Municipal Piggybacking in Qualified-Immunity Appeals

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ABSTRACT

Unlike their employees, municipal defendants in civil-rights suits cannot invoke qualified immunity. Municipal defendants also don't have a right to appeal if a district court refuses to dismiss a municipal claim. These defendants have nevertheless largely succeeded in tagging along when their employees appeal from the denial of qualified immunity. Invoking pendent appellate jurisdiction, most courts of appeals will allow these municipal appeals so long as—in the employees' qualified-immunity appeal—the court concludes that no constitutional violation occurred.

This practice—which I call "municipal piggybacking"—is wholly unnecessary. Jurisdiction in municipal appeals turns entirely on the outcome of the employees' appeals, so no one knows at the outset whether appellate jurisdiction exists. The parties nevertheless spend time researching, briefing, and arguing the municipal claim. If the court of appeals ultimately refuses to extend pendent appellate jurisdiction, all that effort is wasted. Municipal piggybacking serves no legitimate purpose. It's merely a tool for defendants to wear down civil-rights plaintiffs.

Municipal piggybacking needs to stop. But it's not the only aspect of qualified-immunity appeals that needs reform. A unique set of appellate procedures accompany qualified immunity. Defendants have a right to appeal from the denial of immunity, and courts have steadily expanded the scope and availability of those appeals. These expansions serve little or no legitimate purpose. They instead make civil-rights litigation all the more complex, expensive, and time consuming. Qualified-immunity appeals need to change, whether that means limiting their scope and availability, making them discretionary, or doing away with them entirely. And the Rules Committee might be the best forum for those reforms.

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I. INTRODUCTION

Qualified immunity is a special defense in civil-rights actions. It shields government officials from liability and litigation so long as those officials do not violate clearly established law.[1] And it's awful. Courts often require a highly analogous prior decision for the law to be clearly established.[2] The defense thereby inhibits government accountability and prevents victims of government misconduct from obtaining any recovery.[3] But it's not just the substantive defense that is a problem. Qualified immunity comes with a special set of appellate rules that make litigating

1. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For more on qualified immunity, see *infra* Section II.A.

2. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 858 (2010); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–15 (2018) [hereinafter Schwartz, *The Case*].

3. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Supreme Court's "one-sided approach to qualified immunity" that "gut[s] the deterrent effect of the Fourth Amendment"); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1892 (2018) [hereinafter Blum, *The Message*]; Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1158–60 (2020) [hereinafter Schwartz, *Selection Effects*]; Schwartz, *The Case*, *supra* note 2, at 1814; Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2103 (2018) [hereinafter Smith, *Formalism*].

civil-rights suits especially difficult.[4] Government officials have a right to immediately appeal from the denial of qualified immunity.[5] And the courts have steadily expanded the scope and availability of these appeals.[6] While the substantive defense of qualified immunity makes it especially difficult for plaintiffs to prevail in a civil-rights suit, qualified-immunity appeals ensure that litigating these suits is complicated, expensive, and time consuming.

Among these appellate rules, the practice of municipal defendants trying to appeal alongside their employees—what I call "municipal piggybacking"—is one of the least defensible. It's not unusual for civil-rights plaintiffs to sue both the individual government officials that violated the plaintiffs' rights as well as the municipal entity—city, county, sheriff's office, etc.—that employed those officials.[7] Unlike their employees, municipalities cannot invoke the qualified-immunity defense.[8] And municipalities have no right to appeal if a district court refuses to dismiss a claim against them.[9]

But that hasn't stopped municipalities from trying to tag along with their employees' appeals from the denial of qualified immunity. And most courts of appeals have permitted these municipal appeals when, in the employees' appeals, the court concludes that the plaintiff failed to show a constitutional violation. With no constitutional violation by the individual defendants, the municipal defendant generally has nothing to be liable for.[10] So the qualified-immunity appeal necessarily resolves the claims against the municipal defendant. This connection, most courts of appeals hold, is enough to justify what's called "pendent appellate jurisdiction." Pendent appellate jurisdiction allows a court of appeals to extend appellate jurisdiction over a decision that would not normally be appealable when the court has jurisdiction over another, related decision.[11] Upon extending

4. *See* Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. 959, 1020–23 (2021) [hereinafter Lammon, *Assumed Facts*]; Bryan Lammon, *Making* Wilkie *Worse: Qualified-Immunity Appeals and the* Bivens *Question after* Ziglar *and* Hernandez, U. CHI. L. REV. ONLINE (July 24, 2020) [hereinafter Lammon, *Making* Wilkie *Worse*], https://bit.ly/3vtA8jC.

5. *See* Mitchell v. Forsyth, 472 U.S. 511, 527–29 (1985); *see also* Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169, 172–74 (2019) [hereinafter Solimine, *Qualified Immunity Appeals*].

6. *See* Lammon, *Making* Wilkie *Worse*, *supra* note 4.

7. *See, e.g.*, Est. of Ceballos v. Husk, 919 F.3d 1204, 1211 (10th Cir. 2019).

8. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980).

9. *See* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42–43 (1995).

10. The Tenth Circuit has recognized a rare exception to this general rule. *See* Crowson v. Wash. Cnty., 983 F.3d 1166, 1192 (10th Cir. 2020) (discussing the rare scenario in which a municipality can be liable without an underlying constitutional violation by municipal employees). For purposes of this Article, I ignore that exception.

11. For discussions of pendent appellate jurisdiction, see 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD C. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3937 (2d

pendent jurisdiction to the municipal appeal, the court of appeals reverses the district court's refusal to dismiss the municipal claim and renders judgment for the municipality.

Municipal piggybacking makes civil-rights litigation more difficult for no good reason. Jurisdiction over the municipality's appeal turns entirely on the outcome of the individual defendants' qualified-immunity appeal. So no one knows whether jurisdiction exists at the outset of a municipal appeal. If the court of appeals concludes that it does not have jurisdiction, any effort put into the municipal appeal is wasted. And all this effort on appeal is unnecessary. Anything that might be accomplished in the municipal appeal can just as easily be done by the district court. That is, if the court of appeals concludes that the individual defendants did not violate the Constitution, the district court can reconsider its decision on any municipal claims and dismiss them.

Municipal piggybacking is only one of qualified immunity's several profoundly unpragmatic appellate rules. If qualified immunity remains in its present or an altered form, the rules governing qualified-immunity appeals must be reformed. Just like the substantive defense of qualified immunity, Congress or the Supreme Court could change the rules governing qualified-immunity appeals. But reform of qualified-immunity appeals has a special audience: the Rules Committee. Congress has empowered the Supreme Court to create rules of appellate jurisdiction via the rulemaking process. Qualified-immunity appeals are a prime candidate for this process.

In this Article, I tackle municipal piggybacking and show its role in the mix of appellate procedures that make litigating civil-rights suits so complicated. In Part II, I provide a brief background on federal appellate jurisdiction, qualified-immunity appeals, municipal liability, and pendent appellate jurisdiction. I then tackle municipal piggybacking in Part III. I first describe the practice and its prevalence in the courts of appeals. I next show that although the practice might be doctrinally and theoretically defensible, it is profoundly unpragmatic. I end Part III with a brief discussion of how municipal piggybacking is just one example of the expansion of qualified-immunity appeals, an expansion that the Rules Committee might be best situated to reform.

I end this Article in Part IV by briefly offering two potential avenues for future research. The first is pendent appellate jurisdiction generally. The doctrine is understudied, and the theory of pendent appellate

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ed. 1992); Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After* Swint, 49 HASTINGS L.J. 1337, 1346–48 (1998) [hereinafter Steinman, *Scope*]; Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199, 205–12 (2013); Riyaz A. Kanji, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 518–21 (1990).

jurisdiction is unsettled. In fact, there are several potential justifications for pendent appellate jurisdiction, with each pointing towards a different application of the doctrine. Municipal piggybacking is theoretically valid under some of these justifications, but not all. Pendent appellate jurisdiction requires further study to establish which (if any) of these justifications best serves the system of federal appellate jurisdiction.

The second avenue for future research involves the framework by which we evaluate and judge rules of appellate jurisdiction. Most of the literature in this area (mine included) has focused on a narrow set of costs and benefits related to the timing of federal appeals. But other aspects of appellate-jurisdiction rules deserve attention. Among these aspects are the procedures by which we implement interlocutory appeals. Municipal piggybacking illustrates the weakness of current procedures: we lack a reliable means for determining appellate jurisdiction before parties and courts spend time and effort on an appeal's merits. There are certainly other factors that should influence the evaluation of appellate rules. Future research exploring and articulating these other considerations would go a long way towards advancing the study of appellate jurisdiction.

II. QUALIFIED-IMMUNITY APPEALS & PENDENT APPELLATE JURISDICTION

A. Qualified-Immunity Appeals Generally

As a general rule, most federal appeals come after the end of district court proceedings—when all issues have been decided and all that remains is enforcing the judgment.[12] This rule—often called the "final-judgment rule"—comes from 28 U.S.C. § 1291's general grant of appellate jurisdiction over "final decisions" of the district courts.[13] But not all appeals come after a final judgment; a variety of exceptions to the final-judgment rule exist. Some are found in statutes.[14] Others come from rules

12. For background on the law of federal appellate jurisdiction, see generally THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS (2d ed. 2009); Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1814–50 (2018) [hereinafter Lammon, *Finality*]; Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726–47 (1993); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1648–63 (2011) [hereinafter Pollis, *Multidistrict Litigation*].

13. *See, e.g.*, Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); Mitchell v. Forsyth, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part); Abney v. United States, 431 U.S. 651, 657 (1977); *see also* Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 356–60 (2010) (discussing the final-judgment rule's history).

14. *See, e.g.*, 9 U.S.C. § 16; 28 U.S.C. §§ 1292(a)(1), 1453(c).

of procedure.[15] Most come from judicial decisions about what it means for a decision to be "final" for purposes of § 1291.[16]

Denials of qualified immunity are a common source of appeals before a final judgment. Qualified immunity is a special defense in civil-rights actions, and it requires that violations of federal law be "clearly established" before a government official is liable for damages.[17] That is, it's not enough that government officials violated the plaintiffs' rights. The contours of those rights must have been sufficiently clear at that time for the government officials to know that their actions violate the law.[18] This protection exists primarily to ensure that government officials have sufficient notice that their actions violate the law and allow for those officials to make reasonable mistakes without incurring liability.[19] The thought is that government officials need to exercise their discretion without concern about the cost and inconvenience of litigation unless that exercise of discretion is clearly unconstitutional.[20]

This rationale—along with the law of qualified immunity itself—has recently come under sustained attack. And for good reason. Qualified immunity prevents injured plaintiffs from recovering for constitutional violations.[21] It has a shaky historical and textual basis.[22] And it doesn't appear to actually fulfill its underlying purpose of protecting government

15. *See* FED. R. CIV. P. 23(f); FED. R. CIV. P. 54(b).

16. *See* Lammon, *Finality*, *supra* note 12, at 1818.

17. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For background on qualified immunity, see Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1938–40 (2018) [hereinafter Chen, *Intractability*]; Jeffries, *supra* note 2, at 851–54; Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 65–72 (2016); Schwartz, *The Case*, *supra* note 2, at 1801–20.

18. *See* Mullenix v. Luna, 577 U.S. 7, 11–12 (2015).

19. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017); *see also* 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, 14–27 (1997) (explaining the Supreme Court's various justifications for qualified immunity—"fairness, overdeterrence, and social costs"—but showing that recently the Court has focused on social costs).

20. *See Ziglar*, 137 S. Ct. at 1866.

21. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Supreme Court's "one-sided approach to qualified immunity" that "gut[s] the deterrent effect of the Fourth Amendment"); Blum, *The Message*, *supra* note 3, at 1892; Reinhardt, *supra* note 3, at 1245; Schwartz, *Selection Effects*, *supra* note 3, at 1158–60; Schwartz, *The Case*, *supra* note 2, at 1814; Smith, *Formalism*, *supra* note 3, at 2103.

22. *See, e.g.*, *Ziglar*, 137 S. Ct. at 1870–72 (Thomas, J., concurring in part and concurring in the judgment) (contending that qualified immunity should reflect immunities at common law); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 55–61 (2018); Smith, *Formalism*, *supra* note 3, at 1201–02; *see also* Scott Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021); James E. Pfander, Zones of Discretion at Common Law (Dec. 10, 2020) (unpublished manuscript) (https://bit.ly/2S4Z02U).

officials.[23] Efforts are accordingly afoot in Congress,[24] local government,[25] and the Supreme Court to change or abolish qualified immunity.[26]

For now, qualified immunity is the law. And some doubt exists as to whether qualified immunity is going anywhere.[27] I accordingly take much of the law of qualified immunity as it stands for purposes of this Article.

I focus instead on qualified immunity's unique appellate procedures. At the core of these procedures is the right to immediately appeal from the denial of qualified immunity, which the Supreme Court created in *Mitchell v. Forsyth*.[28] Crucial to *Mitchell*'s holding was the Court's conclusion that qualified immunity is not merely a defense from liability.[29] It is also an immunity from litigation itself.[30] According to the Court, the costs, burdens, and uncertainties of litigation can distract government officials from their duties, inhibit their actions, and scare qualified applicants from pursuing public service.[31] Qualified immunity gives government officials a right to be free from those costs, burdens, and uncertainties so long as

23. *See, e.g.*, James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 599 (2020); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 62 (2017); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 939 (2014).

24. *See* George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020).

25. *See* S.B. 20-217, 73d Gen. Assemb., Reg. Sess. (Colo. 2020) (abolishing qualified immunity for state-law claims); *see also* Alex Reinert, *We Can End Qualified Immunity Tomorrow*, BOS. REV. (June 23, 2020), https://bit.ly/3yBaRpH (arguing that state and local law departments should stop seeking qualified immunity).

26. Litigants now regularly ask the Supreme Court to revisit the law of qualified immunity. During its October 2019 term, the Supreme Court denied several closely watched petitions for certiorari that asked the Court to overturn or reform the law in this area. *See* Debra Cassens Weiss, *Supreme Court Rejects Cases on Qualified Immunity used to Shield Police Officers*, A.B.A. J. (June 16, 2020, 10:30 AM), https://bit.ly/3hPzMzO. But petitioners continue to ask the Court to take up the issue. *See, e.g.*, Petition for Writ of Certiorari at i, Fijalkowski v. Wheeler, 141 S. Ct. 261 (2020) (No. 19-1416); *see also* Brief in Opposition at 22, Deasey v. Slater, 141 S. Ct. 550 (2020) (No. 19-1085).

27. *See* Chen, *Intractability*, *supra* note 17, at 1938; *see also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1858 (2018).

28. Mitchell v. Forsyth, 472 U.S. 511, 527–29 (1985). For more on the *Mitchell* decision, see 15A WRIGHT ET AL., *supra* note 11, § 3914.10; Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 855–56 (2018); *see also* Bryan Lammon, *Is* Mitchell v. Forsyth *a Coherent Opinion?*, FINAL DECISIONS (June 7, 2020), https://bit.ly/3uodLLh.

29. *See Mitchell*, 472 U.S. at 526–27.

30. *See id.* at 526 ("The entitlement is an immunity from suit rather than a mere defense to liability . . . ." (emphasis omitted)).

31. *See id.* (expressing concern about "'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982))).

the officials did not violate clearly established law.[32] If a case erroneously proceeds through pretrial and trial, that right to be free from the burdens of litigation would be irretrievably lost.[33]

B. Municipal Liability & Municipal Appeals

Only individual government officials can invoke the qualified-immunity defense. But those officials are not the only kind of defendants in civil-rights litigation. It is not unusual for civil-rights plaintiffs to sue both the individual government officials that violated their rights as well as the municipal entities that employed those officials.[34] Liability for those municipal defendants is nuanced. Municipalities are not liable for their employees' constitutional torts via normal theories of respondeat superior.[35] They are instead liable only if the violation of the plaintiff's rights was due to a municipal custom or policy.[36] That is, the municipality's custom or policy must have caused the constitutional violation that the plaintiff suffered.[37]

Unlike their employees, municipal defendants in civil-rights suits cannot invoke qualified immunity.[38] And when a district court refuses to dismiss a municipal claim, the municipality has no right to an immediate appeal.[39] Because municipalities cannot invoke qualified immunity and have no other protection from the burdens of litigation, a district court's refusal to dismiss a municipal claim can be effectively reviewed in an appeal after a final judgment.[40]

C. Pendent Appellate Jurisdiction

So in a civil-rights suit against both individual government officials and the municipality that employs them, only the individual defendants have a right to an interlocutory appeal. But that has not stopped

32. *See Mitchell*, 472 U.S. at 526 ("*Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.").

33. *See id.*

34. *See* Karen M. Blum, *Making Out the* Monell *Claim Under Section 1983*, 25 TOURO L. REV 829, 829 (2009) [hereinafter Blum, *The* Monell *Claim*].

35. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978).

36. *See id.* at 690; *see generally* Blum, *The* Monell *Claim*, *supra* note 34 (explaining the various methods for establishing municipal liability); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 430–40 (2016) (explaining the custom-or-policy requirement for municipal liability).

37. *See Monell*, 436 U.S. at 695.

38. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980).

39. *See* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995).

40. *See id.*

municipalities from trying to tag along with their employees. To do so, municipalities have invoked the doctrine of pendent appellate jurisdiction.

In any appeal, an appellate court must determine the scope of review—i.e., the issues that are properly before it.[41] In most appeals, this is straightforward. That's because most appeals come after a final judgment. In these appeals, almost every decision that came before the final judgment merges into that judgment, meaning that every district court decision is within the scope of review so long as subsequent events have not rendered an issue moot.[42]

When appeals come before a final judgment, the scope of review can be more complicated. Rules allowing for these appeals are often limited to a particular kind of issue or order. For example, 28 U.S.C. § 1292(a)(1) permits appeals from orders granting, denying, or modifying an injunction.[43] Federal Rule of Civil Procedure 23(f) permits appeals from orders involving class certification.[44] And Rule 54(b) and 28 U.S.C. § 1292(b) allow the district court to specify a particular decision or order for an immediate appeal.[45]

Appeals under these provisions include the particular decision or order to which the rule applies—the injunction, the class-certification decision, the order specified by the district court, etc. But parties aren't

41. *See* 16 WRIGHT ET AL., *supra* note 11, § 3937 ("Once a court of appeals acquires jurisdiction, it is necessary to determine the extent of its power to act on the case.").

42. *See id.* ("If appeal has been taken from a true final judgment that concludes all proceedings in the trial court, the appeal extends to all orders that have been properly preserved and that have not been mooted by subsequent events.").

43. *See* 28 U.S.C. § 1292(a)(1) ("[T]he courts of appeals . . . have jurisdiction . . . from . . . [i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .").

44. *See* FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . ."). For more on Rule 23(f), see Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 13–22 (2007); Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROC. 309 (1999); Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. APP. PRAC. & PROC. (forthcoming 2022) [hereinafter Lammon, *Class-Action Appeals*]; Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1548 (2000).

45. *See* 28 U.S.C. § 1292(b); FED. R. CIV. P. 54(b). For more on § 1292(b) appeals, see Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 AKRON L. REV. 639, 644–49 (2019) [hereinafter Lammon, *Three Ideas*]; Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1171–74 (1990) [hereinafter Solimine, *Revitalizing*]; Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 335–39 (1959). For more on Rule 54(b), see Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013).

always satisfied with immediate appellate review of just that decision or order. They sometimes want the court of appeals to address other issues that are not immediately appealable.

Enter pendent appellate jurisdiction. Pendent appellate jurisdiction allows courts of appeals to review a decision that would not normally be appealable when that court has jurisdiction over another, related decision.[46] The non-appealable decision tags along with the appealable one, giving the court jurisdiction over issues or parties (or both) that it would not normally have.[47] In an appeal from an injunction, for example, the appellant might ask the court to review a related summary-judgment decision.[48] In appeals from the denial of immunity under the Foreign Sovereign Immunities Act, defendants sometimes seek review of other defenses, such as a lack of personal jurisdiction.[49] In several different kinds of interlocutory appeals, courts have extended pendent appellate jurisdiction to address issues of the district court's subject-matter jurisdiction.[50] And appellees sometimes invoke pendent appellate jurisdiction to cross-appeal a normally non-appealable issue alongside the appellant's interlocutory appeal.[51]

The Supreme Court has squarely addressed the scope of pendent appellate jurisdiction only once. The case—*Swint v. Chambers County Commission*—arose from a warrantless police raid on the plaintiffs' nightclub.[52] The plaintiffs sued three officers involved in the raid as well as the municipal entities that employed them.[53] The district court refused

46. For more background on pendent appellate jurisdiction, see generally 16 WRIGHT ET AL., *supra* note 11, § 3937; Steinman, *Scope*, *supra* note 11, at 1346–48; Vladeck, *supra* note 11, at 205–12; Kanji, *supra* note 11, at 518–21.

47. *See* 16 WRIGHT ET AL., *supra* note 11, § 3937.

48. *See, e.g.*, United States v. City of New York, 717 F.3d 72, 81 (2d Cir. 2013); Byrum v. Landreth, 566 F.3d 442, 450 (5th Cir. 2009); Lamar Advert. of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 372 (2d Cir. 2004).

49. *See, e.g.*, Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 669 (7th Cir. 2012); Rux v. Republic of Sudan, 461 F.3d 461, 475 (4th Cir. 2006); Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 755–62 (2d Cir. 1998).

50. *See* Smith v. Arthur Anderson LLP, 421 F.3d 989, 998 (9th Cir. 2005) (reviewing subject-matter jurisdiction in an injunction appeal); Timpanogos Tribe v. Conway, 286 F.3d 1195, 1200 (10th Cir. 2002) (reviewing subject-matter jurisdiction in a sovereign-immunity appeal); Merritt v. Shuttle, Inc., 187 F.3d 263, 268–69 (2d Cir. 1999) (reviewing subject-matter jurisdiction in a qualified-immunity appeal).

