No. 12-87?

IN THE

Supreme Court of the United States

LISA MADIGAN, et al.,

Petitioners,

—v.—

HARVEY N. LEVIN,

Respondent.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors whose teaching, research, and writing focus on federal jurisdiction and the relationship between the trial and appellate courts within the federal system. *Amici* are impelled to file this brief to flag a jurisdictional issue not raised by Petitioners, Respondent, or any other *amici*: Specifically, the Seventh Circuit lacked "pendent appellate jurisdiction" on an interlocutory qualified immunity appeal to decide the question on which certiorari was granted, *i.e.*, whether the remedial scheme created by Congress in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, displaces age-discrimination suits by state employees under the Equal Protection Clause and 42 U.S.C. § 1983.

Moreover, although *this* Court does not suffer from a similar jurisdictional defect, sustaining the Court of Appeals' pendent appellate jurisdiction in this case would precipitate the very result that a unanimous Court warned against in *Swint* v.

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1. The parties have filed blanket consents to the filing of *amicus* briefs in this case. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Chambers County Commission, 514 U.S. 35, 49–50 (1995) ("[A] rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets.").

SUMMARY OF ARGUMENT

This Court repeatedly has stressed the importance of carefully circumscribing the "collateral order doctrine"—which is "best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Thus, although the doctrine treats as "final" for purposes of appeal certain trial-court orders that are interlocutory, this Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will* v. *Hallock*, 546 U.S. 345, 350 (2006) (citations and internal quotation marks omitted).

The "modest scope" of the collateral order doctrine is reflected not only in the narrow category of orders subject to it, but also in the *scope* of the interlocutory appellate jurisdiction that it confers even in cases in which it applies. *See, e.g.*, *Johnson* v. *Jones*, 515 U.S. 304 (1995). To that end, this Court has expressed significant skepticism about the concept of "pendent appellate jurisdiction," and has

constrained the extent to which courts entertaining interlocutory appeals may use such jurisdiction to reach and resolve issues that are not themselves immediately appealable. In *Swint*, for example, this Court suggested that such "pendent appellate jurisdiction" would be appropriate, if at all, only in cases in which the district court ruling over which pendent review is sought "was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or [in which] review of the former decision was necessary to ensure meaningful review of the latter." 514 U.S. at 51.

In this case, the Seventh Circuit decided the question on which certiorari has been granted by purporting to exercise pendent appellate jurisdiction as part of on an interlocutory appeal from the district court's denial of Petitioners' motion for summary judgment on the basis of qualified immunity. *See Levin* v. *Madigan*, 692 F.3d 607 (7th Cir. 2012), *cert. granted*, 133 S. Ct. 1600 (2013). Although the Court of Appeals stressed that resolution of the cause-of-action question was "irrelevant" to Petitioners' entitlement to qualified immunity, *see id.* at 622, it nevertheless concluded that it had "pendent appellate jurisdiction" over the cause-of-action question under this Court's decision in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007). *See* 692 F.3d at 611.

In so holding, the Seventh Circuit both misapplied *Swint* and erred by equating the scope of

its interlocutory appellate jurisdiction with the scope of this Court's jurisdiction in such cases. As a logical matter, whether it was clearly established at the time of Respondent's termination that the Equal Protection Clause prohibits irrational age discrimination in no way turns on whether the ADEA displaces remedies under 42 U.S.C. § 1983—and vice-versa.

Nor do any of this Court's prior holdings support the Court of Appeals' jurisdictional analysis. Despite inartful dicta to the contrary in *Hartman* v. *Moore*, 547 U.S. 250 (2005), *Wilkie*, and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), *Hartman* and *Iqbal* both presented far more compelling cases for pendent appellate jurisdiction. And in any event, there are critical differences between the scope of a circuit court's appellate jurisdiction under the collateral order doctrine and this Court's jurisdiction over all cases "in" the courts of appeals; the latter is considerably broader.

To be sure, as this Court's prior decisions attest, because the Seventh Circuit had jurisdiction over the qualified immunity issue, the Supreme Court still has the *power* to proceed to the merits notwithstanding the pendent jurisdictional defect below. But compelling reasons of prudence, practice, and policy all favor vacating the decision below and returning this case to the district court, rather than rewarding the Court of Appeals' jurisdictional bootstrapping.

ARGUMENT

I. THE COURT OF APPEALS LACKED JURISDICTION TO DECIDE THE QUESTION ON WHICH CERTIORARI WAS GRANTED

a. The Collateral Order Doctrine Represents a Narrow and Carefully Circumscribed Departure from the Final Judgment Rule

As Justice Frankfurter explained over 70 years ago, "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U.S. 323, 324–25 (1940) (footnotes omitted). Thus, "it has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (quoting *Will* v. *United States*, 389 U.S. 90, 96 (1967)).

