Nos. 17-721, 17-749, 17-788

In the

Supreme Court of the United States

JAMES GAUGER, DR. LOWELL T. JOHNSON, and DR. RAYMOND RAWSON

Petitioners,

v.

ROBERT LEE STINSON.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ROBERT LEE STINSON IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should expand appellate jurisdiction under the collateral order doctrine, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and overrule *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Johnson v. Jones*, 515 U.S. 304 (1995), which held that appellate jurisdiction in qualified immunity appeals is confined to purely legal questions, and allow for appellate review of the factual inferences that a district court relies upon in deciding summary judgment.

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STATEMENT OF THE CASE

The Wrongful Conviction of Robert Lee Stinson

Robert Lee Stinson spent 23 years imprisoned for a murder he did not commit. App. 1. On November 3, 1984, the body of Ione Cychosz was found raped and murdered with human bite marks left on her skin. App. 3. No eyewitness saw the crime and no useable fingerprints existed. App. 1. The only evidence offered to connect Stinson to the crime was bite mark evidence fabricated by detective James Gauger and two forensic dentists, Drs. Lowell Johnson and Raymond Rawson, who worked with him.

Stinson maintained his innocence throughout the criminal process. In 2008, the Wisconsin Innocence Project reinvestigated Stinson's case and a panel of four forensic odontologists concluded that it would have been impossible for Stinson to have made the bite marks found on the victim given the differences between Stinson's dentition and those bite marks. App. 92. In addition, DNA from blood found on Ms. Cychosz's clothing was tested, revealing an unknown male profile, which was not Stinson. App. 9. That unknown profile was later linked to the actual perpetrator of the crime, Moses Price, who confessed and was properly convicted. *Id*.

Prior to his wrongful conviction, Stinson had never stepped foot inside a prison, and he had not been convicted of anything other than a

misdemeanor for shoplifting hair gel as a juvenile. Although he will never regain the two decades–from ages 23 to 46—that he lost, Stinson has worked hard since his exoneration to obtain an Associate's Degree and make up for lost time with his family.

Petitioners Fabricated Evidence to Connect Stinson to the Crime

Gauger and his partner, Thomas Jackelen, investigated the Cychosz murder. They knew who Stinson was and did not like him. Gauger had previously tried, unsuccessfully, to frame Stinson for the murder of a man named Ricky Johnson, App. 4-5, but his frame-up fell apart because the only evidence Gauger had inculpating Stinson in that crime was a coerced and obviously false witness statements concocted by Gauger. App. 69. The falsity of that statement became clear, and Stinson was never charged with the Johnson homicide. Gauger has admitted, however, that he believed Stinson got away with murder, and that he worked in the Cychosz homicide investigation to make sure that did not happen again. App. 4-5.

After being assigned to the Cychosz homicide, but before they ever met with Stinson, Gauger and Jackelen met with one of the dentists, Dr. Johnson, who showed them a sketch of the dentition of the suspect, which he made based on the bite marks. App. 3.[1] The sketch showed a

[1] Johnson's and Rawson's briefs in the Seventh Circuit omitted the fact of this meeting entirely despite that it was

perpetrator who was missing a front tooth. App. 3, 72-73 n. 6. Neither the fact nor substance of this meeting was ever disclosed to Stinson. App. 3, 72-73 & n. 6.[2]

Gauger and Jackelen later spoke to Stinson as part of their neighborhood canvas. App. 3-4. After making Stinson laugh so that they could see Stinson was missing a front tooth, Jackelen told Gauger "we have him." App. 4. Gauger concluded

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central to district court's opinion and the case. App. 18-19. Petitioner Gauger and Johnson now admit that this meeting occurred, Gauger Pet. at 3, Johnson Pet. at 3-4, and Gauger accepts that Johnson provided them a detailed sketch during the meeting. Gauger Pet. at 3. But, Johnson still ignores the district court's factual assumption that Johnson showed a detailed sketch to Gauger at the pre-interview meeting and Rawson's petition still ignores that this meeting ever occurred. Rawson Pet. at 3-4.

