

No. 17-550

---

---

**In the Supreme Court of the United States**

---

EDWARD WIERSZEWSKI,

*Petitioner,*

v.

ALAN THIBAUT,

*Respondent.*

---

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

---

---

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

---

---

DANIEL W. WEININGER  
EXCOLO LAW, PLLC  
*COUNSEL OF RECORD*  
26700 LAHSER ROAD, SUITE 401  
SOUTHFIELD, MI 48033  
(866) 939-2656  
WEININGERLAW@GMAIL.COM

*COUNSEL FOR RESPONDENT*

---

---

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit appropriately concluded that it lacked jurisdiction to entertain Petitioner's appeal from an order of the district court denying qualified immunity because of genuine and material factual disputes.

2. Whether Petitioner lacks standing to appeal the portion of the Sixth Circuit's decision dismissing his appeal on jurisdictional grounds.

3. Whether Petitioner raises compelling reasons for granting his petition for a writ of certiorari.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES .....	iv
COUNTER STATEMENT OF THE CASE.....	1
A. Background .....	1
1. The Traffic Stop .....	1
2. Disputed Facts/Facts Supporting Thibault .....	5
3. Reliability of the Field Sobriety Tests .....	7
4. Dashboard Recording System .....	9
5. The Arrest .....	9
B. District Court Proceedings .....	10
C. Sixth Circuit Proceedings .....	11
REASONS FOR DENYING THE PETITION .....	11
I. THE SIXTH CIRCUIT APPROPRIATELY CONCLUDED THAT IT LACKED JURISDICTION TO ENTERTAIN WIERSZEWSKI’S APPEAL.....	11
II. WIERSZEWSKI LACKS STANDING TO APPEAL THE PORTION OF THE SIXTH CIRCUIT’S DECISION DISMISSING HIS APPEAL ON JURISDICTIONAL GROUNDS.....	15
III. THERE ARE NO COMPELLING REASONS TO GRANT WIERSZEWSKI’S PETITION FOR A WRIT OF CERTIORARI.....	17
CONCLUSION.....	20

**TABLE OF CONTENTS – Continued**

Page

**APPENDIX TABLE OF CONTENTS**

Edward Wierszewski’s Sixth Circuit Principal Brief (October 12, 2016) .....	1a
Marty Bugbee’s Deposition Transcript (February 23, 2016) .....	54a
Edward Wierszewski’s Deposition Transcript (December 3, 2015) .....	128a
Alan Thibault’s Deposition Transcript (October 21, 2015) .....	192a

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Deposit Guar. Nat’l Bank v. Roper</i> , 445 U.S. 326 (1980) .....	15, 16
<i>District of Columbia v. Wesby</i> , 2018 U.S. LEXIS 760 (Jan. 22, 2018) .....	18
<i>Everson v. Leis</i> , 556 F.3d 484 (6th Cir. 2009) .....	17
<i>Gardenhire v. Schubert</i> , 205 F.3d 303 (6th Cir. 2000) .....	17
<i>Granite Rock Co. v. Int’l Bhd. of Teamsters</i> , 561 U.S. 287 (2010) .....	17
<i>Green v. Throckmorton</i> , 681 F.3d 853 (6th Cir. 2012) .....	18, 19
<i>Johnson v. Jones</i> , 515 U.S. 304 (1995) .....	passim
<i>Miller v. Sanilac County</i> , 606 F.3d 240 (6th Cir. 2010) .....	18, 19
<i>Ortiz v. Jordan</i> , 562 U.S. 180 (2011) .....	14, 15
<i>Parr v. United States</i> , 351 U.S. 513 (1956) .....	15
<i>Pedreira v. Sunrise Children’s Servs.</i> , 802 F.3d 865 (6th Cir. 2015) .....	15
<i>Plumhoff v. Rickard</i> , 134 S.Ct. 2012 (2014) .....	14