51. *See, e.g.*, United States v. Masino, 869 F.3d 1301, 1305 (11th Cir. 2017); Ross v. Am. Exp. Co., 547 F.3d 137, 142 (2d Cir. 2008); King v. Cessna Aircraft Co., 562 F.3d 1374, 1380–81 (11th Cir. 2009); Freeman v. Complex Computing Co., 119 F.3d 1044, 1050 (2d Cir. 1997).

52. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 38 (1995). For in-depth discussions of *Swint*, see 16 WRIGHT ET AL., *supra* note 11, § 3937; Steinman, *Scope*, *supra* note 11, at 1342–48.

53. *See Swint*, 514 U.S. at 38.

to dismiss the claims against both groups of defendants.[54] Both groups of defendants then tried to appeal.

Jurisdiction over the individual defendants' appeal was straightforward. The district court had denied their request for qualified immunity, so they had a right to appeal under *Mitchell*.[55]

The municipal defendants' appeal was a different story. In moving to dismiss the claims against them, the municipal defendants had argued (among other things) that the individuals who authorized the raid were not policymakers.[56] If the municipality was correct on this point, that would mean any violation of the plaintiffs' rights was not due to a municipal custom or policy, shielding the municipal defendants from liability.[57] Thinking that it would be more efficient to address the individual and municipal claims together, the Eleventh Circuit extended pendent appellate jurisdiction over the municipal appeal.[58]

The Supreme Court reversed, holding that the Eleventh Circuit lacked jurisdiction over the municipal appeal.[59] In doing so, the Court expressed little enthusiasm for pendent appellate jurisdiction and at times suggested that pendent appellate jurisdiction was illegitimate.[60] After all, Congress—not the courts—controls federal jurisdiction. Congress has statutorily set out the rules governing the timing of appeals, delaying most appeals until after the district court enters a final judgment.[61] Rules and statutes provide exceptions to this general final-judgment rule, and Congress has empowered the Supreme Court to create additional exceptions to the final-judgment rule via the rulemaking process.[62] Circumventing these rules and processes, the Supreme Court said, would undermine the appellate-jurisdiction scheme that Congress had created.[63]

The Supreme Court also saw a practical problem with pendent appellate jurisdiction: bootstrapping interlocutory appeals.[64] Although a party might have the opportunity to appeal under an established exception to the final-judgment rule, the likelihood of success in that appeal might be so low that the party forgoes the opportunity. Even if the party does appeal, the issue might be so straightforward as to require little work from

54. *See id.* at 39.
55. *See id.* at 38.
56. *See id.* at 39.
57. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978); *see also* Blum, *The* Monell *Claim*, *supra* note 34, at 854–56.
58. *See Swint*, 514 U.S. at 40–41.
59. *See id.* at 51.
60. *See id.* at 45–50.
61. *See id.* at 45.
62. *See* 28 U.S.C. §§ 1292(e), 2072(c).
63. *See Swint*, 514 U.S. at 47–48.
64. *See id.* at 49–50; *see generally* Vladeck, *supra* note 11, at 210–11 (criticizing courts' use of pendent appellate jurisdiction to bootstrap multi-issue appeals).

the appellate court. Generous use of pendent appellate jurisdiction would allow parties in this scenario to add difficult or time-consuming issues to the scope of an interlocutory appeal. Parties could thus parlay narrow appeals "into multi-issue interlocutory appeal tickets."[65] The expansive exercise of pendent appellate jurisdiction would thus not only undermine Congress's jurisdictional framework; it would also add to appellate workloads and the delays that come with interlocutory appeals.

Swint did not, however, completely close the door on pendent appellate jurisdiction.[66] The Court recognized that it had "not universally required courts of appeals to confine review to the precise decision independently subject to appeal."[67] The Court also saw no need to definitively resolve the existence or precise scope of pendent appellate jurisdiction. It was enough to say that the exercise of pendent jurisdiction in *Swint* was improper. The municipal appeals in *Swint* were not "inextricably intertwined" with the denial of qualified immunity, nor was reviewing municipal liability "necessary to ensure meaningful review of [immunity]."[68] So "there [was] no 'pendent party' appellate jurisdiction of the kind" that the municipal defendants had invoked.[69]

III. MUNICIPAL PIGGYBACKING

The rejection of the municipal appeal in *Swint* did not stop municipalities from trying to appeal alongside their employees. Municipal defendants soon picked up on the negative implication of the just-quoted parts of *Swint*. The Court said that pendent appellate jurisdiction was improper in *Swint* because the pendent issue was not "inextricably intertwined with," nor "necessary to ensure meaningful review of," the appealable one.[70] It would stand to reason, then, that pendent jurisdiction might be proper if the opposite were true—if: (1) a normally unappealable decision *was* inextricably intertwined with an appealable one; or (2) review of the normally unappealable decisions *was* necessary to ensure meaningful review of the appealable one. Municipalities and courts have used *Swint*'s negative implication to create another, relatively common form of municipal appeal that I call municipal piggybacking.

This Part first describes the now-common practice of municipal piggybacking. I then show that this practice—though perhaps doctrinally and theoretically plausible—is highly impractical. I end by describing how municipal piggybacking is one part of a larger set of special appellate

65. *See Swint*, 514 U.S. at 50.
66. *See id.* at 50–51.
67. *Id.* at 50.
68. *Id.* at 51.
69. *See id.*
70. *Id.*

procedures that accompany the qualified-immunity defense. These special appellate procedures add wholly unnecessary complexity, expense, and delay to civil-rights litigation. Municipal piggybacking is only one of several procedures that needs to go. And rulemaking might be the best way to achieve these reforms.

A. The Practice

Recall the two questions that courts address in qualified-immunity appeals: did the plaintiff show a constitutional violation, and was that violation clearly established? If in the course of deciding a qualified-immunity appeal a court concludes that no constitutional violation occurred, the court will often then extend pendent appellate jurisdiction over a municipal defendant's appeal. The court reasons that without a constitutional violation, there is nothing for the municipality to be liable for.[71] After all, the existence of a constitutional violation is a common element in the individual and municipal claims. Resolution of the qualified-immunity appeal thus necessarily resolves the municipal claim. This overlap, the courts of appeals have concluded, make the two claims inextricably intertwined. And *Swint* suggested that pendent appellate jurisdiction is proper when two issues are inextricably intertwined.[72]

This practice can largely be traced to the Tenth Circuit's decision in *Moore v. City of Wynnewood*.[73] Decided only a few months after *Swint*, *Moore* held that pendent appellate jurisdiction existed over a municipal appeal alongside a qualified-immunity appeal.[74] The plaintiff in *Moore* was a former deputy chief of police who, after being demoted, brought First Amendment-retaliation claims against both the chief of police and the city that employed the chief.[75] The district court denied both defendants' motions for summary judgment, and both defendants then appealed.[76]

Jurisdiction over the police chief's appeal was straightforward; the district court had denied qualified immunity, so the police chief had a right to appeal.[77] As for the city, the Tenth Circuit ultimately concluded that the municipal claim was inextricably intertwined with the claim against the chief, such that pendent appellate jurisdiction existed to review the municipal claim.[78] The court recognized that *Swint* had questioned the propriety of exercising pendent appellate jurisdiction, "particularly over

71. *See, e.g.*, Moore v. City of Wynnewood, 57 F.3d 924, 930 (10th Cir. 1995).
72. *See Swint*, 514 U.S. at 51.
73. *See Moore*, 57 F.3d at 924.
74. *See id.* at 928–29.
75. *See id.* at 928.
76. *See id.*
77. *See id.*
78. *See id.*

pendent parties."[79] But, the Tenth Circuit continued, *Swint* did not "completely foreclose" the use of pendent appellate jurisdiction.[80] And the Supreme Court suggested that pendent jurisdiction was appropriate when two issues were "inextricably intertwined."[81]

The question, then, was what it meant for two issues to be inextricably intertwined. Without much elaboration on why, the Tenth Circuit interpreted that phrase to mean that the pendent issue is "coterminous with, or subsumed in," the appealable issue.[82] In other words, the appealable issue must necessarily resolve the pendent one.[83] That was the case with the individual and municipal claims in *Moore*. The city argued on appeal that it was not liable because its employee, the police chief, did not violate the First Amendment.[84] The police chief raised that very same issue in his appeal from the denial of qualified immunity.[85] And in the police chief's appeal, the Tenth Circuit had concluded that the chief did not violate the First Amendment.[86] With no constitutional violation by the individual defendant, there was nothing for which the city could be liable. So the police chief's appeal necessarily resolved the city's, making the two issues inextricably intertwined.[87]

The Tenth Circuit noted, though, that pendent appellate jurisdiction would not exist anytime a municipality tried to appeal alongside its employee.[88] Had the court determined that the plaintiff had shown a violation of clearly established law and affirmed the denial of qualified immunity, its decision would not have resolved the claims against the city.[89] The same would be true if the court reversed the denial of immunity on only clearly established law grounds.[90] In such a case, the court would determine (or assume for the sake of argument) that a constitutional violation occurred. And that decision would not necessarily resolve the claims against the city.[91]

79. *Id.* at 929.
80. *Id.* at 930.
81. *Id*. (citing Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 51 (1995)).
82. *Id.*
83. *See Moore*, 57 F.3d at 930.
84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*

Other circuits quickly followed *Moore*'s lead. In addition to the Tenth Circuit,[92] the rule was adopted by the Second,[93] Fourth,[94] Sixth,[95] Seventh,[96] Eighth,[97] Ninth,[98] and Eleventh Circuits.[99] Like *Moore*, these courts say that two claims are inextricably intertwined if one necessarily resolves the other. Upon concluding that the plaintiff has not shown a constitutional violation, these courts will extend pendent appellate jurisdiction over the municipal appeal and render judgment for the municipal defendant. But pendent appellate jurisdiction over the municipal appeal will not exist if the court affirms the denial of qualified immunity or reverses on clearly established law grounds because neither of those decisions necessarily resolves the municipal claim.[100] Courts have also continued to reject municipalities' attempts to tag along with a qualified-immunity appeal to argue other aspects of a municipal claim, such as the existence of a custom or policy.[101]

The path to adopting the *Moore* rule was not always straightforward. The Ninth Circuit, for example, initially rejected the exercise of pendent appellate jurisdiction over municipal appeals in *Henderson ex rel. Epstein*

92. *See* Bame v. Iron Cnty., 566 F. App'x 731, 737 (10th Cir. 2014); Green v. Post, 574 F.3d 1294, 1310 (10th Cir. 2009); Cruz v. City of Laramie, 239 F.3d 1183, 1190–91 (10th Cir. 2001); DeAnzona v. City and Cnty. of Denver, 222 F.3d 1229, 1234 (10th Cir. 2000); Stewart v. Pulis, No. 99-6382, 2000 WL 1034642, at *2 (10th Cir. July 27, 2000); Daniels v. Glase, No. 97-7115, 1999 WL 1020522, at *6 (10th Cir. Nov. 3, 1999).