The resulting "final judgment" rule codified today at 28 U.S.C. § 1291 serves as an important statutory barrier to what might otherwise be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt civil litigation toward the party

with greater financial resources. *See Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981) ("In addition, the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.'" (quoting *Cobbledick*, 309 U.S. at 325) (alteration in original; citation omitted)); *see also Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985) ("In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" (citation omitted)).

Although there are a host of statutory exceptions to this general rule, the most significant source of authority for interlocutory appeals is the "collateral order" doctrine, which "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip.*, 511 U.S. at 867 (quoting *Cohen*, 337 U.S. at 546). To that end, collateral order appeals encompass "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 106 (2009); *see also Swint*, 514 U.S. at 42 ("That small category

includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.").

Because of its controversial origins, amorphous grounding, and ambiguous scope, and to ensure that the "underlying doctrine [does not] overpower the substantial finality interests § 1291 is meant to further," *Hallock*, 546 U.S. at 350, this Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Id.*; *see also id.* ("And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."). As Justice Souter explained in *Digital Equipment*, "the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered . . . ." 511 U.S. at 868 (citation omitted).

Moreover, "This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus.*, 558 U.S. at 113 (quoting *Swint*, 514 U.S. at 48); *see*

also id. at 115 (Thomas, J., concurring in part and concurring in the judgment) ("We need not . . . further justify our holding by applying the *Cohen* doctrine, which prompted the rulemaking amendments in the first place.").

b. Collateral Order Appeals Should Be Limited to the Properly Appealed Question and Those Issues the Resolution of Which is Necessary to Decide that Question

The "modest scope" of the collateral order doctrine is reflected not only in the narrow category of orders subject to it—which this Court has carefully circumscribed—but also in the *scope* of the interlocutory appellate jurisdiction that it confers even in cases in which it applies. Thus, although *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), held that a district court's denial of summary judgment on an officer-defendant's claim of qualified immunity was an immediately appealable collateral order, the Court later clarified that such interlocutory qualified immunity appeals are necessarily limited in their breadth.

As Justice Breyer explained in *Johnson* v. *Jones*, interlocutory review of a qualified immunity appeal should not encompass whether there was a genuine issue of material fact. In his words, the theory behind the collateral order doctrine

> finds a "final" district court decision in part because the immediately appealable decision involves issues significantly different from those that underlie the plaintiff's basic case. . . . *Mitchell* rested upon the view that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." It held that this was so because, although sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits (*i.e.*, in the absence of qualified immunity).

515 U.S. at 314 (quoting *Mitchell*, 472 U.S. at 527); *see also id.* ("[*Mitchell*] explicitly limited its holding to appeals challenging . . . what law was 'clearly established.'"); *Mitchell*, 472 U.S. at 528 ("An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, *nor even determine whether the plaintiff's allegations actually state a claim*." (emphasis added)).

To similar effect, this Court has expressed significant skepticism about the concept of "pendent appellate jurisdiction," and has constrained the extent to which courts entertaining interlocutory appeals may use such jurisdiction to reach and

resolve issues that are not themselves immediately appealable. *See, e.g.*, Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After* Swint, 49 HASTINGS L.J. 1337 (1998); Riyaz A. Kanji, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511 (1990). Writing for a unanimous Court in *Swint*, for example, Justice Ginsburg suggested that such "pendent appellate jurisdiction" would be appropriate, if at all, only in cases in which the district court ruling over which pendent review is sought "was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or [in which] review of the former decision was necessary to ensure meaningful review of the latter." 514 U.S. at 51.

Otherwise, *Swint* warned, "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 49–50; *see also Johnson*, 515 U.S. at 318 (assuming only for the sake of argument that pendent appellate jurisdiction is ever permissible in a collateral order appeal); *Abney* v. *United States*, 431 U.S. 651, 663 (1977) ("Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals

prior to conviction and sentence."). *See generally Malik* v. *Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306, 1316–17 (10th Cir. 1999) ("[E]ven if the purpose of our exercise of pendent jurisdiction is to conserve judicial resources and promote judicial efficiency, the aggregate effect of the seemingly efficient disposition of the individual case is to 'invite frequent extensive briefing and argument of issues that should not be reviewed because review would substantially increase the danger of untoward interference with the trial court process.'" (quoting 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3937, at 696 (1996))).

c. In This Case, the Court of Appeals Held that the Question Presented Was "Irrelevant" to Petitioners' Qualified Immunity Appeal