**TABLE OF AUTHORITIES—Continued**

	Page
<i>Reichle v. Howards</i> , 566 U.S. 658 (2012) .....	17
<i>Transamerica Ins. Co. v. South</i> , 125 F.3d 392 (7th Cir. 1997) .....	15
<i>United States v. Gonzales</i> , 344 F.3d 1036 (10th Cir. 2003) .....	15
<i>United States v. Van</i> , 931 F.2d 384 (6th Cir. 1991).....	16

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. IV .....	10, 13, 14, 17
-----------------------------	----------------

**STATUTES**

28 U.S.C. § 1291.....	15
Mich. Comp. Laws § 257.625.....	9

**COURT RULES**

Sup. Ct. R. 10 .....	17, 19
----------------------	--------

## COUNTER STATEMENT OF THE CASE

### A. Background

#### 1. The Traffic Stop

At around 2:00 A.M. on December 5, 2014, Officer Edward Wierszewski (“Wierszewski”) was on duty in his squad car when he noticed a semi tractor-trailer near the intersection of Moross Road and Mack Avenue in Grosse Pointe Farms, Michigan. (Pet.App.75). Wierszewski saw the truck’s front driver’s side tire “hit, go up and over and bounce off [a] median, while it was being operated in a straight line on [a] stretch of straight roadway.” (*Id.*). After following the truck in his squad car, Wierszewski observed that the truck had two equipment violations. (*See id.*). He then initiated a traffic stop with a fellow officer providing back-up. (*Id.* at 113-14). The dashboard video recording system in Wierszewski’s squad car captured both visual and audio recordings of the stop. (*Id.* at 73-74).

Alan Thibault (“Thibault”) was driving the truck as he made his way to a local restaurant for a food delivery. (Res.App.249a-250a). Thibault informed Wierszewski that he was attempting to make a left-hand turn when he “saw [a] split in the road and “jerked over a little bit” to avoid “oncoming traffic.” (Pet.App.87). As Thibault remained seated in the truck’s cab, Wierszewski noted that the driver’s side window was rolled down despite the cold weather, the truck’s radio was “extremely loud,” Thibault was “smoking/puffing on an unlit cigarette,” and his “face was flushed and red.” (*Id.* at 76). Wierszewski recalled that Thibault “appeared disoriented and [he] spoke with slow speech.” (*Id.*). He acknowledges, however, that Thibault did not

exhibit “slurred” speech. (Res.App.145a). When Wierszewski asked Thibault to exit the truck, he recounted that Thibault “tried to extinguish” the unlit cigarette. (Pet.App.76). Thibault also appeared to be “shaking, in spite of the fact that he just exited a warm semi-tractor cab.” (*See Id.* at 76-77) The following colloquy ensued:

Wierszewski: Why are you shaking so much?

Thibault: Because it’s chilly.

Wierszewski: Is it just chilly?

Thibault: Yes.

Wierszewski: But you’re in a truck. You’re in a vehicle with heat, right?

Thibault: Yes. I just stepped out.

(*Id.* at 88-89).

Wierszewski asked Thibault twice if he had recently consumed any alcohol or drugs. Thibault responded that he had not. (*Id.* at 89, 98). Wierszewski performed a brief pat-down search of Thibault that revealed nothing suspicious. (*Id.* at 89-90). Wierszewski repeatedly insisted that Thibault must be “on something” and searched the truck’s cab for evidence of intoxicants. (*Id.* at 95-98). He found no trace of alcohol, drugs, or any related paraphernalia. (*Id.*).

Wierszewski then directed Thibault to perform seven different field sobriety tests. Wierszewski testified that he is certified to conduct these tests and that he administered them in accordance with standardized procedures. (Res.App.149a-150a). Three of the tests—the Walk-and-Turn Test, the One-Leg Stand Test, and the Horizontal Gaze Nystagmus (“HGN”) Test—are



recommended and approved by the National Highway Traffic Safety Administration (“NHTSA”). (Pet.App.78). Wierszewski selected the other four tests—the Pick-A-Number Test, the Alphabet Test, the Finger Dexterity Test, and the 30-Second Test—based upon his field training experience. (*Id.* at 77-78; Res.App.149a-152a, 162a-163a).

