and capitalization omitted).

Stated another way, the district court held that respondents had presented a factual record that, if maintained at trial, would establish a violation of clearly established law. Petitioners were forbidden from seeking qualified immunity until "after discovery," which meant after "[t]he discovery deadline." Pet. App. 8, 11. And nothing in the order limited discovery to that narrowly tailored to immunity. The order thus exemplifies the imposition of "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit," which qualified immunity aims to eliminate. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (qualified immunity aims to "prevent[] the harmful distractions from carrying out the work of government that can often accompany damages suits.").

2. Respondents also inaccurately portray this case in framing the scenario that confronted petitioners by relying exclusively on the operative complaint. BIO 1-4 & n.2. "On summary judgment, however, the plaintiff can no longer rest on the pleadings, … and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry." *Behrens*, 516 U.S. at 309. In short, neither respondents nor any plaintiff can reset

a case to the pleadings after a summary judgment motion is filed.

Certainly petitioners do not contend that the district court was bound by their declarations. But as the Court made clear (in authority on which respondents rely (BIO 2 n.1)), "the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (citation and internal quotation marks omitted). Completely independent of respondents' Rule 36 admissions, petitioners offered the testimony of the only two disinterested witnesses to observe Lookabill's actions immediately before petitioners fired their weapons, and *both* confirmed that Lookabill reached for his gun. Pet. App. 93-94, 99-101, 123-24. Indeed, respondents relied on the *exact* same transcripts when they opposed summary judgment. *See* Dist. Ct. Dkts. 66-2 (Brandon Presler), 67-4 (Kyle Tingley). Thus, petitioners sought an appeal based on *respondents'* record.

To be sure, and contrary the complaint, respondents' own evidence confirmed that only "half a second" passed between the first and second series of shots. Pet. App. at 139-140. Despite respondents' claim, there is no legal significance to the number of shots fired; once police officers are entitled to shoot, "the officers need not stop shooting until the threat has ended." *Plumhoff*, 134 S. Ct. at 2022. Accepting respondents' evidence, petitioners fired, paused for "half a second," and then continued firing a number

of shots fewer than what *Plumhoff* found to be reasonable as a matter of law. Petitioners were entitled to ask an appellate court to determine the legal sufficiency of at least that part of respondents' case. *Behrens*, 516 U.S. at 312.

III. This case is a good vehicle for reviewing the questions presented.

Respondents offer various reasons why, in their view, this case is an inappropriate vehicle for considering the questions presented. Those arguments should be rejected.

1. Respondents claim that interlocutory appeal is unnecessary because petitioners have the ability to seek the "extraordinary remedy" of mandamus. BIO 27. That argument would be equally applicable in any qualified immunity case, but the Court has never accepted it, and with good reason. Mandamus is available only when the district court has acted beyond its jurisdictional authority. *Will v. United States*, 389 U.S. 90, 104 (1967). While the district court's refusal to rule on petitioners' summary judgment motion was erroneous, it was not so "extraordinary" as to warrant mandamus review. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004).

2. Next, respondents contend that "[i]mmediate appellate review would make no practical difference in this case" because, they say, petitioners "would still be subject to similar discovery in connection with respondents' claims against the City." BIO 27-28. This argument lacks merit. It is common for plaintiffs in §1983 cases to assert claims both against individual officers and municipalities, but this Court has never suggested that the pendency of a claim

under *Monell v. Department of Social & Health Services*, 436 U.S. 658 (1978), defeats the individual defendant's right to invoke qualified immunity and appeal the erroneous denial thereof.

3. Respondents also claim (BIO 28) that this case sits in an "unusual factual posture … [that] diminishes any general importance and renders it an unsuitable vehicle for this Court's review" because petitioners' claim of immunity rests in part on respondents' Rule 36 admissions. As noted above, however, respondents never identified any witness—as opposed to their pleading, which is not enough on summary judgment—who would dispute that Lookabill reached for the gun, whereas the "disinterested witnesses" Tingley and Presler both confirmed that he did. *Reeves*, 530 U.S. at 151. The legal issues presented by this case are not limited to the Rule 36 context; they are questions that could occur in any qualified-immunity case in which the undisputed record makes clear that plaintiffs will be unable to establish that the defendants violated clearly established law.

4. Respondents further observe (BIO 26) that the Ninth Circuit's order is unpublished and nonprecedential. But the unpublished nature of this order simply demonstrates how entrenched the Ninth Circuit is in its position. The same can be said of the Seventh Circuit, which now declines to publish decisions applying *Khorrami*. *E.g.*, *Chriswell*, 570 Fed. Appx. at 617. In any event, given the importance of qualified immunity, this Court has granted certiorari to review unpublished orders denying appellate jurisdiction. *E.g.*, *Behrens, supra*. Indeed, the importance of appellate jurisdiction is demon-

strated by this Court's recent grant of certiorari to review an unpublished order outside of the qualified-immunity context. *Gelboim v. Bank of Am.*, 134 S. Ct. 2876 (2014).

5. Finally, Respondents' argument against review of the second question presented (BIO 29-31) rests on the inaccurate premise that no court has rejected petitioners' entitlement to qualified immunity. On the contrary, by forcing petitioners to endure all discovery through the scheduled pretrial deadline, the district court necessarily denied petitioners' right to qualified immunity on *any one* of respondents' claims. Respondents wisely do not attempt to defend that proposition on the merits. Petitioners sought qualified immunity based on whether their actions violated Lookabill's clearly established Fourth Amendment rights or respondents' clearly established First Amendment rights. These are "pure question[s] of law," *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007), and it is appropriate to review "purely legal" questions of qualified immunity, even if the Court of Appeals passed on jurisdictional grounds, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Because petitioners are plainly entitled to qualified immunity, this Court should review the second question presented in conjunction with the jurisdictional question.

CONCLUSION

For the foregoing reasons, those stated in the petition, and those offered by *amici curiae*, the petition should be granted.

Respectfully submitted,

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