In this case, the Court of Appeals reached the question on which certiorari was granted only by purporting to exercise pendent appellate jurisdiction. *See Levin*, 692 F.3d at 610–11. In denying the defendants' motion for summary judgment on qualified immunity grounds, the district court also left intact an earlier decision holding that "the ADEA does not preclude a § 1983 suit for age discrimination." *Levin* v. *Madigan*, No. 07-C-4765, 2011 WL 2708341, at *12 (N.D. Ill. July 12, 2011); *see also Levin* v. *Madigan*, 697 F. Supp. 2d 958 (N.D. Ill. 2010). As Judge Chang explained, "The qualified-immunity analysis, with its focus on whether it was

reasonably clear that the official's conduct violated a constitutional right, is a poor fit for determining whether one cause of action or another is the appropriate one upon which to base a lawsuit against that otherwise clearly prohibited conduct." *Levin*, 2011 WL 2708341, at *12; *see also id.* ("It is especially odd to apply qualified immunity in the context where the procedural uncertainty arises from the fact that Congress created a statutory remedy for age discrimination that is substantively *broader* than the equal protection clause.").

On interlocutory appeal, the Seventh Circuit affirmed the district court's recognition of a viable § 1983 claim, and then affirmed its denial of the defendants' qualified immunity-based motion for summary judgment. This order of battle notwithstanding, Judge Kanne agreed with the district court that "Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is *irrelevant*" for purposes of qualified immunity. *Levin*, 692 F.3d at 622 (emphasis added).

Given that analysis, it is impossible to understand how the Court of Appeals could have concluded that pendent appellate jurisdiction was proper under either of the theories Justice Ginsburg described in *Swint—i.e.*, because the existence of a cause of action under § 1983 was "inextricably intertwined" with the defendants' qualified immunity or because review of the cause of action question was

necessary to meaningfully review the defendants' qualified immunity. If the scope of pendent appellate jurisdiction is no broader than that which this Court described in *Swint*, then the Court of Appeals' own analysis of the lack of relationship between the existence of a § 1983 cause of action and the Petitioners' entitlement to qualified immunity suggests that it lacked jurisdiction to reach the question on which certiorari has been granted.

d. The Court of Appeals Was Correct That the Existence of a Cause of Action is Irrelevant to the Resolution of Qualified Immunity

Of course, the mere fact that the Seventh Circuit *asserted* that the existence of a cause of action is "irrelevant" to Petitioners' entitlement to qualified immunity does not make it so. But *Swint* bears out the Seventh Circuit's conclusion.

In a decision that has been widely followed, the Tenth Circuit understood *Swint* to authorize pendent appellate jurisdiction "only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Moore* v. *City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995); *see Mueller* v. *Auker*, 576 F.3d 979, 990 (9th Cir. 2009) (following *Moore*); *Mattox* v. *City of Forest Park*, 183 F.3d 515, 524 (6th Cir. 1999)

(same); *Kincade* v. *City of Blue Springs*, 64 F.3d 389, 394 (8th Cir. 1995) (same); *see also, e.g.*, *King* v. *Cessna Aircraft Co.*, 562 F.3d 1374, 1379 n.1 (11th Cir. 2009) (citing *Moore* with approval); *Altman* v. *City of High Point*, 330 F.3d 194, 207 n.10 (4th Cir. 2003) (same). Under *Moore*, then, a claim is "inextricably intertwined" with qualified immunity when the disposition of the qualified immunity appeal necessarily resolves—or cannot occur without resolution of—the pendent claim. *See* Kanji, *supra*, at 530 ("The purpose of the collateral order doctrine in ensuring that parties receive a timely review of their important claims does not warrant the forging of additional inroads into the final judgment rule any broader than this.").

Applying that understanding here, it follows that the Seventh Circuit lacked interlocutory appellate jurisdiction to decide whether the ADEA displaces remedies under § 1983 and the Equal Protection Clause. As a logical matter, whether it was clearly established at the time of Respondent's termination that the Equal Protection Clause prohibits irrational age discrimination in no way turns on whether a claim for a violation of the Equal Protection Clause can be pursued against Petitioners under 42 U.S.C. § 1983. Indeed, the remedial relationship between the Age Discrimination in Employment Act (AEDA) and § 1983 has nothing at all to say about the substantive scope of the Equal Protection Clause—either in general or at the time of

the Petitioners' allegedly unlawful conduct. The Seventh Circuit's holding that the scope of the Equal Protection Clause *was* clearly established at the time of Respondent's termination neither turns upon nor resolves the pendent claim, *i.e.*, whether the ADEA bars *enforcement* of the Equal Protection Clause via 42 U.S.C. § 1983. Petitioners are free to contest that point an appeal after final judgment.[2]

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2. The Second Circuit has taken a somewhat more flexible approach to pendent appellate jurisdiction, holding that courts of appeals may review a claim pendent to a qualified immunity appeal in cases in which there is "substantial factual overlap" between the two issues. *See Toussie* v. *Powell*, 323 F.3d 178, 184 (2d Cir. 2003) ("Whether issues are inextricably intertwined is determined by whether there is substantial factual overlap bearing on the issues raised." (internal quotation marks omitted)).