93. *See* Clubside, Inc. v. Valentin, 468 F.3d 144, 161 (2d Cir. 2006); Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 112 (2d Cir. 2006); Sadallah v. City of Utica, 383 F.3d 34, 39 (2d Cir. 2004); Escalera v. Lunn, 361 F.3d 737, 749 (2d Cir. 2004); McCullough v. Wyandanch Union Free Sch. Dist., 187 F.3d 272, 281–82 (2d Cir. 1999).

94. *See* Altman v. City of High Point, 330 F.3d 194, 207 n.10 (4th Cir. 2003).

95. *See* Pollard v. City of Columbus, 780 F.3d 395, 404 (6th Cir. 2015); Meals v. City of Memphis, 493 F.3d 720, 727 (6th Cir. 2007); Schack v. City of Taylor, 177 F. App'x 469, 473 (6th Cir. 2006); Tucker v. City of Richmond, 388 F.3d 216, 224 (6th Cir. 2004); Scott v. Clay Cnty., 205 F.3d 867, 879 (6th Cir. 2000); Hoard v. Sizemore, 198 F.3d 205, 222 (6th Cir. 1999); Mattox v. City of Forest Park, 183 F.3d 515, 524 (6th Cir. 1999); Isibor v. City of Franklin, No. 97-5729, 1998 WL 344078, at *6 (6th Cir. May 26, 1998).

96. *See* Novoselsky v. Brown, 822 F.3d 342, 357 (7th Cir. 2016).

97. *See* Sherbrooke v. City of Pelican Rapids, 513 F.3d 809, 816 (8th Cir. 2008); Smook v. Minnehaha Cnty., 457 F.3d 806, 813–14 (8th Cir. 2006); Avalos v. City of Glenwood, 382 F.3d 792, 802 (8th Cir. 2004); Samuels v. Meriwether, 94 F.3d 1163, 1166 (8th Cir. 1996); Eagle v. Morgan, 88 F.3d 620, 628 (8th Cir. 1996).

98. *See* Huskey v. City of San Jose, 204 F.3d 893, 904–06 (9th Cir. 2000).

99. *See* Taffe v. Wengert, 775 F. App'x 459, 462 n.2 (11th Cir. 2019).

100. *See, e.g.*, Thompson v. City of Lebanon, 831 F.3d 366, 372 (6th Cir. 2016) (no pendent appellate jurisdiction over a municipal appeal after affirming the denial of qualified immunity); Cox v. Glanz, 800 F.3d 1231, 1257 (10th Cir. 2015) (no pendent appellate jurisdiction over a municipal appeal after reversing on clearly established law grounds).

101. *See, e.g.*, Jones v. Fransen, 857 F.3d 843, 850 (11th Cir. 2017); Al-Lamadani v. Lang, 624 F. App'x 405, 415 (6th Cir. 2015); Anderson-Francois v. Cnty. of Sonoma, 415 F. App'x 6, 10–11 (9th Cir. 2011).

v. Mohave County.[102] The case involved unlawful-seizure claims against both police officers and the county that employed them.[103] When both defendants appealed from the denial of their motions for summary judgment, the Ninth Circuit dismissed the county's appeal for lack of jurisdiction.[104] The court cited *Swint*—which had been decided only two months prior—and simply said that "there [was] no 'pendent appellate jurisdiction' over the county's claim."[105]

But five years later, in *Huskey v. City of San Jose*, the Ninth Circuit distinguished *Henderson*.[106] The Ninth Circuit said that its decision in *Henderson* had not considered whether the individual and municipal claims were inextricably intertwined.[107] *Huskey* adopted *Moore*'s definition of the term: two claims are inextricably intertwined if one necessarily resolves the other.[108] That made pendent appellate jurisdiction over the municipal appeal in *Huskey* proper. The court had concluded that the plaintiff failed to allege a constitutional violation by the individual defendants.[109] That conclusion necessarily resolved the municipal claim against the plaintiff.[110] The Ninth Circuit has followed *Huskey* ever since.[111]

The Second Circuit walked a similar path to the municipal-piggybacking rule. In *Heisler v. Rockland County*, the Second Circuit held (albeit in an unpublished decision) that there was no pendent party jurisdiction over a municipal appeal alongside a qualified-immunity appeal.[112] *Heisler* explained that the municipal issues were neither intertwined with immunity nor necessary for review, and allowing the appeal would encourage parlaying qualified-immunity appeals into multi-issue appeals.[113] But no subsequent Second Circuit decisions have ever

102. Henderson *ex rel.* Epstein v. Mohave Cnty., 54 F.3d 592, 594 (9th Cir. 1995).
103. *See id.*
104. *See id.*
105. *Id.*
106. *See* Huskey v. City of San Jose, 204 F.3d 893, 903–04 (9th Cir. 2000).
107. *See id.*
108. *See id.* at 905.
109. *See id.*
110. *See id.* at 905–06.
111. *See* Suzuki v. Cnty. of Contra Costa, No. 19-16629, 2020 WL 4435099, at *2 (9th Cir. Aug. 3, 2020); Medina v. Cnty. of San Diego, 671 F. App'x 699, 700–01 (9th Cir. 2016); *see also* Smith v. City of Stockton, 818 F. App'x 697, 700 (9th Cir. 2020) (holding that no pendent appellate jurisdiction existed over a municipal appeal because the individual qualified-immunity appeals did not necessarily resolve the municipal claim); Horton *ex rel.* Horton v. City of Santa Maria, 915 F.3d 592, 603–05 (9th Cir. 2019) (same); Hernandez v. City of San Jose, 897 F.3d 1125, 1140 (9th Cir. 2018) (holding that no pendent appellate jurisdiction existed over a municipal appeal after affirming the denial of qualified immunity).
112. *See* Heisler v. Rockland Cnty., No. 97-2869, 1998 WL 636985, at *1 (2d Cir. July 21, 1998).
113. *See id.*

cited to *Heisler*. And only a year after *Heisler*, the Second Circuit adopted the municipal-piggybacking rule. In *McCullough v. Wyandanch Union Free School District*, the Second Circuit held that "sufficient overlap" existed between a qualified-immunity appeal and the claims against a school district.[114] The overlap was sufficient because the court's resolution of the immunity appeal—concluding that no constitutional violation occurred—necessarily resolved the claim against the school district.[115] "[N]o additional inquiry or analysis [was] necessary."[116] The Second Circuit has consistently applied the municipal-piggybacking rule ever since.[117]

The Eleventh Circuit only recently adopted the municipal-piggybacking rule after several years of rejecting it. The Supreme Court had reversed the Eleventh Circuit in *Swint*. On remand from the Court's decision, the Eleventh Circuit squarely rejected pendent party jurisdiction, declaring that "[t]here is no pendent party appellate jurisdiction."[118] The court repeated that statement for several years.[119] As recently as 2018, the Eleventh Circuit continued to say individual and municipal liability were too distinct for the exercise of pendent appellate jurisdiction.[120]

But the Eleventh Circuit eventually walked back its seemingly categorical ban on pendent party jurisdiction. The court said in *King v. Cessna Aircraft Co.* that, although pendent party jurisdiction did not exist in the qualified-immunity/municipal-appeal context, it might exist in other contexts.[121] In 2018's *Glasscox v. City of Argo*, the Eleventh Circuit addressed a city's appeal alongside its employee's qualified-immunity appeal, though the court did not mention pendent appellate jurisdiction.[122] And in 2019's *Taffe v. Wengert*, the Eleventh Circuit exercised pendent appellate jurisdiction over a city's appeal alongside a qualified-immunity appeal.[123] The reasoning was the same as that used in other circuits that

114. *See* McCullough v. Wyandanch Union Free Sch. Dist.,187 F.3d 272, 281–82 (2d Cir. 1999).

115. *See id.* at 282.

116. *Id.*

117. *See* Clubside, Inc. v. Valentin, 468 F.3d 144, 161 (2d Cir. 2006); Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 112 (2d Cir. 2006); Sadallah v. City of Utica, 383 F.3d 34, 39 (2d Cir. 2004); Escalera v. Lunn, 361 F.3d 737, 749 (2d Cir. 2004).

118. Swint v. City of Wadley, 51 F.3d 988, 1002–03 (11th Cir. 1995).

119. *See* Hartley v. Parnell, 193 F.3d 1263, 1272 (11th Cir. 1999); Jones v. Cannon, 174 F.3d 1271, 1293 (11th Cir. 1999); Harris v. Bd. of Educ., 105 F.3d 591, 595 (11th Cir. 1997); Nolen v. Jackson, 102 F.3d 1187, 1189–90 (11th Cir. 1997); Ratliff v. DeKalb Cnty., 62 F.3d 338, 339–40 n.2–4 (11th Cir. 1995); Pickens v. Hollowell, 59 F.3d 1203, 1208 (11th Cir. 1995).

120. *See* Saunders v. Sheriff of Brevard Cnty., 735 F. App'x 559, 563 (11th Cir. 2018).

121. *See* King v. Cessna Aircraft Co., 562 F.3d 1374, 1379 n.1 (11th Cir. 2009).

122. *See* Glasscox v. City of Argo, 903 F.3d 1207, 1212 (11th Cir. 2018).