Wierszewski concedes that Thibault passed the Pick-A-Number Test—where he correctly selected “20” as the number between 19 and 21—and the Finger Dexterity Test—where Thibault successfully touched all the fingertips on his right hand with his right thumb while counting out loud forwards and backwards. (Pet. App.77-78). As for the remaining five tests, Wierszewski maintains that Thibault failed them all by demonstrating clear signs of impairment.

During the Alphabet Test, for instance, Wierszewski instructed Thibault to recite the alphabet from the letter “D” through and including the letter “O.” Wierszewski attested that Thibault started at the letter “D,” immediately went backwards to the letter “A,” and then proceeded through the alphabet “past the letter O.” (*Id.*). During the 30-Second Test, Wierszewski instructed Thibault to close his eyes and reopen them after silently counting off thirty seconds. Thibault apparently failed this test because he “counted the passage of 30 seconds in his mind as 19 seconds.” (*Id.*).

Regarding the Walk-and-Turn Test, there are two “phases”—the “instruction” phase and the “walking” phase. (*Id.* at 78-79). The “instruction” phase “requires a subject to stand heel-to-toe with [his] arms at [his] sides, listening to and remembering the instructions.”

(*Id.*). The “walking” phase requires a subject to “take nine heel-to-toe steps on an imaginary straight line, turn around keeping the front or lead foot on the line and to turn by taking a series of small steps with the other foot, and return nine heel-to-toe steps down the line, counting each step out loud.” (*Id.* at 79). The subject must “keep his arms at his sides at all times [and] not stop walking until the test [is] completed.” (*Id.*). According to Wierszewski, Thibault exhibited the following “clues” of intoxication: (1) “extreme body rigidity throughout the instructional and walking phases,” (2) swaying, (3) using his arms to maintain his balance, and (4) “stopping on at least two occasions while walking.” (*Id.* at 80).

Wierszewski then administered the One-Leg Stand Test. Here, Wierszewski instructed Thibault to “raise either leg approximately six inches off the ground with that leg held straight out with the other leg straight as well.” (*Id.* at 81-82). He further directed Thibault to “maintain this foot elevation throughout the test” and “look at [his] elevated foot during the test” while counting “one thousand one, one thousand two, one thousand three, until instructed to stop.” (*Id.* at 81). This time Thibault “did not count as instructed,” he “could not maintain his elevated foot at a consistent height,” he “swayed while balancing,” he used his arms for balancing, and he “hopped [on] one occasion.” (*Id.* at 82).

Lastly, Wierszewski instructed Thibault to perform the HGN Test by focusing his eyes on a blue-colored light that Wierszewski moved from side to side opposite the bridge of Thibault’s nose. (*Id.* at 82-83). Thibault “demonstrated a lack of smooth pursuit” and nystag-

mus in both eyes, which led Wierszewski to conclude that he was intoxicated. (*Id.* at 83). Wierszewski followed the HGN Test with yet another Walk-and-Turn Test, where Thibault again used his arms to maintain his balance whenever “he began to sway” and he “demonstrated extremely rigid muscle tone and rigid movement.” (*Id.* at 81).

## 2. Disputed Facts/Facts Supporting Thibault

The following summary (reproduced from the district court’s amended opinion and order (Pet.App.90-92)) paints a more nuanced picture of the traffic stop and demonstrates that this case is littered with triable issues of fact.