Amici are concerned that the "substantial factual overlap" standard sweeps too broadly. To take just one example, insofar as the "substantial factual overlap" approach would allow appellate courts to resolve factual sufficiency claims on an interlocutory appeal from a denial of summary judgment based upon absolute or qualified immunity, it seems inconsistent with both *Swint* and *Johnson* v. *Jones*. But even the Second Circuit's approach would not support the Seventh Circuit's exercise of pendent appellate jurisdiction in this case: There is no factual overlap whatsoever between the qualified immunity question in this case (whether it was clearly established at the time of Petitioners' allegedly unlawful conduct that irrational age discrimination violates the Equal Protection Clause) and the question on which certiorari was granted (whether Congress, when it created the ADEA's remedial scheme, intended to displace remedies under 42 U.S.C. § 1983).

e. The Court of Appeals Nevertheless Erred by Conflating This Court's Jurisdiction Under § 1254 With Its Jurisdiction Under § 1291

Notwithstanding the above analysis, the Seventh Circuit justified its exercise of pendent appellate jurisdiction in this case by reference to this Court's decision in *Wilkie*, 551 U.S. 537, which also resolved the existence *vel non* of a cause of action as part of a qualified immunity-based interlocutory appeal. *See Levin*, 692 F.3d at 611; *see also* Pet'r Br. at 1–2 (citing *Wilkie* as holding that, "whether to recognize [a] cause of action is [a] proper question for [an] interlocutory appeal from [the] denial of qualified immunity").

In so holding, the Seventh Circuit erred by equating the scope of *its* interlocutory appellate jurisdiction with the scope of this Court's jurisdiction. In fact, and despite loose language to the contrary in some of this Court's earlier decisions, there are critical differences between the scope of a circuit court's appellate jurisdiction under the collateral order doctrine and this Court's considerably broader jurisdiction over all cases "in" the courts of appeals.

For a host of reasons, Congress has never applied the same final judgment rule to this Court's appellate jurisdiction vis-à-vis the U.S. Courts of Appeals as that which generally constrains the

appellate jurisdiction of the circuit courts. Instead, and in terms far broader than this Court's other fonts of appellate jurisdiction,[3] 28 U.S.C. § 1254 confers authority upon the Supreme Court to review by certiorari *all* "[c]ases in the courts of appeals," "before *or* after rendition of judgment or decree." 28 U.S.C. § 1254(1) (emphasis added). As this Court's practice of allowing certiorari before judgment in exceptional cases underscores, the plain language of § 1254 empowers this Court to exercise jurisdiction over any case from the moment it is properly "in" the court of appeals, without regard to when, how, or why it got there. *See, e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 246–53 (1998); *cf. Hertz Corp.* v. *Friend*, 559 U.S. 77, 83–84 (2010) (noting that the historical lineage of § 1254 "provides particularly strong reasons not to read [another statute's] silence or ambiguous language as modifying or limiting [this Court's] pre-existing jurisdiction").

Moreover, because § 1254 provides jurisdiction over the "case," this Court's statutory jurisdiction in an appeal under § 1254 reaches the entire dispute, and not just those issues that were properly within

3. For example, 28 U.S.C. § 1253 authorizes review of "an *order* granting or denying, after notice and hearing, an interlocutory or permanent injunction" by a three-judge district court; and 28 U.S.C. § 1257 authorizes review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" so long as that decision lacks an adequate and independent ground in state law. *See also* 28 U.S.C. § 1259(4) (authorizing review in cases in which the Court of Appeals for the Armed Forces "granted relief").

the scope of the *lower court*'s jurisdiction.[4] *See, e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 689–92 (1997); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 & n.23 (1982); *cf. Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 204–05 (1996) (explaining that interlocutory appellate review under § 1292(b) extends to the entire order certified by the court of appeals, and is not limited to the specific question formulated by the district court). In other words, even when the case that is in the Court of Appeals presents that tribunal with a narrow interlocutory appeal under the collateral order doctrine, *this* Court's appellate jurisdiction over the appealed case is plenary, rather than limited to the issues that the intermediate appellate court could properly decide.[5]

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4. To that end, when the Supreme Court accepts a certified question from a court of appeals under 28 U.S.C. § 1254(2), the Court's own rules provide that "this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy." SUP. CT. R. 19.2.