123. *See* Taffe v. Wengert, 775 F. App'x 459, 462 n.2 (11th Cir. 2019).

had adopted municipal piggybacking. The court in *Taffe* had concluded that the individual defendants did not violate the constitution, and that conclusion necessarily doomed the claims against a sheriff's office.[124] Citing to *King*, the Eleventh Circuit said that this relationship made the two claims inextricably intertwined.[125] Pendent jurisdiction was thus proper.[126]

The Seventh Circuit has inconsistent caselaw in this area. That court's two decisions in *Allman v. Smith*—one granting a stay pending appeal, the other addressing the qualified-immunity appeal—allowed for a very limited exercise of pendent appellate jurisdiction over a municipal appeal. In the stay decision (*Allman I*), the Seventh Circuit held that pendent appellate jurisdiction existed only to stay an impending trial against a municipal defendant.[127] After denying summary judgment to both the individual defendants and the city that employed them, the district court intended to proceed directly to trial.[128] But the individual defendants appealed, and because the individual defendants were appealing from the denial of qualified immunity, the Seventh Circuit stayed any further proceedings against them.[129] The Seventh Circuit also held that it had pendent appellate jurisdiction to stay further proceedings against the city.[130] Resolution of the individual qualified-immunity appeals could affect the claims against the city; with no constitutional violation, there could be no municipal liability.[131] It thus made little sense, the Seventh Circuit thought, to proceed with a trial against the city while the individual defendants' appeals were pending.[132] Absent a stay, the district court would proceed to a potentially unnecessary trial against the city (and possibly a second trial after the immunity appeal).[133] But the scope of pendent appellate jurisdiction was "exceedingly narrow": the Seventh Circuit could address only the necessity of a stay, not the district court's denial of summary judgment on the municipal claims.[134]

When it came time to decide the merits of the individual defendants' immunity appeals (*Allman II*), the Seventh Circuit again said that it could

124. *See id.* at 467.
125. *See id.* at 462 n.2 (citing *King*, 562 F.3d at 1379).
126. *See also* Spencer v. Benison, No. 18-14397, ___ F.4d ____, 2021 WL 3009182, at *7 (11th Cir. July 16, 2021) (extending pendent appellate jurisdiction in a qualified-immunity appeal to review the refusal to dismiss official-capacity claims).
127. *See* Allman v. Smith, 764 F.3d 682, 686 (7th Cir. 2014).
128. *See id.* at 684.
129. *See id.*
130. *See id.* at 686.
131. *See id.* at 685.
132. *See id.*
133. *See id.* at 686.
134. *See id.*

not review municipal claims alongside a qualified-immunity appeal.[135] Pendent appellate jurisdiction, *Allman II* explained, "barely survived its scathing treatment in *Swint*" and is proper only when the pendent issue is inextricably intertwined with the appealable one.[136] The city's arguments in *Allman II* were "not 'intertwined' at all, let alone 'inextricably,'" with immunity.[137] The Seventh Circuit explained that the qualified-immunity appeals concerned how much legal uncertainty existed in the law.[138] The city's appeal, in contrast, concerned the merits of the plaintiff's municipal claim.[139]

But a year later, in *Novoselsky v. Brown*, the Seventh Circuit held that pendent appellate jurisdiction existed to hear a municipal appeal alongside a qualified-immunity appeal.[140] The immunity appeal—in which the court concluded that no constitutional violation occurred—necessarily resolved the claim against the municipal defendant.[141] Without citing either *Allman* opinion, *Novoselsky* concluded that this relationship made the two issues inextricably intertwined.[142] And that was enough to exercise pendent appellate jurisdiction over the municipal appeal.

Not all courts of appeals have adopted municipal piggybacking. At least one—the Fifth Circuit—appears to have rejected it. In *Zarnow v. City of Wichita Falls*, the Fifth Circuit held that no pendent jurisdiction existed to review a municipal appeal alongside a qualified-immunity appeal.[143] In the course of doing so, the court quoted a pre-*Swint* decision to say that the Fifth Circuit had "refused to recognize 'so strange an animal as pendent party interlocutory appellate jurisdiction.'"[144] I could not find any Fifth Circuit decisions to the contrary. Nor could I find any First or Third Circuit decisions directly addressing municipal appeals alongside qualified-immunity appeals.[145]

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135. *See* Allman v. Smith, 790 F.3d 762, 763 (7th Cir. 2015).
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.*
140. *See* Novoselsky v. Brown, 822 F.3d 342, 357 (7th Cir. 2016).
141. *See id.*
142. *See id.*
143. *See* Zarnow v. City of Wichita Falls, 500 F.3d 401, 407 (5th Cir. 2007).
144. *Id.* (quoting McKee v. City of Rockwall, 877 F.2d 409, 413 (5th Cir. 1989)); *see also* Johnson v. Bowe, No. 19-40615, 2021 WL 1373959, at *3 n.5 (5th Cir. April 12, 2021) ("We note that the discretion to exercise pendent interlocutory appellate jurisdiction does not include pendent party interlocutory appellate jurisdiction over parties that the collateral order doctrine does not already bring into the appeal.").
145. The First Circuit touched on the issue tangentially in *Fletcher v. Town of Clinton*, 196 F.3d 41, 55–56 (1st Cir. 1999), in which the court exercised pendent appellate jurisdiction over a municipal appeal only to the extent necessary to vacate the denial of immunity on a municipal claim. Municipal defendants cannot invoke qualified immunity, so it was improper to deny it on the merits. *See id.* The court also spoke at length about the

B. The Specific Problem

Despite its widespread acceptance in the courts of appeals, municipal piggybacking is a bad practice. And courts have overlooked its flaws. To be sure, neither *Swint* nor the theory of pendent appellate jurisdiction foreclose municipal piggybacking. But neither strongly supports it, either. Doctrine and theory thus are insufficient to judge municipal piggybacking.

What's left are practicalities. And municipal piggybacking is highly impractical. Jurisdiction over a municipal appeal turns on the outcome of the individual appeal, meaning that neither the parties nor the court can determine at the outset of the appeal whether pendent jurisdiction is proper. This uncertainty causes potentially wasted efforts researching, briefing, and arguing the municipal appeal. These efforts might not be immense. But absolutely nothing is gained from them. No matter what the court of appeals does with a municipal appeal, the district court could reach the same result with less effort. Defendants thus appear to use these appeals to obtain stays of district court proceedings and protections from the burdens of litigation—the benefits of qualified immunity to which, the Supreme Court has held, municipalities are not entitled. Municipal piggybacking is thus nothing more than a tool for making civil-rights litigation more difficult for plaintiffs.

1. Doctrine & Theory

On a doctrinal level, *Swint* cast serious doubts on the use of pendent appellate jurisdiction. The Supreme Court emphatically rejected its use and called into question the very existence of pendent appellate jurisdiction—particularly pendent *party* jurisdiction.[146] *Swint* also specifically rejected a municipality's attempt to tag along with a qualified-immunity appeal.[147] The Court's reasons for doing so—concerns over undermining the congressionally created system of appellate jurisdiction and bootstrapping multi-issue interlocutory appeals[148]—apply just as much to the current practice of municipal piggybacking as the attempted use of pendent appellate jurisdiction in *Swint*. And the Court gave no indication that, had the municipal defendants in *Swint* raised different issues, pendent jurisdiction over their appeals would have been proper.

But *Swint* did not completely foreclose the use of pendent appellate jurisdiction.[149] And two years after *Swint*, in *Clinton v. Jones*, the Supreme Court noted with approval the Eighth Circuit's use of pendent appellate

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difference between civil-rights claims against individuals and against municipalities, and why municipal appeals are improper. *See id.*

146. *See* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 50–51 (1995).

147. *See id.* at 51.

148. *See id.* at 45–50.

149. *See id.* at 50–51.

jurisdiction in that litigation.[150] The municipal appeal in *Swint* also raised a different issue than that raised in the municipal-piggybacking context. The municipal defendants in *Swint* wanted appellate review of whether certain individuals were policymakers for the municipalities.[151] The individual qualified-immunity appeals did not resolve that question. None of the overlap that is central to modern municipal piggybacking existed.

On a theoretical level, the propriety of municipal piggybacking depends on the meaning one gives to the term "inextricably intertwined." That meaning is not settled, though the meaning of that term likely dictates the acceptable uses of pendent appellate jurisdiction. And several interpretations are plausible.

One interpretation of the term deems issues inextricably intertwined only if review of the pendent issue is necessary to effectively reviewing the appealable one. That is, the pendent issue must be logically antecedent to the appealable one.[152] To be sure, this interpretation collapses *Swint*'s two options—inextricably intertwined and necessary to resolve—into one. But it has some support. The Supreme Court appeared to equate the two options in *Clinton v. Jones*, suggesting that issues were inextricably intertwined because review of one was necessary to meaningful review of the other.[153] A few court of appeals decisions have come to a similar conclusion on the meaning of inextricably intertwined.[154] If these courts are right, municipal piggybacking is an improper exercise of pendent appellate jurisdiction; reviewing the denial of qualified immunity does not require reviewing the validity of a different claim against a different defendant.

That said, most courts have held that issues are inextricably intertwined if the appealable one necessarily resolves the pendent one. That's a plausible interpretation of the term. After all, *Swint* seemed to suggest that pendent appellate jurisdiction was proper if two issues were inextricably intertwined *or* review of one was necessary to review the other.[155] Given the Court's distinction between these two grounds for pendent appellate jurisdiction, they might mean different things. If inextricably intertwined means something other than "necessary to resolve," one plausible definition is that which underlies municipal piggybacking: two issues are inextricably intertwined if one necessarily resolves the other.

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150. *See* Clinton v. Jones, 520 U.S. 681, 707 n.41 (1997).

151. *See Swint*, 514 U.S. at 39.

152. *See* Vladeck, *supra* note 11, at 212; Kanji, *supra* note 11, at 511.

153. *See Clinton*, 520 U.S. at 707 n.41.

154. *See, e.g.*, Archie v. Lanier, 95 F.3d 438, 443 (6th Cir. 1996); Lamar Advert. of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 372 (2d Cir. 2004); Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 758 (2d Cir. 1998).

155. *See Swint,* 514 U.S. at 50–51.

I return to this theoretical issue—the purpose of pendent appellate jurisdiction and when it is appropriate—later. For now, it's enough to say that the theory underlying pendent appellate jurisdiction does not definitively determine the propriety of municipal piggybacking.

2. Practical Issues

Neither doctrine nor theory provides a definitive verdict on the propriety of municipal piggybacking. But practicality does.

Municipal piggybacking appears to be rooted in notions of convenience. Consider the exercise of pendent appellate jurisdiction from the appellate court's perspective. It has already been determined (in the individual defendant's qualified-immunity appeal) that no constitutional violation occurred. That holding necessarily means that the plaintiff's claim against the municipal defendant fails. The additional effort needed to resolve the municipal claim is therefore marginal—the plaintiff is already defending the appeal, the jurisdictional issue is relatively simple, and the merits issue is straightforward. Further, by exercising pendent appellate jurisdiction and resolving the municipal claim, the court of appeals can resolve multiple—and perhaps all—of the claims in the action at once. The appeal might therefore mark the end of the action. Given the apparent ease of exercising pendent appellate jurisdiction in these circumstances, why not reach out and decide the municipal claim, too?

The exercise of pendent appellate jurisdiction in any particular case looks convenient. But this seeming convenience overlooks systemic costs. However convenient the exercise of pendent appellate jurisdiction might be when looking at a single appeal, municipal piggybacking systematically creates extra work for parties and courts with no offsetting benefits.

By leaving open the possibility of pendent appellate jurisdiction, courts invite municipalities to try to appeal alongside their employees. But at the outset of the appeal, no one knows whether jurisdiction exists over the municipal claim. The exercise of pendent appellate jurisdiction in these cases turns entirely on the outcome of the individual defendant's qualified-immunity appeal. If the court holds that no constitutional violation occurred, pendent appellate jurisdiction then exists over the municipal claim. Any other outcome on appeal means no pendent jurisdiction. So municipal piggybacking necessarily comes with substantial jurisdictional uncertainty. Only the court of appeals can resolve that uncertainty with its resolution of the qualified-immunity appeal. And if the court determines that it lacks jurisdiction over the municipal appeal, all the parties' (and the court's) efforts on that appeal are wasted.