[2] In their briefs, the Petitioners assert that Johnson's sketch of Stinson's dentition was in the Milwaukee Police Department file and disclosed to the prosecution, but it was not. The sketch in the file is by a police employee, not Johnson. To be clear, Johnson made his own sketch of the assailant's dentition but that sketch was suppressed by the Petitioners at the John Doe hearing and has never been produced. App. 3, 72-73 n. 6.

As to the police sketch, Johnson worked with the police sketch artists, who "made a sketch from my sketch and visited the office and asked me if this was consistent with what I had in mind." App. 5-6. This sketch, like Johnson's own sketch, which it was based off of, did not match Stinson's dentition, but Johnson dismissed it alternately, as not his own, based "off of memory" and from "preliminary opinions." App. 77.

that they had found their man—Stinson was missing a front tooth. App. *id*. Gauger's conclusion was incorrect. As the district court recognized, dentist Johnson's initial sketch conflicted with Stinson's dentition in several material ways: the suspect was missing a tooth (the upper right lateral incisor) that Stinson was not missing (and vice versa); the suspect had a "twisted tooth to the side of the missing tooth," which Stinson did not have; and the suspect had a broken lower tooth where Stinson's tooth was intact. App. 72-73 n. 6.

After their canvas, Gauger and Jackelen met with Johnson again. App. 5. Together they amended Johnson's findings about the suspect's dentition to falsely match Stinson. This fabrication was significant: it turned the exculpatory fact of Mr. Stinson's dentition into false evidence of guilt. *Id*.

There is no dispute that the initial meeting among Gauger, Jackelen and Johnson was concealed from the prosecution and defense; Gauger admits that he never disclosed the existence of this meeting until he wrote his memoir, years after retiring the Milwaukee Police Department and decades after Stinson's wrongful conviction. The district court correctly recognized that Petitioners' concealment of their first meeting, the differences between their initial description of the suspect's dentition and Stinson, their later fabricated description of the bitemarks as matching Stinson, and the inference that Johnson changed his findings only after Gauger and Jackelen settled

on Stinson would support a jury finding that Petitioners conspired to violate Stinson's right to due process. App. 75, 108-113.

After Gauger and Jackelen identified Stinson during their canvas, Assistant District Attorney Dan Blinka convened a "John Doe" hearing so that he could subpoena Stinson to court and Johnson could evaluate his dentition. App. 78-79. At the hearing, Johnson and Gauger suppressed Johnson's initial sketch showing that the suspect's dentition did not match Stinson. As a result, Johnson, examined Stinson's teeth for only 15 to 20 seconds, and was able to testify unimpeded that it was "remarkable" how closely Stinson's teeth matched his sketch, even though that was untrue. App. 6.

Following the John Doe hearing, Johnson went to what an expert has categorized as "extreme efforts" to make it falsely appear as if Stinson's dentition fit the bite marks found on the victim. App. 95. This included: manipulating the dental overlays; distorting the orientation of the bites; and asserting that certain of Stinson's teeth imprinted on the victim's body when to do so was either physically impossible or directly contradicted by the actual bite marks on Ms. Cychosz's body. App. 93-95. Finally, Johnson eliminated other suspects without conducting a workup of their dentitions based solely on photographs of their mouths. Doing so had no basis in science and was contrary to Johnson's practice and basic standards of forensic odontology. App. 5, 76.

Before approving charges against Stinson, Blinka wanted a second opinion. App. 7. Johnson steered Blinka to Rawson, who was a friend and colleague in Las Vegas. Indeed, at Johnson's suggestion, Blinka hired Rawson to provide a second opinion in the Cychosz case. App. 82-83. Johnson made the initial contact with Rawson about the case, and then Gauger and Jackelen flew the bite mark evidence to Rawson. App. 7. In an "extremely short time" after coming to in Gauger's hotel room, Rawson "took a look at the x-rays and the molds, and said that was good enough for him and that he concurred with [Johnson]." *Id.* All trained odontologists, including Rawson, know that an accurate conclusion could not be reached in such a short amount of time. App. 101. Both the fact that Rawson's review was cursory and his quick agreement to testify were never disclosed to Stinson. Based on these facts, the district court concluded that there was sufficient evidence for a jury to find that Rawson participated in the conspiracy to frame Stinson. App. 101, 115.