5. Of course, this Court does not always—or even usually—*choose* to review issues that either were not or could not have been presented to the lower courts, and for good reason. The critical point for present purposes, however, is that such reluctance on this Court's part is not a matter of jurisdictional compulsion, but is instead based upon sound judicial discretion. *See, e.g.*, *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980) ("[C]onsideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals *is not beyond our power*, and in appropriate circumstances we have addressed them." (emphasis added)).

f. No Holding of this Court Supports the Court of Appeals' Jurisdictional Analysis

A proper understanding of the scope of pendent appellate jurisdiction under *Swint*, together with the distinction between the Court of Appeals' jurisdiction under § 1291 and this Court's authority under § 1254, helps to explain why this Court was able to reach the issues it resolved in *Hartman* v. *Moore*, 547 U.S. 250 (2006), *Wilkie* v. *Robbins*, 551 U.S. 537, and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—even if each of these opinions included inartful language in this regard.

In *Hartman*, this Court held that an absence of probable cause to support a prosecution was a necessary element of a First Amendment claim under *Bivens* for retaliatory prosecution. *See* 547 U.S. at 256–65. As the D.C. Circuit had explained in the decision below, the defendants in *Hartman* argued "that what they were doing could violate a clearly established right *only if* the First Amendment prohibits retaliatory prosecution even when probable cause exists." *Moore* v. *Hartman*, 388 F.3d 871, 877 (D.C. Cir. 2004) (emphasis added), *rev'd on other grounds*, 547 U.S. 250.

Thus framed, whether a plaintiff had to allege an absence of probable cause was inextricably intertwined with the defendants' entitlement to qualified immunity because the pendent issue

directly implicated the scope of the First Amendment right that the defendants allegedly violated—and, therefore, whether that scope was clearly established at the time of the defendants' allegedly unlawful conduct. *See* 547 U.S. at 257 n.5 ("[O]ur holding does not go beyond a definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal."). If pendent appellate jurisdiction is *ever* appropriate on an interlocutory qualified immunity appeal, *Hartman* would appear to be a paradigmatic case for it.[6]

In *Wilkie*, on which the Court of Appeals relied in this case, the district court had initially dismissed the plaintiff's *Bivens* claims for failure to state a claim on which relief could be granted, only to be reversed by the Tenth Circuit on (a then-final) appeal. *See Robbins* v. *Wilkie*, 300 F.3d 1208 (10th Cir. 2002). On remand, the district court denied the defendants' motion for summary judgment,

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6. It also bears emphasizing that *Hartman* was decided while *Saucier* v. *Katz*, 533 U.S. 194 (2001), and its corresponding "order-of-battle" for qualified immunity cases, was still good law. *But see Pearson* v. *Callahan*, 555 U.S. 223 (2009) (overruling *Saucier*).

Under *Saucier*, a court of appeals on an interlocutory qualified immunity appeal *had* to reach the scope of the constitutional right at issue even in cases in which that scope was *not* clearly established at the time of the relevant conduct. *See, e.g.*, *Lyons* v. *City of Xenia*, 417 F.3d 565, 582–85 (6th Cir. 2005) (Sutton, J., concurring); *Wong* v. *U.S. INS*, 373 F.3d 952, 957 (9th Cir. 2004). Thus, there was no way for the D.C. Circuit in *Hartman* to avoid the probable-cause question.

prompting an interlocutory appeal. The Court of Appeals affirmed the denial of qualified immunity, and this Court granted certiorari, ultimately holding that no *Bivens* cause of action should be inferred for Robbins' claims. *See* 551 U.S. at 549–62. In explaining why the Supreme Court had jurisdiction to reach this issue, Justice Souter's reasoning was cryptic:

> We recognized just last Term that the definition of an element of the asserted cause of action was "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." Because the same reasoning applies to the recognition of the entire cause of action, the Court of Appeals had jurisdiction over this issue, as do we.

Id. at 550 n.4 (quoting *Hartman*, 547 U.S. at 257 n.5).

This cursory analysis suffers from two distinct shortcomings: *First*, there was no need for the *Wilkie* Court to *defend* the Court of Appeals' jurisdiction. In *Wilkie*, the Court of Appeals had reached the existence of a cause of action on appeal from an indisputably final judgment—the district court's initial dismissal of the plaintiff's claims, which the Tenth Circuit reversed. *See Wilkie*, 300 F.3d 1208. The case came to the Supreme Court only after the

Tenth Circuit had rejected defendants' qualified immunity on post-remand interlocutory appeal, and so there was no question that the Court of Appeals had jurisdiction over the relevant issues at the relevant times. In any event, as explained above, the Supreme Court had jurisdiction to reach the cause of action question without regard to whether the Court of Appeals did, as well.