This problem is not unique to municipal piggybacking. Anytime uncertainty exists over appellate jurisdiction, there is a risk of wasted efforts in the appeal. That is due in part to the lack of any reliable means

for determining appellate jurisdiction at the outset of an appeal, before any effort is spent on the appeal's merits. But municipal piggybacking is worse than the normal case of uncertain appellate jurisdiction. One cannot know whether jurisdiction exists over the municipal appeal until the court of appeals resolves the qualified-immunity appeal. It is thus impossible at the outset of a municipal appeal to determine appellate jurisdiction.

To be sure, municipal piggybacking probably does not result in immense amounts of additional work. The only real issue is jurisdictional: when can the court of appeals extend pendent appellate jurisdiction over a municipal appeal alongside a qualified-immunity appeal? When courts of appeals determine that no constitutional violation exists, the merits of the municipal claim are straightforward.

But it is still extra work. And there is no reason for it. As the courts of appeals themselves have occasionally recognized, the district court can just as easily reach the same result.[156] If the court of appeals concludes that no constitutional violation occurred, the municipality can then ask the district court to reconsider its decision on the municipal claim. Given that the municipality cannot be liable unless a constitutional violation occurred—and given the appellate court's decision that no constitutional violation occurred—reconsideration should be straightforward. Opposition to reconsideration would be frivolous and thus sanctionable. If the district court refuses to reconsider its decision, mandamus would probably be warranted.

Why, then, do municipalities insist on taking these appeals if they have no legitimate benefit? Perhaps municipalities want to participate in the determination of whether a constitutional violation occurred. Or perhaps they prefer to have the claims against them resolved by the court of appeals, not the district court.

I suspect, however, that municipalities often take these appeals to obtain a stay of district court proceedings, which they are otherwise not entitled to. Recall that, unlike individual defendants, municipalities have no right to qualified immunity's protections from the burdens of

156. *See* Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 111 (2d Cir. 2006); Hadix v. Johnson, 228 F.3d 662, 669 (6th Cir. 2000) (noting that "resolution of the properly reviewable claims will necessarily decide how the district court must proceed on remand"); Scott v. Clay Cnty., 205 F.3d 867, 879 n.22 (6th Cir. 2000) (noting that even if pendent appellate jurisdiction was improper, the district court would have to reach the same decision on the municipal claims); *see also* Hartley v. Parnell, 193 F.3d 1263, 1272 (11th Cir. 1999) (declining to exercise pendent appellate jurisdiction but noting that the district court might reexamine the official-capacity claim on remand in light of the court's opinion); Veneklase v. City of Fargo, 78 F.3d 1264, 1270 (8th Cir. 1996) (declining to exercise pendent appellate jurisdiction over a municipal appeal but noting that the district court would reexamine the issue on remand, particularly in the light of the court's conclusion that no constitutional violation occurred).

litigation.[157] So if only the individual defendants appeal, the case against the municipality could normally proceed. Granted, the claims against the municipality normally should not proceed to trial while the individual defendants' appeal is pending; there is often too much overlap in the individual and municipal claims for that to make any sense.[158] But the plaintiff and municipality could still partake in other pretrial matters, such as discovery.

A municipality's attempted appeal can effectively obtain the benefits of qualified immunity. An appeal normally deprives the district court of jurisdiction over any aspects of the case at issue in the appeal and halts any proceedings on the appealed claims.[159] So by appealing (or trying to appeal) alongside their employees, municipalities can deprive the district court of jurisdiction over the claims against them and effectively halt proceedings. Municipalities thereby obtain the qualified immunity's protections from litigation.

In short, by exercising pendent appellate jurisdiction over municipal claims, a court of appeals does what the district court could have easily done itself. And nothing of any value is gained by shortcutting this process with an interlocutory appeal of uncertain jurisdiction.

C. The Larger Qualified-Immunity Appeals Problem

Municipal piggybacking is a practice that needs to stop. The courts could do so themselves. In an appropriate case, the Supreme Court could put an end to the practice. Or the courts of appeals could go en banc to reconsider their decisions allowing municipal appeals.

But courts aren't the only potential audience for reform efforts, and municipal piggybacking is not the only issue with qualified-immunity appeals. Ending municipal piggybacking might be better accomplished via the rulemaking process. That process could also tackle the larger problem of qualified-immunity appeals.

The special appellate procedures that accompany qualified immunity, along with the substantive defense itself, give defendants a potentially devastating one-two punch in civil-rights actions. The substantive defense of qualified immunity makes it especially difficult for plaintiffs to win a civil-rights suit, as courts often require highly analogous Supreme Court or in-circuit decisions for law to be clearly established.[160] The special appellate rules add procedural hurdles, ensuring that litigating a civil-rights suit to the end is no small feat.

157. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980).
158. *See* Allman v. Smith, 764 F.3d 682, 686 (7th Cir. 2014).
159. *See* Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982).
160. *See* Jeffries, *supra* note 2, at 858; Schwartz, *The Case*, *supra* note 2, at 1815.

It didn't have to be this way. *Mitchell* appeared to envision a relatively limited right to appeal.[161] The Supreme Court emphasized that the appeal needed to address only whether (under the plaintiff's allegations or evidence) the defendant violated clearly established law.[162] Other issues were off the table.

If courts adhered to this narrow focus, qualified-immunity appeals might have had only a minimal impact on appellate workloads and district court proceedings. But courts didn't stop there. They instead steadily expanded both the scope and availability of qualified-immunity appeals.[163] In addition to using pendent appellate jurisdiction to allow other defendants to tag along, courts have added issues to qualified-immunity appeals, increased the opportunities to appeal, and undermined the supposed limits on the scope of these appeals. Altogether, these expansions have made civil-rights litigation more difficult, expensive, and time consuming—often for no legitimate purpose.[164]

For example, courts can now review the plausibility of the pleadings as part of a qualified-immunity appeal.[165] *Mitchell* seemed to say that this issue was off the table; the Supreme Court said that courts hearing these appeals "need not . . . even determine whether the plaintiff's allegations actually state a claim."[166] But that's no longer the case. *Ashcroft v. Iqbal*—known primarily for establishing the current regime of plausibility pleading—was also a qualified-immunity appeal.[167] Before addressing whether the plaintiff had stated a claim, the Court held that the issue was properly in the court of appeals (and thus properly before the Supreme Court).[168] Qualified-immunity appeals are proper, the Court said, so long as the district court's decision denying immunity turned on an issue of law.[169] The sufficiency of the pleadings was an issue of law that was inextricably intertwined with, or directly implicated by, qualified

161. *See* Vladeck, *supra* note 11, at 204 ("[T]he only questions such an appeal present[s] is whether the defendant broke the law, and whether that law was clearly established at the time of the alleged transgression.").

162. *See* Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). *Mitchell* emphasized the issue of whether the allegedly violated law was clearly established. *Id.* The Supreme Court later added that addressing that issue of course requires determining whether the law was violated in the first place. *See* Siegert v. Gilley, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.").

163. *See* Lammon, *Making* Wilkie *Worse*, *supra* note 4.

164. *See id.*

165. *See* Ashcroft v. Iqbal, 556 U.S. 662, 674–75 (2009).

166. *Mitchell*, 472 U.S. at 528.

167. *See Iqbal*, 556 U.S. at 672–73.

168. *See id.*

169. *See id.*at 674.

immunity.[170] It was also a legal issue that a court of appeals was well suited to address.[171] So after *Iqbal*, courts hearing a qualified-immunity appeal can address whether the plaintiff's complaint states a claim.

Another example concerns the existence of a cause of action against federal officials, i.e., the *Bivens* question.[172] In *Wilkie v. Robbins*, the Supreme Court held that courts can address the existence of a remedy as part of a qualified-immunity appeal.[173] This inquiry exists because the commonly used statute for civil-rights suits (§ 1983) applies only to state actors.[174] If a federal official violates a plaintiff's rights, that plaintiff might be able to sue under the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[175] But a *Bivens* remedy doesn't exist for all constitutional violations by federal officials. *Wilkie* added the *Bivens* question to the scope of qualified-immunity appeals.

Wilkie was a bad decision. As Stephen Vladeck and Laurence Tribe have separately explained, the *Bivens* question is not a necessary part of a qualified-immunity appeal, nor do the purposes of qualified-immunity appeals justify immediate review of the *Bivens* question.[176] In short, interlocutory review of the *Bivens* question serves no legitimate purpose.

Recent decisions have made *Wilkie* worse.[177] *Ziglar v. Abbasi* and *Hernandez v. Mesa* (in addition to weakening *Bivens* itself) emphasized that courts must ask the *Bivens* question anytime a case arises in a "new context."[178] And the Court defined a new context so broadly (and vaguely) that nearly all federal defendants can argue that the claims against them arise in a new context, requiring a fresh *Bivens* inquiry.[179] This new argument (or newly reinvigorated old argument) can be pursued both in the district court and in an immediate appeal. Because interlocutory review of the *Bivens* question already serves no legitimate purpose, *Ziglar* and *Hernandez* mean more time and effort spent (and wasted) addressing the *Bivens* question.[180]

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170. *See id.*
171. *See id.* at 674–75.
172. *See generally* Lammon, *Making* Wilkie *Worse*, *supra* note 4.
173. *See* Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007).
174. *See* 28 U.S.C. § 1983.
175. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
176. *See* Vladeck, *supra* note 11; Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006 CATO SUP. CT. REV. 23, 72–76 (2006).
177. *See* Lammon, *Making* Wilkie *Worse*, *supra* note 4 (collecting cases).
178. *See* Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017).
179. *See* Lammon, *Making* Wilkie *Worse*, *supra* note 4.
180. *See id.*

There has been one significant exception to the expansion of qualified-immunity appeals: *Johnson v. Jones*'s limit on challenging the factual basis for an immunity denial at summary judgment.[181] When a district court denies qualified immunity at summary judgment, it makes two determinations: (1) the facts that a reasonable factfinder could find (given the summary judgment record); and (2) whether the most plaintiff-favorable version of those facts amounts to a violation of clearly established law. *Johnson* held that (with rare and narrow exceptions) the courts of appeals lack jurisdiction to review the first determination—what facts a reasonable factfinder could find.[182] The court of appeals must instead take the district court's assessment of the record as given and address the core qualified-immunity questions. In other words, the court of appeals can address only the materiality of any factual disputes; it cannot review whether those disputes are genuine.[183]

This limit on the scope of the appeal was supposed to simplify and streamline qualified-immunity appeals, focusing appellate courts on the more abstract legal questions and eliminating appeals involving record review.[184] But it has been both undermined and ignored.