WIERSZEWSKI’S OBSERVATIONS SUPPORTING HIS CONCLUSION THAT THIBAUT WAS INTOXICATED	CONTRARY/COMPETING EVIDENCE IN THE RECORD
Radio volume was unusually high	<ul style="list-style-type: none"> <li>• Thibault testified that the radio was “not that loud.” (Res.App.257a).</li> </ul>

<p>Thibault attempted to extinguish an unlit cigarette that was in his mouth</p>	<ul style="list-style-type: none"> <li>• Thibault denied that he “attempt[ed] to extinguish an unlit cigarette.” (Pet. App.181; Res.App.288a-289a).</li> <li>• The video recording of the stop does not depict Thibault attempting to extinguish an unlit cigarette.</li> </ul>
<p>Thibault appeared flushed and red in the face and was shaking when he exited his truck</p>	<ul style="list-style-type: none"> <li>• Thibault explained that he was shaking because he was not wearing a coat and “i[t] was cold out. It was really extremely cold outside.” (Res.App.267a).</li> <li>• Thibault informed Wierszewski that he was shaking because he was cold. (<i>See id.</i>; <i>see also</i> Pet.App. 88-89).</li> <li>• Wierszewski acknowledged that it was “very cold” at the time of the stop and that the cold “could” explain Thibault’s flushed face. (Res.App.146a).</li> </ul>
<p>Thibault seemed to be “disoriented” and “restless” and he spoke with “slow” speech</p>	<ul style="list-style-type: none"> <li>• The video and audio recording of the stop do not reveal any obviously slow speech or clear signs of disorientation.</li> </ul>

Thibault momentarily lost his balance during the Walk-and-Turn and One-Leg Stand Tests	<ul style="list-style-type: none"> <li>• The video depicts Thibault walking steadily over uneven terrain as he traveled from the cab of his truck to the front of Wierszewski's squad car.</li> </ul>
--	---

Notably, the parties never disputed that Wierszewski failed to detect any trace of alcohol on Thibault's breath and that his search of the truck's interior uncovered no other evidence of intoxicants. (Res.App. 11a). Even Wierszewski conceded that there are disputed factual issues regarding (1) whether he properly administered the HGN Test, (2) whether the results of that test may serve "as a reliable indicator of intoxication," and (3) whether Thibault was playing his radio at an unusually high level when Wierszewski initially approached the truck's cab. (*Id.* at 41a).

### 3. Reliability of the Field Sobriety Tests

Additionally, the opinion of Thibault's expert witness, former Michigan State Trooper Marty Bugbee, raised significant factual questions about the reliability of Wierszewski's administration and interpretation of the field sobriety tests. With respect to the 30-Second Test, Bugbee opined that Wierszewski improperly directed Thibault to silently count the passage of time in his head rather than audibly. (*Id.* at 109a). Bugbee further indicated that Wierszewski provided Thibault with confusing instructions during the Alphabet Test. (*Id.* at 108a). He noted that Wierszewski mistakenly combined the HGN test with, what is commonly known as, the Lack-of-Convergence Test. Taken together, these tests increase the risk of eye fatigue and can con-

tribute to false positive results. (*Id.* at 111a). And Bugbee testified that Wierszewski neglected to fully observe Thibault during the One-Leg Stand Test and that he should not have repeatedly instructed Thibault to raise his leg to higher elevation levels. (*Id.* at 104a).

As for Wierszewski's interpretation of these test results, Bugbee opined that Thibault actually "passed" the Alphabet and One-Leg Stand Tests. Bugbee stated that "although [Thibault] did the [Alphabet Test] improperly, he did it with clear speech. He wasn't confused. Although he did it wrong . . . [t]he letters were said in sequence . . . [and] [h]e maintained a steady position of balance throughout the test." (*Id.* at 108a). Bugbee also found that Thibault appropriately performed the One-Leg Stand because he followed Wierszewski's instructions and did not exhibit "slurred speech as he was speaking and counting," and "complete[d] the test without putting his foot to the ground." (*Id.* at 104a).

The reliability of the Walk-and-Turn Test and the One-Leg Stand Test tests were further eroded by Thibault's own testimony that he suffers from medical conditions affecting his balance and that he specifically informed Wierszewski of his past balancing difficulties during the stop. (*Id.* at 266a, 286a-287a).<sup>1</sup>

---

<sup>1</sup> The district court accurately noted that while "[t]he transcript of the traffic stop in the record does not contain any evidence that confirms Thibault's testimony that he informed Wierszewski that he had a problem with his balance . . . there are numerous parts of the transcript in which Thibault's responses are transcribed as 'inaudible.'" (Pet.App.44, n.5).