Second, and more fundamentally, it is simply not accurate to say (as Justice Souter did) that "the same reasoning applies to the recognition of the entire cause of action" as had applied in *Hartman*. The pendent issue in *Hartman* raised the scope of the First Amendment right allegedly violated. In *Wilkie*, in contrast, this Court's discussion of the existence of a *Bivens* cause of action was wholly independent of whether the defendants were entitled to qualified immunity. As in this case, "The qualified-immunity analysis, with its focus on whether it was reasonably clear that the official's conduct violated a constitutional right, is a poor fit for determining whether one cause of action or another is the appropriate one upon which to base a lawsuit against that otherwise clearly prohibited conduct." *Levin*, 2011 WL 2708341, at *12.[7]

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7. At a more fundamental level, the flaw with *Wilkie*'s analysis is that it is impossible to separate the existence of a cause of action from the merits. *See Mitchell*, 472 U.S. at 528 (upholding application of the collateral order doctrine to qualified immunity appeals because "[a]n appellate court reviewing the denial of the defendant's claim of immunity need

Finally, in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), the district court denied in part the defendants' motion to dismiss on qualified immunity. On appeal, the Second Circuit affirmed in part and reversed in part, holding that it had jurisdiction to reach both the defendants' entitlement to qualified immunity and their amenability to the personal jurisdiction of the district court. As part of the Second Circuit's analysis of qualified immunity, the Court of Appeals also considered the relevant pleading standard that plaintiffs had to meet in order to overcome a qualified immunity defense, holding—albeit sub silentio—that the pleading standard was part-and-parcel of the resolution of the defendants' interlocutory qualified immunity appeal. *See Iqbal* v. *Hasty*, 490 F.3d 143, 153–59 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 662.

The Supreme Court agreed. *See Iqbal*, 556 U.S. at 672 ("[T]he Court of Appeals had jurisdiction to hear petitioners' appeal."). As Justice Kennedy explained,

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not consider the correctness of the plaintiff's version of the facts, *nor even determine whether the plaintiff's allegations actually state a claim*" (emphasis added)); *see also Behrens* v. *Pelletier*, 516 U.S. 299, 309 n.3 (1996) ("[T]he *Cohen* 'separability' component asks whether the question to be resolved on appeal is 'conceptually distinct from the merits of the plaintiff's claim.'" (citation omitted)). Thus, it is unlikely that the existence of a cause of action will *ever* be an issue over which a court of appeals may permissibly exercise pendent jurisdiction as part of an interlocutory qualified immunity appeal.

> [*Hartman* and *Wilkie*] cannot be squared with respondent's argument that the collateral-order doctrine restricts appellate jurisdiction to the "ultimate issu[e]" whether the legal wrong asserted was a violation of clearly established law while excluding the question whether the facts pleaded establish such a violation. Indeed, the latter question is even more clearly within the category of appealable decisions than the questions presented in *Hartman* and *Wilkie*, since whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded. In that sense the sufficiency of respondent's pleadings is both "inextricably intertwined with," and "directly implicated by," the qualified immunity defense.

Id. at 673 (second alteration in original; citation omitted). This Court thereby concluded that the pleading issue *was* inextricably intertwined with qualified immunity, and so the Court of Appeals properly had jurisdiction to decide the issue.

Although its analysis was necessarily dicta (insofar as this Court's jurisdiction did not turn on that of the Court of Appeals), one way to read *Iqbal* is as implicitly endorsing the Second Circuit's

"substantial factual overlap" standard for pendent appellate jurisdiction. *See ante* at 15 n.2. After all, the Second Circuit itself had used that very rationale to explain why *it* had jurisdiction to reach the pendent issues raised on the defendants' interlocutory qualified immunity appeal. *See Iqbal*, 490 F.3d at 177 (citing *Toussie*, 323 F.3d at 184). And on the merits, it is not difficult to understand how the factual sufficiency of the pleadings could "overlap" with the qualified immunity question, *i.e.*, whether, based upon *those* facts, the defendants knew or should have known that their conduct violated clearly established law. *See Iqbal*, 556 U.S. at 674–75.