The undermining comes from *Scott v. Harris*'s blatant-contradiction exception to *Johnson*. In *Scott*, the Supreme Court rejected the facts that the district court had taken as true, holding that a video of a high-speed car chase "blatantly contradicted" them.[185] The Court did so, however, without mentioning *Johnson* or appellate jurisdiction.[186] Courts of appeals have since struggled to reconcile *Johnson*'s jurisdictional limit with the analysis in *Scott*.[187] Most have concluded that Scott created a blatant-contradiction exception to *Johnson*: an appellate court can review whether the summary-judgment record supports the facts that the district court assumed to be true when something in the record blatantly contradicts those assumed facts.[188]

The blatant-contradiction exception is an unwieldy and inefficient method for determining appellate jurisdiction.[189] Deciding whether the exception applies requires reviewing the summary-judgment record—precisely what *Johnson* meant to prevent.[190] The exception is also

181. *See* Johnson v. Jones, 515 U.S. 304, 307 (1995); *see also* Lammon, *Assumed Facts*, *supra* note 4, at 976–85.
182. *See Johnson*, 515 U.S. at 320.
183. *See id.*
184. *See id.* at 316–17.
185. Scott v. Harris, 550 U.S. 372, 380 (2007).
186. *See* Lammon, *Assumed Facts*, *supra* note 4, at 986.
187. *See id.* at 988.
188. *See id.* at 991–94.
189. *See id.* at 994–1005.
190. *See id.* at 997–98.

wasteful, as courts often address the exception—and thus their appellate jurisdiction—only after full briefing on qualified immunity.[191] And all this work is unnecessary. Blatant contradictions (assuming they can be reliably identified) are rare.[192] Mandamus is a more appropriate tool for these cases.[193]

Defendants also regularly ignore *Johnson*.[194] Whether intentionally violating *Johnson*'s limits or not understanding them, these defendants argue their own version of the facts on appeal.[195] Courts normally reject these attempts. But the damage is done.[196] The appeal adds unnecessary work, expense, delay, and uncertainty to the case. District court proceedings are stalled. The parties must research and brief both jurisdiction and the merits of the qualified-immunity appeal. And months pass between the notice of appeal and the eventual dismissal.[197]

One qualified-immunity appeal in a case is bad enough. But courts have not stopped there. They have held that defendants can appeal from several kinds of district court decisions denying immunity, even if that means multiple appeals in a single action. In *Behrens v. Pelletier*, the Supreme Court held that defendants can appeal from the denial of immunity at both the motion-to-dismiss and summary-judgment stages.[198] So litigants pursuing a civil-rights suit must gird themselves for the possibility of two interlocutory appeals before resolving an action. Or maybe more. The courts of appeals have added orders granting a new trial to that list.[199] Indeed, courts of appeals don't always wait until the district court has reached a decision. They have held that delay in deciding a motion seeking qualified immunity amounts to an effective denial, such that the defendant can immediately appeal without the district court having actually reached a decision.[200]

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191. *See id.* at 999–1001.

192. *See id.* at 1004–05.

193. *See id.* at 1003.

194. *See id.* at 977–79; *see also* Bryan Lammon, *Sanctioning Qualified-Immunity Appeals*, 2021 U. ILL. L. REV. ONLINE 130, 135–37 [hereinafter Lammon, *Sanctioning*].

195. *See, e.g.*, Betton v. Belue, 942 F.3d 184, 192 (4th Cir. 2019); Koh v. Ustich, 933 F.3d 836, 844 (7th Cir. 2019); Barry v. O'Grady, 895 F.3d 440, 443–45 (6th Cir. 2018); McCue v. City of Bangor, 838 F.3d 55, 62–63 (1st Cir. 2016); Morales v. Chadbourne, 793 F.3d 208, 219 (1st Cir. 2015); Penn v. Escorsio, 764 F.3d 102, 110–12 (1st Cir. 2014); Gutierrez v. Kermon, 722 F.3d 1003, 1011 (7th Cir. 2013); Bennett v. Krakowski, 671 F.3d 553, 559 (6th Cir. 2011). In 2020 alone, there were at least 44 qualified-immunity appeals in which the court rejected a defendant's attempts to challenge the factual basis for an immunity denial. *See* Lammon, *Sanctioning*, *supra* note 194, at 136.

196. *See* Lammon, *Sanctioning*, *supra* note 194, at 137–38 (discussing the harms of fact-based qualified-immunity appeals).

197. *See id.* at 138 (finding that fact-based qualified-immunity appeals took about 14 months from the notice of appeal to an appellate decision).

198. *See* Behrens v. Pelletier, 516 U.S. 299, 311 (1996).

199. *See* Benson v. Facemyer, 657 F. App'x 828, 831 (11th Cir. 2016) (per curiam).

200. *See* Zapata v. Melson, 750 F.3d 481, 485–86 (5th Cir. 2014).

These and other special rules of appellate procedure combine to add difficulty, expense, and delay to civil-rights litigation. And they're not worth those costs. Should efforts to abolish qualified immunity succeed, these special appellate procedures will disappear. But if qualified immunity remains in its current or an altered form, the appellate procedures that go along with it must change. This could mean narrowing the scope of the appeals to exclude everything but the core qualified-immunity questions. It could mean switching to discretionary appeals.[201] Or it could mean doing away with qualified-immunity appeals entirely.

Like the substantive defense of qualified immunity, Congress or the Supreme Court could change the rules governing qualified-immunity appeals. But these appeals have an additional audience that the substantive defense does not: the Rules Committee. Congress authorized the Supreme Court to create rules governing appellate jurisdiction via the rulemaking process. Under 28 U.S.C. § 2072(c), the Court may prescribe rules defining when a district court decision is final for the purposes of 28 U.S.C. § 1291. And under 28 U.S.C. § 1292(e), the Court can prescribe rules that provide "for an appeal of an interlocutory decision to the courts of appeals." The Rules Committee can accordingly reform the law governing interlocutory appeals from the denial of qualified immunity.

The Rules Committee moves deliberately; any change via the rulemaking process will take years. And further research on qualified-immunity appeals is needed before crafting any rules. The defense of qualified immunity might stick around. So the time to start thinking about what qualified-immunity appeals might look like is now.

IV. RE-EXAMINING APPELLATE JURISDICTION, PENDENT & OTHERWISE

This examination of municipal piggybacking—particularly courts' overlooking the practice's impracticality—suggests two potential avenues for future research.

First, we lack any accepted theory or justification for the exercise of pendent appellate jurisdiction. Pendent appellate jurisdiction could be useful in several different ways. Or it might be completely illegitimate. Additional work is necessary to determine the doctrine's purpose.

Municipal piggybacking also illustrates a weakness in theories of appellate jurisdiction. Most work on appellate jurisdiction focuses on a limited set of costs and benefits in the timing of an appeal. But other aspects of appellate-jurisdiction rules require scholarly attention. Municipal piggybacking shows, for example, that courts and commentators must pay attention to the procedures that implement these

201. *See* Lammon, *Assumed Facts*, *supra* note 4, at 1023; Solimine, *Qualified Immunity Appeals*, *supra* note 5, at 183.

rules. The lack of attention to those procedures explains the widespread acceptance of this practice. Other aspects of appellate-jurisdiction rules require similar attention.

A. Exploring Pendent Appellate Jurisdiction's Purpose

The purpose of pendent appellate jurisdiction is not settled. But that purpose determines when (if ever) the exercise of pendent appellate jurisdiction is proper. And a few possibilities exist.

One way to look at pendent appellate jurisdiction is as a tool of inevitability and convenience. This is how most of the municipal-piggybacking caselaw views it. In this understanding of pendent appellate jurisdiction, extending jurisdiction is proper when the appealable issue necessarily resolves the pendent one. In that instance, the outcome of the pendent issue is inevitably determined, and there is nothing more for the court to do except say so. It is thus convenient for the court of appeals to address the pendent issue; almost no additional work is necessary.

But there are other possible ways of looking at pendent appellate jurisdiction. Courts could wield pendent appellate jurisdiction as a discretionary tool, extending jurisdiction when the court thinks doing so will more efficiently resolve the action. A court might extend pendent jurisdiction even if the appealable issue does not itself resolve the pendent one. That means the exercise of pendent appellate jurisdiction could require more work from the court of appeals. But a court might put in this extra effort when doing so will (in the court's view) lead to a more efficient resolution of the case.

The D.C. Circuit has adopted something like this discretionary understanding of pendent appellate jurisdiction. In *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, the court interpreted *Swint* to mean that extending pendent appellate jurisdiction is proper when "substantial considerations of fairness or efficiency demand it."[202] A variety of considerations could inform that exercise, including the likelihood of terminating a case and thus sparing the district court from further proceedings.[203] And it's clear that the appealable issue need not resolve the pendent one for the D.C. Circuit to exercise pendent appellate jurisdiction—the court has avoided resolving an appealable issue when a pendent issue was more straightforward and resolved the entire case.[204]

This discretionary use of pendent appellate jurisdiction can also be seen in some of the Fifth Circuit's qualified-immunity appeals. Recall that

202. Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 679 (D.C. Cir. 1996).

203. *See id.*

204. *See, e.g.*, KiSKA Constr. Corp.-U.S.A. v. Wash. Metro. Area Transit Auth., 167 F.3d 608, 611 (D.C. Cir. 1999); Rendall-Speranza v. Nassim, 107 F.3d 913, 917 (D.C. Cir. 1997).

qualified immunity exists to protect litigants from the burdens of litigation. But qualified immunity is not available for all claims against individual defendants, such as state-law claims. When defendants appeal from the denial of qualified immunity, the Fifth Circuit has extended pendent appellate jurisdiction to dismiss these other claims against those defendants.[205] Doing so, the Fifth Circuit says, furthers the purpose of qualified immunity by protecting the defendant from litigation, even on claims to which immunity does not apply.[206]

This efficiency rationale is also close to the approach to pendent appellate jurisdiction for which Joan Steinman has argued. In her exhaustive study of this area, Steinman contended that the exercise of pendent appellate jurisdiction should be largely discretionary.[207] So long as a proper interlocutory appeal has been taken, Steinman would give the court of appeals discretion over whether to address other issues.[208] In making that discretionary determination, the court would consider potential judicial economies, such as the connection between the appealable and pendent issues, the potential for guiding further district court proceedings or resolving an action entirely, and burdens on both the courts and parties.[209]

A third, stricter understanding of pendent appellate jurisdiction also exists. This understanding focuses on necessity: exercising pendent jurisdiction only to address an issue that is logically antecedent to resolving the appealable issue. A few cases have endorsed this strict, necessity approach. In *Archie v. Lanier*, for example, the Sixth Circuit held that it lacked jurisdiction to review the denial of a motion to dismiss for failure to state a claim alongside an appeal from the denial of absolute judicial immunity.[210] In the course of doing so, the court noted that *Swint* meant to narrow appellate jurisdiction, not expand it.[211] So *Swint*'s "'inextricably intertwined' requirement was not meant to be loosely applied as a matter of discretion."[212] That requirement instead meant "that pendent jurisdiction may be exercised only when the [appealable] issues absolutely cannot be resolved without addressing the nonappealable collateral issues."[213] The Second Circuit has similarly suggested that

205. *See* Waller v. Hanlon, 922 F.3d 590, 598 (5th Cir. 2019); Morin v. Caire, 77 F.3d 116, 119–20 (5th Cir. 1996).
206. *See, e.g.*, *Waller*, 922 F.3d at 598.
207. *See* Steinman, *Scope*, *supra* note 11, at 1479.
208. *See id.*
209. *See id.* at 1482–85.
210. *See* Archie v. Lanier, 95 F.3d 438, 443 (6th Cir. 1996).
211. *See id.*
212. *Id.*
213. *Id.*

Swint's inextricably intertwined and necessary-to-resolve options are "essentially the same thing."[214]

This strict approach to pendent appellate jurisdiction has also received some support in the literature. Riyaz Kanji's student note—which the Supreme Court cited with approval in *Swint*—contended that pendent appellate jurisdiction extends only to issues that are "logically antecedent" to the appealable issue.[215] Stephen Vladeck has similarly argued that pendent appellate jurisdiction should be available only when review of the pendent issue is necessary.[216]

So what's the best understanding of pendent appellate jurisdiction? Who knows? Some additional study of pendent appellate jurisdiction is needed. It might be that one understanding of pendent appellate jurisdiction is better than the rest. Or each might be valid in different contexts. Or pendent appellate jurisdiction might be entirely improper. Only further study of pendent appellate jurisdiction in the courts of appeals will tell.