#### 4. Dashboard Recording System

The dashboard video recording taken from Wierszewski's squad car also does not fully depict what transpired during the stop. The recording fails to show (1) the interaction between Wierszewski and Thibault where, according to Wierszewski, Thibault attempted to extinguish the unlit cigarette that was in his mouth, (2) the halting movement of Thibault's eyes during the HGN Test, or 3) the unsteadiness of Thibault's feet as he performed the Walk-and-Turn Test. And the audio recording is inaudible at several junctures where Thibault responds to Wierszewski's inquiries. *See also, supra*, n.1.

#### 5. The Arrest

Based upon what Wierszewski characterized as Thibault's "erratic" driving, his personal interview with Thibault, and the results of the field sobriety tests, Wierszewski arrested Thibault for operating a vehicle while intoxicated. *See Mich. Comp. Laws* § 257.625.

Wierszewski transported Thibault to the Grosse Pointe Farms police station where Thibault underwent a breathalyzer test. The test did not detect the presence of any alcohol. (Res.App.168a). Later blood tests conducted by the Michigan State Police and Thibault's employer also came back negative for a variety of drugs.<sup>2</sup>

---

<sup>2</sup> Thibault consented to have his blood drawn and later analyzed by the Michigan State Police laboratory. Those tests eventually yielded negative results for alcohol, amphetamines, opiates, cocaine, and barbiturates. Tests conducted by Thibault's employer also came back negative for alcohol, marijuana, cocaine, amphetamines, opiates, and PCP.

(*Id.* at 181a-187a). On January 28, 2015, the state district court dismissed the charge against Thibault.

## **B. District Court Proceedings**

Thibault commenced a section 1983 action against Wierszewski in federal district court on April 14, 2015. (Dist. Ct. Doc. 1). The complaint alleged causes of action for unlawful arrest and malicious prosecution. Wierszewski filed a timely answer asserting various affirmative defenses, including qualified immunity. (Dist. Ct. Doc. 4).

Wierszewski eventually moved for summary judgment, arguing that he did not violate Thibault's rights under the Fourth Amendment to the United States Constitution and, alternatively, that he is entitled to qualified immunity. The Court heard oral argument on the motion on June 6, 2016.

On June 24, 2016, the district court issued an amended opinion and order granting the portion of Wierszewski's motion seeking summary judgment on the malicious prosecution claim and denying the portion of the motion seeking summary judgment on the unlawful arrest claim. (Pet.App.33-67). With respect to the unlawful arrest claim, the district court found that Wierszewski was not entitled to summary judgment on his qualified immunity defense due to (1) "the important factual disputes concerning the basis for the arrest" and (2) "if a jury resolved those disputes in Thibault's favor, it could find that Wierszewski lacked a reasonable basis to believe that the arrest was lawful." (*Id.* at 49).



### C. Sixth Circuit Proceedings

On June 9, 2017, a split three-judge panel of the Sixth Circuit affirmed the district court's amended opinion and order. The majority concluded that the district court appropriately denied qualified immunity to Wierszewski because of the factual disputes underlying his probable cause determination. (*Id.* at 30). In light of this ruling, the panel majority dismissed the appeal for lack of jurisdiction and remanded the case to the district court for further proceedings. (*Id.*). Judge Sutton dissented on the sole ground that the Sixth Circuit should have retained jurisdiction over the appeal. (*Id.* at 31-32).

On July 13, 2017, the Sixth Circuit denied Wierszewski's combined petition for panel rehearing and en banc review. (*Id.* at 68-69). Only Judge Sutton dissented for the reasons stated in his prior opinion. (*Id.* at 69). Wierszewski now petitions this Court for a writ of certiorari.