Thus, *Hartman* and *Iqbal* both held that the legal question resolved by this Court was properly within the pendent appellate jurisdiction of the Court of Appeals because it *was* inextricably intertwined with qualified immunity—albeit under a looser standard in *Iqbal* than *amici* believe is appropriate.[8] And *Wilkie* appeared to misconceive both the Court of Appeals' and this Court's jurisdiction, neither of which were at issue given the procedural posture of that case. *See Kirtsaeng* v.

8. As noted above, *amici* have concerns about the potential sweep of the Second Circuit's test for pendent appellate jurisdiction. *See ante* at 15 n.2. But the far more important point for present purposes is that even the Second Circuit's approach does not support the Seventh Circuit's exercise of pendent appellate jurisdiction over the question presented in this case. *See id.*

John Wiley & Sons, Inc., 133 S. Ct. 1351, 1358 (2013) ("[W]e are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct."); *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'Ship*, 513 U.S. 18, 24 (1994) ("This seems to us a prime occasion for invoking our customary refusal to be bound by dicta . . . .").

None of these decisions remotely supports the conclusion that the Court of Appeals had pendent appellate jurisdiction to decide the question on which this Court granted certiorari. The Seventh Circuit itself rightly concluded that the cause-of-action question was "irrelevant" to the defendants' qualified immunity. To allow pendent appellate jurisdiction in such a case is thus not merely "to take . . . a small step beyond" *Swint*; "it would in many cases simply abandon it." *Johnson*, 515 U.S. at 315.

II. ALTHOUGH THERE IS NO BAR TO THIS COURT REACHING THE QUESTION PRESENTED, IT SHOULD DECLINE TO DO SO

a. Reaching the Merits Would Encourage Jurisdictional Boot-strapping By the Lower Courts

As *amici* have acknowledged, this Court has the power to proceed to the merits notwithstanding the jurisdictional defect below. Nevertheless, compelling reasons of prudence, practice, and policy all militate in favor of vacating the decision below

and returning this case to the district court, rather than rewarding the Court of Appeals' jurisdictional bootstrapping.

Reaching the merits of the question on which certiorari was granted would encourage similar jurisdictional bootstrapping by the courts of appeals. That, in turn, would create two related sets of docket pressures: First, as the unanimous Court succinctly put it 18 years ago in *Swint*, "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 49–50.

Once those issues are raised, courts of appeals might be incentivized to reach them either (1) to tee them up for this Court, which clearly *would* have the power to resolve those issues on appeal from the circuit courts; or (2) to resolve them despite the absence of jurisdiction, on the theory that this Court lacks the wherewithal to reverse every instance in which a court of appeals wrongly exercises pendent appellate jurisdiction. And if the courts of appeals are incentivized to reach questions through extensions of pendent appellate jurisdiction doctrine, they can present a multitude of issues to this Court simply by resolving them on interlocutory appeal of a denial of qualified immunity.

Second, even if this Court is willing to supervise such jurisdictional overreaching on a case-

by-case basis, the pressure that such an approach could place on this Court is obvious. After all, the "multi-issue interlocutory appeal tickets" about which *Swint* warned would remain problematic if parties believed that they could routinely invoke *this* Court's jurisdiction via certiorari even on issues that the courts of appeals lacked power to resolve.

Wholly apart from the pressures such an approach would place on the dockets of the courts of appeals and this Court, such interlocutory appeal tickets also would be expensive: "[T]he consequence of such bootstrapping would be to add substantial costs to officer suits, especially those in which the plaintiff ought to prevail on the merits—*i.e.*, those in which these added costs ultimately shouldn't have any bearing on the outcome." Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199, 210 (2013); *see also id.* at 211 (suggesting that these are "costs that the collateral order doctrine specifically exists to minimize, not exacerbate").[9]

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9. Nor is there anything to the argument that these costs already are incurred by dint of the *proper* appeal of a denial of qualified immunity. *See, e.g.*, *Swint*, 514 U.S. at 45 (noting—and rejecting—the parties' argument that, "[o]nce litigation has already been interrupted by an authorized pretrial appeal, . . . there is no cause to resist the economy that pendent appellate jurisdiction promotes"). This case proves all too well the extent to which a court of appeals' resolution of a "pendent" issue over which it lacked jurisdiction can add substantial economic and non-economic costs to what otherwise would have been a relatively straightforward—and ultimately meritless—qualified immunity appeal. *See also Johnson*, 515 U.S. at 318–19.

b. Reaching the Merits Would Defeat the Analytical Distinction Driving this Court's Application of the Final Judgment Rule and Collateral Order Doctrine

In addition to the potentially substantial costs that such jurisdictional bootstrapping would create, such expansions of pendent appellate jurisdiction risk destabilizing not only the final judgment rule, but also the longstanding distinction this Court has drawn between defenses to liability and immunities from suit.