Prior to Stinson's criminal trial, both Johnson and Rawson created false expert reports memorializing their fabricated findings. App. 8. Johnson and Rawson testified against Stinson at his criminal trial. *Id.* The only evidence used to convict Stinson was Petitioners' false dental evidence. App. 1-2, 8-9.

Proceedings Below

Petitioners moved for summary judgment, asserting qualified immunity and testimonial immunity. App. 2, 10. The district court found sufficient evidence for Stinson to proceed to trial on his claims that the Defendants fabricated false evidence and suppressed material evidence, in violation of due process. App. 108-119. A panel of the Seventh Circuit reversed, concluding that there were no factual disputes in the record that would require a trial, and ordering the district court to enter judgment against Stinson on his constitutional claims. App. 64.

The Seventh Circuit granted rehearing *en banc* and ruled that under *Johnson v. Jones*, 515 U.S. 304 (1995), it lacked jurisdiction in a collateral-order appeal to consider Petitioners' factual challenges to the district court's conclusion that the record presented material disputes of fact for trial. App. 2. The court observed that Petitioners were not asking the Court to decide the appeal based on Stinson's version of the facts, but instead were disputing and ignoring key facts that the district court had relied upon to deny summary judgment. App. 17-18.

Finally, the Seventh Circuit concluded that it had jurisdiction to consider the purely legal question of whether Johnson and Rawson were entitled to absolute immunity for their testimony at Stinson's trial. Consistent with this Court's decisions in *Buckley v. Fitzsimmons*, 509 U.S. 259,

273 (1993), and *Rehberg v. Paulk*, 566 U.S. 356, 370 n.1 (2012), the lower court concluded that Johnson and Rawson were immune for their testimony, but not for their suppression and fabrication of evidence while the murder was being investigated. App. 25, 102-106.

SUMMARY OF ARGUMENT

The consolidated petitions for *certiorari* should be denied. First, the petitions advocate for an expansion of appellate court jurisdiction that contradicts: (1) this Court's decisions in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Johnson v. Jones*, 515 U.S. 304 (1995), which limit qualified-immunity appeals to pure questions of law; (2) the Court's repeated admonition that the collateral-order doctrine "must never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered," *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)); and (3) the rule set out in *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009), that any expansion of the appellate jurisdiction must occur through rulemaking rather than common-law decision. Petitioners' proposed distinction between a finding of fact and a finding of inferences to be drawn from facts is not workable in practice and requires exhaustive review of the evidence in a manner that is not separate from or collateral to the merits of a case. Indeed, to expand appellate jurisdiction to provide review of the inferences drawn from facts during interlocutory appeals would permit appellate courts in the middle of a case to conduct

plenary review of district court determinations about the sufficiency of the evidence in the summary judgment record. Neither Congress nor this Court's decisions confer such jurisdiction.

Second, the Petitioners allege that *certiorari* is necessary to remedy purported "circuit chaos" over competing interpretations of *Johnson v. Jones*, 515 U.S. 304 (1995). But no such chaos or confusion exists. *Johnson* limited appellate jurisdiction in qualified-immunity appeals to purely legal questions, and it made clear that appellate courts lack jurisdiction to second guess a district court's finding that there is sufficient evidence in the summary judgment record for a trial. 515 U.S. at 313. *Johnson* is this Court's leading case on the scope of appellate jurisdiction, and the Court's later decisions in *Scott v. Harris,* 550 U.S. 372 (2007), and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), confirm *Johnson*'s holding. No court of appeals has read these cases as expanding the basic principles of appellate jurisdiction established in *Johnson*.

In order to avoid this clear authority, the Petitioners attempt to re-cast their factual challenges to the district court's decision by arguing that the trial court made findings that are "legally impermissible." *See, e.g.*, Gauger Pet. at 20-21. But calling a factual inference "legally impermissible" does not transform that fundamentally factual question into a purely legal one. A district court's conclusions about facts in the record and the reasonable inferences a jury might draw from those facts fall on the fact side of "the law-fact divide."

Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009) (discussing *Johnson's* holding that only legal questions satisfy as "final" for purposes of the collateral order doctrine).