## REASONS FOR DENYING THE PETITION

### I. THE SIXTH CIRCUIT APPROPRIATELY CONCLUDED THAT IT LACKED JURISDICTION TO ENTERTAIN WIERSZEWSKI'S APPEAL

The Sixth Circuit correctly relied on *Johnson v. Jones*, 515 U.S. 304 (1995) to dismiss Wierszewski's appeal on jurisdictional grounds. (Pet.App.8-9). In *Johnson*, police officers discovered the plaintiff lying in the street after he suffered a diabetic seizure. Believing he was intoxicated, the officers placed him under arrest and transported him to the police station.

He later regained consciousness in the hospital “with several broken ribs.” *Id.* at 307.

The plaintiff commenced a section 1983 claim against five named police officers and several unnamed defendants, alleging that they used excessive force when arresting him and that they subsequently beat him at the police station. *Id.* Three of the officers moved for summary judgment asserting that the plaintiff marshaled no admissible evidence that they either assaulted him or failed to intervene while the other officers attacked him. The plaintiff responded with excerpts from his deposition, where he stated that the “officers (though he did not name them) had used excessive force when arresting him and later, in the booking room at the station house.” *Id.* He also highlighted the officers’ own depositions, “in which they admitted they were present at the arrest and in or near the booking room when [the plaintiff] was there.” *Id.* at 307-08.

When the district court denied their summary judgment motion, the officers sought interlocutory review in the Seventh Circuit Court of Appeals. On appeal, the officers reiterated their contention that the plaintiff failed to adduce any admissible proof of their direct or indirect involvement in the alleged assault. *Id.* at 308. But the Seventh Circuit declined to address the officers’ position and dismissed the appeal. The appellate panel opined that it lacked jurisdiction to even consider whether the district court improperly determined that the plaintiff raised genuine factual questions concerning the officers’ participation in the assault.

This Court granted certiorari and affirmed. The Court held that “a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court’s summary judgment order insofar as that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for trial.” *Id.* at 319-20.

Wierszewski asked the Sixth Circuit (and now asks this Court) to examine these same factual questions. Consider Wierszewski’s principal brief below. With the exception of three pages (Res.App.50a-52a), it is entirely dedicated to refuting the district court’s evaluation of the factual record. And arguments such as “Controlling Law Mandates That Plaintiff’s Claims Of Unlawful Arrest Be Subject To Summary Judgment Because The Incontrovertible Record Demonstrates The Defendant Police Officer Had Probable Cause To Arrest Plaintiff For Driving While Under The Influence of Intoxicants” and “As A Matter Of Incontrovertible Fact, Probable Cause Existed For Thibault’s Arrest For Driving While Intoxicated” confirm that Wierszewski almost exclusively challenged the district court’s opinion that the record contains significant factual disparities. (*Id.* at 30a, 38a) (emphasis added).

Even in his petition for a writ of certiorari, Wierszewski contends that:

[had] the District Court correctly determined that material questions of fact exist with respect to Wierszewski’s alleged violation of the Fourth Amendment, the Sixth Circuit was nonetheless obligated to exercise appellate review over discrete legal issues raised by Wierszewski regarding the District Court’s improper assessment of: (1) the dash cam

video; (2) the lack of evidence of alcohol use; (3) admissions on behalf Thibault regarding his unusual behavior; (4) the uncontested affidavits of three other police officers at the scene of the arrest confirming the existence of probable cause; (5) the blood test results produced after the arrest; and, (6) expert opinions regarding the reasonableness of Wierszewski's probable cause determination.

(Pet.18) (emphasis in original). Contrary to Wierszewski's view, the district court's evaluation of the above factors does not raise "neat abstract issues of law," but rather the genuine factual issues *Johnson* categorically precludes from federal appellate review. *Johnson*, 515 U.S. at 317.