B. A Framework for Judging Appellate Jurisdiction

This study of municipal piggybacking also reveals the lack of a robust framework for analyzing appellate-jurisdiction rules. Most work on appellate jurisdiction focuses on a limited set of costs and benefits in the timing of an appeal. But other aspects of appellate-jurisdiction rules require scholarly attention. These other aspects need to be developed in the literature so that courts and commentators can incorporate them into their assessment of appellate-jurisdiction rules.

Much of the appellate-jurisdiction literature—mine included—focuses on *when* exceptions to the final-judgment rule should exist.[217] And these discussions often focus on a particular form of efficiency, with a familiar weighing of the costs and benefits of delaying appeals until the

214. *See* Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 758 (2d Cir. 1998); *see also* Lamar Advert. of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 372 (2d Cir. 2004).

215. *See* Kanji, *supra* note 11, at 511.

216. *See* Vladeck, *supra* note 11, at 212.

217. *See, e.g.*, Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 553 (1932); Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 292 (1966); Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 182–84 (2001); Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267, 270–71 (2017); Bryan Lammon, *Dizzying* Gillespie*: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 375–76 (2017) [hereinafter Lammon, *Dizzying* Gillespie]; Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 428–29 (2013); Petty, *supra* note 13, at 356–57; Pollis, *Multidistrict Litigation*, *supra* note 12, at 1648–51; Solimine, *Revitalizing*, *supra* note 45, at 1168–69.

end of district court proceedings.[218] As for benefits, delaying appeals saves litigants the expense, inconvenience, and delay—as well as potential harassment by better-resourced litigants—of multiple appeals.[219] Interlocutory appeals that might eventually become unnecessary—say, because the aggrieved party ultimately prevailed at trial—are avoided.[220] And delaying appeals reduces appellate workloads.[221]

But the final-judgment rule also has costs. Appellate decisions can correct errors and develop unclear areas of the law. Cases that end in settlement or abandonment—a common outcome in federal litigation—do not produce appealable decisions, leaving errors or issues unexamined.[222] In some cases, appellate intervention might also speed along district court proceedings or cut short what would later be deemed unnecessary litigation.[223] And the delay between an erroneous district court decision and vindication on appeal can cause substantial, sometimes irreparable, harms.[224]

The final-judgment rule reflects a view that the benefits of delaying appeals generally outweigh the costs.[225] Exceptions to the final-judgment rule often reflect a conclusion that this cost-benefit balance has shifted somehow—the benefits of delaying an appeal are especially low, the costs are especially high, or both.[226]

I have explained before that this common focus on appealability—*when* appeals should occur—overlooks other important aspects of federal appellate jurisdiction.[227] This focus also overlooks other important aspects of the rules that implement federal appellate jurisdiction.

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218. *See* Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 157 (1984) ("The most direct components of the appeal timing calculus are so familiar as to require no more than a brief reminder."). As Brooke Coleman has explained, any discussion of efficiency should include "all costs and benefits, both pecuniary and nonpecuniary." Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1777 (2015); *see also id.* at 1797–1802 (discussing the incomplete definition of efficiency in the civil-procedure context). As explained below, common discussions of appellate jurisdiction focus on a specific set of costs and benefits, overlooking other important considerations. So, thinking of appellate rules in terms of "efficiency" is not necessarily bad; that efficiency calculus just needs to include other considerations.

219. *See, e.g.*, Lammon, *Dizzying* Gillespie, *supra* note 217, at 375.

220. *See, e.g.*, Will v. Hallock, 546 U.S. 345, 350 (2006); Cooper, *supra* note 218, at 157–58; Solimine & Hines, *supra* note 44, at 1548.

221. *See, e.g.*, Solimine, *Revitalizing*, *supra* note 45, at 1168.

222. This was the impetus for Federal Rule of Civil Procedure 23(f), which authorizes discretionary appeals from class-certification decisions. *See* Lammon, *Class-Action Appeals*, *supra* note 44, 14–15.

223. *See, e.g.*, Cooper, *supra* note 218, at 157.

224. *See, e.g.*, Pollis, *Multidistrict Litigation*, *supra* note 12, at 1650.

225. *See* 15A WRIGHT ET AL., *supra* note 11, § 3911.2.

226. *See* Lammon, *Finality*, *supra* note 12, at 1837.

227. *See generally id.* at 1825–50.

Municipal piggybacking, as well as pendent appellate jurisdiction more generally, illustrate as much. The key flaw in pendent appellate jurisdiction is the lack of procedures for implementing it. Neither parties nor appellate courts know at the outset whether jurisdiction exists over the pendent issue. The courts of appeals also lack reliable procedures for determining appellate jurisdiction early in the course of an appeal.[228] Appeals normally involve a single point of decision: the panel's ultimate decision on the entire appeal.[229] So litigants often must go through the entirety of appellate litigation—researching, briefing, and arguing both jurisdiction and the merits—before getting a decision on jurisdiction.

Arguments for the liberal use of pendent appellate jurisdiction give short shrift to the procedures for implementing the practice. Recall Joan Steinman's argument for the discretionary use of pendent appellate jurisdiction.[230] Steinman says that courts would exercise their discretion while considering a variety of factors, such as the overlap in appealable and pendent issues, the amount of work required to resolve the pendent issue, whether the pendent issue has been sufficiently developed in the district court and the appellate briefing, appellate workloads, the progress of the district court litigation, and the burdens on the parties.[231] But when should the court of appeals consider these factors? Unless there is some procedure at the outset for the court to decide whether to exercise pendent appellate jurisdiction, there is a huge potential for wasted efforts. Indeed, this lack of procedures for implementing appellate jurisdiction exists any time there is uncertainty over appellate jurisdiction.

Despite their importance, the procedures that implement rules of appellate jurisdiction receive little attention in the literature. Some exceptions exist, such as Adam Steinman's criticism of the procedures for implementing the collateral-order doctrine and mandamus.[232] Pendent appellate jurisdiction—and municipal piggybacking in particular—show that procedures should be part of any framework for evaluating appellate-jurisdiction rules.

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228. In contexts like municipal piggybacking, in which appellate jurisdiction turns on the merits of the appeal, it is impossible to determine whether jurisdiction exists at the outset of an appeal.

229. Contrast this with district court proceedings. District court litigation involves multiple decision points, including the pleading stage, summary judgment, trial, and post-trial Rule 12 motions that encourage (and, in the case of personal jurisdiction, require) parties to raise jurisdictional issues early. *See* FED. R. CIV. P. 12(b). Those same motions give district courts the chance to notice a jurisdictional defect before much time is spent on the merits of the suit.

230. *See* Steinman, *Scope*, *supra* note 11, at 1482–86.

231. *See id.* at 1483–85.

232. *See* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1257, 1271–72 (2007).

Procedures are not the only often-overlooked aspect of appellate-jurisdiction rules. Equally important is how we define the types of orders to which a rule applies.[233] As Richard Heppner has explained, exceptions to the final-judgment rule apply to a particular category of order.[234] That category can be narrow (e.g., limited to one particular kind of order) or broad (e.g., applying to *all* district court decisions).[235] That category can also be clear (such as class-certification decisions under Rule 23(f)) or fuzzy (such as "final decisions" under 28 U.S.C. § 1291).[236] And categorization is an essential part of crafting—and evaluating—an appellate rule.[237] I have suggested, for example, that clear categories are appropriate for most (if not all) appellate rules.[238] If I'm correct, we should avoid or reform rules with fuzzy categories.[239]

The accessibility of appellate-jurisdiction rules also deserves some attention. The current rules are spread across a variety of statutes, rules, and judicial decisions. And the rules themselves are often complicated. The result is a mess—an intricate, occasionally inscrutable web of legal doctrine.[240] Even those steeped in the law of federal appellate jurisdiction face confusion and uncertainty.[241] Non-experts have it much tougher.[242] A more accessible body of law—one that could be navigated without becoming a specialist in interlocutory appeals—would be of great benefit to litigants and courts. So it's worth considering the accessibility of appellate-jurisdiction rules when evaluating them.

These are not the only considerations relevant to judging rules of appellate jurisdiction. There are also questions of who—Congress, rulemakers, or courts—should be crafting these rules. And other considerations likely exist. The point is merely that the current framework by which we evaluate rules of appellate jurisdiction is insufficient. Theoretical work on appellate jurisdiction is necessary to explore and articulate the criteria for judging appellate jurisdiction.

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233. *See* Richard L. Heppner, Jr., *Conceptualizing Appealability: Resisting the Supreme Court's Categorical Imperative*, 55 TULSA L. REV. 395, 406 (2020).

234. *See id.*

235. *See* Lammon, *Three Ideas*, *supra* note 45, at 647.

236. *See* Heppner, *supra* note 233, at 409–11, 420–21.

237. *See id.* at 406.

238. *See* Lammon, *Three Ideas*, *supra* note 45, at 648.

239. *See id.* (criticizing certified appeals under 28 U.S.C. § 1292(b) for having a fuzzy category).

240. *See* Lammon, *Finality*, *supra* note 12, at 1821–22 (collecting unflattering descriptions of the law of appellate jurisdiction).

241. *See* Cooper, *supra* note 218, at 157 ("Lawyers and judges who are expert in working with the system are able to identify the doctrinal rules and lines of argument, but often encounter elusive uncertainty in seeking clear answers to many problems.").

242. *See id.* ("Those who are less than expert are apt to go far astray.").

V. CONCLUSION

As I said at the beginning, qualified immunity is awful. The defense itself makes winning a civil-rights suit especially difficult. The special appellate procedures that accompany the defense ensure that any wins come at a high cost. Municipal piggybacking is only one example of the ways in which courts have expanded these appeals, making civil-rights litigation more complicated, time-consuming, and expensive. Should qualified immunity stick around in its current or an altered form, qualified-immunity appeals are in sore need of reform. That reform can come via the rulemaking process. And that reform could end the practice of municipal piggybacking.