Although this Court has long cautioned against "play[ing] word games with the concept of a 'right not to be tried,'" *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989), case law has ultimately coalesced around a relatively stable distinction, focusing on whether the "immunity" at issue is, in essence, a right possessed by the defendant to not stand trial *at all*. Even the most complete defenses will not satisfy this exacting standard if they merely establish the defendant's right "not to be subject to a binding judgment of the court," as opposed to his right to avoid being haled into court in the first place. *See, e.g.*, *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988); *see also Will*, 546 U.S. at 353 ("Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable

claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was."). Outside the context of suits against government officers, at least, this distinction is still routinely dispositive as to whether an interlocutory appeal is available. *See, e.g.*, *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc) (holding that the district court's rejection of various defenses by military contractors could not be immediately appealed insofar as they were not immunities from suit).

Leaving the Court of Appeals' jurisdictional analysis undisturbed, and thereby encouraging future courts of appeals to engage in similar jurisdictional bootstrapping, would risk unraveling decades of precedent based upon the bright-line distinctions between these conceptions. "There is certainly no constitutional problem with such a piecemeal arrangement, but it is difficult to reconcile such an approach with the analytical underpinnings of the collateral order doctrine—or with the more fundamental statutory final judgment rule from which that doctrine delicately departs." Vladeck, *supra*, at 212. As then-Justice Rehnquist explained in an analogous context,

> Were we to sustain the procedure followed here, we would condone a practice whereby a district court in virtually any case before it might render an interlocutory decision on the

> question of liability of the defendant, and the defendant would thereupon be permitted to appeal to the court of appeals without satisfying any of the requirements that Congress carefully set forth.

Liberty Mut. Ins. Co. v. *Wetzel*, 424 U.S. 737, 745–46 (1976).

c. As Prior Decisions Recognize, the Appropriate Disposition is to Vacate the Decision Below and Remand With Instructions

Thus, even though this Court *may* exercise jurisdiction to decide the question upon which certiorari was granted, the more appropriate disposition would be to vacate the decision below, and remand with instructions to resolve the interlocutory appeal solely on the basis of qualified immunity—and those issues properly pendent thereto. According to Chief Justice Hughes,

> When it appears, on an appeal to this Court from decree of the Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of Appeals and to remand the case with directions to dismiss the

> appeal to that court for want of jurisdiction.

Stratton v. *St. Louis S.W. Ry. Co.*, 282 U.S. 10, 18 (1930); *see also id.* (citing multiple additional cases to the same effect); *accord. Risjord*, 449 U.S. at 379–80 ("[B]ecause the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits. Consequently, the judgment of the Eighth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction." (citing *Di Bella* v. *United States*, 369 U.S. 121, 132–33 (1962)) (footnote omitted).

Unlike in *Stratton*, the Court of Appeals in this case did not lack jurisdiction over the *appeal*; it merely lacked jurisdiction to reach the issue on which this Court granted certiorari. Nevertheless, the same considerations obtain; in both instances, this Court *could* theoretically review the decision below, but the better part of prudence is for it not to do so.[10] *Cf. Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 648 (2006) (vacating and remanding with

10. Nothing would stop this Court from taking advantage of its plenary appellate jurisdiction in an exceptional case in which there are compelling reasons to reach the question presented rather than allow the litigation to proceed apace in the lower courts. *See, e.g.*, *Nixon*, 457 U.S. at 743 n.23; *see also, e.g.*, *Clinton*, 520 U.S. at 689–92. Tellingly, though, neither Petitioners nor Respondent have identified any such compelling reasons here.

instructions to dismiss the appeal for lack of jurisdiction).

But even if this Court is inclined to resolve the question upon which certiorari was granted (on the merits of which *amici* agree with the Court of Appeals), it should not pass up the opportunity to clarify the appropriate scope of pendent appellate jurisdiction under 28 U.S.C. § 1291 in the courts of appeals. As *Swint* suggested, that scope encompasses only whether the trial court's resolution of the pendent issue is "inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or [whether] review of the former decision was necessary to ensure meaningful review of the latter." 514 U.S. at 51.

Whether under the understanding of *Swint* articulated by the Tenth Circuit in *Moore* or the more capacious approach outlined by the Second Circuit in *Toussie*, the Court of Appeals lacked pendent appellate jurisdiction to decide the question on which certiorari was granted—and its jurisdictional bootstrapping must not be left undisturbed.

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that the decision below be affirmed insofar as it affirmed the district court's denial of qualified immunity, vacated insofar as it resolved whether a cause of action can be maintained under § 1983, and remanded for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX

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