Wierszewski's reliance on *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014) is equally unavailing. (Pet.31). Unlike here, the officers in *Plumhoff* strictly raised the following legal issues—(1) whether, construing the facts in the plaintiff's favor, their conduct violated the Fourth Amendment, and (2) whether their conduct ran afoul of clearly established Fourth Amendment jurisprudence—issues "quite different from [the] purely factual issues" raised in *Johnson*. *Id.* at 2019; *see also Ortiz v. Jordan*, 562 U.S. 180, 189 (2011) (interlocutory appeal "is not available . . . when the district court determines that factual issues genuinely in dispute preclude summary adjudication.").

Consequently, the Sixth Circuit properly declined to exercise jurisdiction over Wierszewski's appeal since the district court's amended opinion and order is not an appealable "final decision" under 28 U.S.C. § 1291. *See e.g., Ortiz*, 562 U.S. at 190 (the denial of

qualified immunity is appropriate for interlocutory appeal in cases that “typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law.”); *Johnson*, 515 U.S. at 313 (“the District Court’s determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioners’ involvement in the alleged beating of respondent was not a ‘final decision’ within the meaning of [28 U.S.C. § 1291].”).

## II. WIERSZEWSKI LACKS STANDING TO APPEAL THE PORTION OF THE SIXTH CIRCUIT’S DECISION DISMISSING HIS APPEAL ON JURISDICTIONAL GROUNDS

Assuming the Sixth Circuit improperly dismissed Wierszewski’s appeal for want of jurisdiction, he still lacks standing to appeal that determination in this Court.

The maxim that “[o]nly one injured by the judgment sought to be reviewed can appeal” is a fundamental tenet of federal appellate jurisdiction. *Parr v. United States*, 351 U.S. 513, 516 (1956). “A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 333 (1980); see also *Pedreira v. Sunrise Children’s Servs.*, 802 F.3d 865, 869 (6th Cir. 2015); *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997) (“Standing to appeal is recognized if the appellant can show an adverse effect of the judgment.”); *United States v. Gonzales*, 344 F.3d 1036, 1039 (10th Cir. 2003) (former prosecutor lacked standing to appeal because the district court’s order censuring his

conduct did not injure him “in the legal sense”). “Standing may be a bar to an appeal even though a litigant had standing before the district court.” *United States v. Van*, 931 F.2d 384, 387 (6th Cir. 1991); *see also Roper*, 445 U.S. at 333-34 (appellate standing “does not have its source in the jurisdictional limitations of Art. III.”).

Here, Wierszewski is not aggrieved by the Sixth Circuit’s dismissal of his appeal for lack of jurisdiction because the panel majority nevertheless rendered a decision on the merits. Among other things, the Sixth Circuit considered (1) Wierszewski’s personal observations of Thibault’s person and demeanor; (2) Thibault’s performance of the sobriety tests Wierszewski administered; and (3) other extraneous factors impacting Thibault’s performance, *i.e.*, weather and terrain. Viewing this evidence in Thibault’s favor (including the video of the traffic stop and Thibault’s arrest), the Sixth Circuit concluded that:

the video of the traffic stop and the field sobriety tests, Thibault’s testimony, and the testimony of Thibault’s expert create genuine disputes of material fact that call into question both the validity of Wierszewski’s conclusions, his credibility, and the legitimacy of his decision to arrest Thibault.

(Pet.App.27).

Accordingly, Wierszewski is not aggrieved by the Sixth Circuit’s dismissal for lack of jurisdiction since the panel majority, in any event, reached the merits of his appeal.

### III. THERE ARE NO COMPELLING REASONS TO GRANT WIERSZEWSKI'S PETITION FOR A WRIT OF CERTIORARI

The hallmark of any successful petition for writ of certiorari is whether it raises legal issues that are sufficiently “compelling” to justify Supreme Court review. Sup. Ct. Rule 10. The Court is more likely to grant certiorari where the decision of a federal appellate court (1) conflicts with the decision of another federal appellate tribunal “on the same important matter,” (2) decides an “important question of federal law” that the Supreme Court should settle, or (3) decides and “an important federal question” in a manner that conflicts with Supreme Court precedent. Sup. Ct. Rule 10(a), (c). Wierszewski’s petition satisfies none of these criteria.

In a last-ditch effort, Wierszewski struggles to frame the question presented to this Court as whether the Sixth Circuit wrongly decided that Wierszewski violated Thibault’s clearly established constitutional “right to be subject only to arrest upon probable cause.” *Everson v. Leis*, 556 F.3d 484, 500 (6th Cir. 2009); *see also Gardenhire v. Schubert*, 205 F.3d 303, 313 (6th Cir. 2000). As discussed above, Wierszewski largely ignored this issue at the Sixth Circuit and it is, therefore, waived. *See Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (contention deemed waived after party “did not raise th[e] argument in the Court of Appeals.”).

Even still, Wierszewski’s argument lacks merit. Assuming court of appeals’ precedent carries sufficient weight as “a dispositive source of clearly established law,” *Reichle v. Howards*, 566 U.S. 658, 665 (2012), Sixth Circuit caselaw provided Wierszewski with ample notice that his conduct violated Thibault’s Fourth

Amendment rights.<sup>3</sup> Within the qualified immunity context, a growing consensus of Sixth Circuit authority addresses the requisite probable cause to support an intoxicant-related traffic arrest. As far back as *Miller v. Sanilac County*, 606 F.3d 240 (6th Cir. 2010), and more recently in *Green v. Throckmorton*, 681 F.3d 853 (6th Cir. 2012), the Sixth Circuit confronted substantially similar circumstances to Thibault’s arrest. And the Sixth Circuit denied qualified immunity in each of those cases after deciding a jury could reasonably determine that the arresting officers lacked probable cause.

For example, the Sixth Circuit ruled in *Miller* that a jury could reasonably conclude the arresting officer lacked sufficient probable cause since the plaintiff’s 0.00% blood alcohol level could undermine the officer’s observations that the plaintiff “smelled of alcohol and failed the field sobriety tests.” *Miller*, 606 F.3d at 248-250.

Likewise, in *Green*, the Sixth Circuit found that the video and audio recording of the traffic stop, along with the field sobriety tests, did not provide the arresting officer with sufficient probable cause to conclude the plaintiff was driving while intoxicated. The Sixth Circuit held that a reasonable jury could infer that the plaintiff did not show clear signs of intoxication during the field sobriety tests and that her negative urine test results “alone” could have undermined the credibility of the officer’s observation that

---

<sup>3</sup> Most recently, in *District of Columbia v. Wesby*, No. 15-1485, 2018 U.S. LEXIS 760, at \*26 n.8 (Jan. 22, 2018), the Court declined to express its view about “what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.”



the plaintiff's pupils were abnormally constricted. *Id.* at 863.

But neither *Miller* nor *Green* held that the arresting officer was entitled to qualified immunity because the plaintiff's "right to be subject only to arrest upon probable cause," under those case-specific circumstances, was not clearly established at the time of the arrest. And Wierszewski's contention that *Miller* and *Green* are limited to alcohol-related traffic arrests is unpersuasive because the sobriety tests employed in those cases—like the ones Wierszewski administered to Thibault—evaluate bodily impairment irrespective of the illicit substance the driver is suspected of using.

At best, Wierszewski's petition poses a straightforward question—whether the district court, and the Sixth Circuit, correctly determined that a jury could reasonably conclude Wierszewski lacked probable cause to arrest Thibault. That issue alone, however, is not "compelling" enough to warrant certiorari. Sup. Ct. Rule 10.

**CONCLUSION**

For the above reasons, Thibault respectfully requests that the Court deny Wierszewski's petition for a writ of certiorari.

Respectfully submitted,

DANIEL W. WEININGER  
*COUNSEL OF RECORD*  
EXCOLO LAW, PLLC  
26700 LAHSER ROAD, SUITE 401  
SOUTHFIELD, MI 48033  
(866) 939-2656  
WEININGERLAW@GMAIL.COM

*COUNSEL FOR RESPONDENT*

FEBRUARY 5, 2018