Third, the jurisdictional rule that the Petitioners' propose is completely unworkable. They suggest that while courts could not exercise jurisdiction to consider appeals challenging the sufficiency of evidence in the summary judgment record, they could exercise jurisdiction when the appeal challenged the district court's inferences drawn from evidence (and invent the new term "legally impermissible" to do so). But inferences drawn from facts are factual determinations that are not distinct from other types of factual determinations. This Court has long held that circumstantial evidence—evidence that gives rise to inferences—can be used to prove legal claims, including the conspiracy claims at issue here. *Thompson v. Bowie*, 71 U.S. 463, 473 (1866). It is therefore impossible to craft a jurisdictional rule that confers jurisdiction over disputes about inferences but not over factual disputes. And, any such rule would require appellate courts to delve into the disputed record and consider all of the evidence as a whole.

Fourth, the Court should deny the petitions because they are fact-bound challenges to a district court opinion that present a poor case in which to consider the limits of appellate jurisdiction.

For all of the foregoing reasons, the Court should deny *certiorari*.

ARGUMENT

A. This Court's Cases Establish That the Qualified-Immunity Appeals Falling Within the Collateral Order Doctrine Are Limited to Purely Legal Questions

Petitioners ask this Court to grant *certiorari* to overrule existing, long-established precedent. Worse yet, their proposed alternative jurisdictional rule—which would allow for interlocutory review of the sufficiency of factual inferences—would turn the collateral order doctrine on its head and require this court to expand appellate jurisdiction outside of the rulemaking process.

The petitions fall within the "small class" of collateral order appeals. *Cohen v. Beneficial Indus. Loan Corp.*, 337, U.S. 541, 545-46 (1949). *Mitchell* extended *Cohen*'s collateral order doctrine to denials of qualified immunity. 472 U.S. at 530. The following term, the Court made clear that successive qualified immunity appeals are permissible, but only to the extent that the denial "turns on an 'issue of law.'" *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (quoting in part *Mitchell*, 472 U.S. at 530). In *Mohawk Industries*, the Court's most recent decision on the scope of collateral order appeals, this Court repeated its "healthy respect for the virtues of the final-judgment rule" explaining

that "[p]ermitting piecemeal, prejudgment appeals, we have recognized, undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-07 (2009) (quoting in part *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981)); *see also Richardson–Merrell Inc. v. Koller,* 472 U.S. 424, 436 (1985) ("[T]he district judge can better exercise [his or her] responsibility [to police the prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings"). Further, "[i]n applying *Cohen*'s collateral order doctrine, [the Court has] stressed that it must never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." 558 U.S. at 106 (quoting in part *Digital Equipment Corp.*, 511 U.S. at 868 (citation omitted)).

That legal backdrop is important here because Petitioners propose a radical expansion of the scope of appellate court jurisdiction for qualified immunity appeals. Petitioners' proposal would violate *Cohen* and *Mohawk Industries* and overturn this Court's decisions in *Mitchell* and *Johnson*, which properly balanced the protection qualified immunity affords public officials to be protected from both liability and "standing trial", *Johnson*, 515 U.S. at 312, with the final order requirement of 28 U.S.C. § 1921.

This Court gave careful consideration to the competing principles of immunity and the final order rule in both *Mitchell* and *Johnson* and struck the appropriate balance by limiting interlocutory appeals to legal issues and prohibiting review of the sufficiency of the evidence because such appeals are not separate from or collateral to the merits. *Mitchell* held that a denial of qualified immunity satisfied *Cohen's* "collateral order" requirements to justify immediate appeal where "(1) the defendant was a public official asserting a defense of 'qualified immunity,'" and (2) the issue appealed concerned whether a given set of facts showed a violation of 'clearly established' law as opposed to which facts the parties might be able to prove at trial. 515 U.S. at 311 (citing *Mitchell,* 472 U.S. at 528). *Mitchell* explicitly limited its holding to appeals raising "the purely legal issue of what law was 'clearly established.'" *Id.* at 313. *Mitchell* explained that qualified immunity appeals are separate from the merits because "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Id.* (quoting, *Mitchell*, 472 U.S. at 528).

After *Mitchell*, the circuits split on whether appellate courts had jurisdiction over qualified immunity appeals that challenged the sufficiency of the evidence. 515 U.S. 308-09. *Johnson* unambiguously and unanimously settled that question, holding that appellate courts lacked jurisdiction to review a district court's

determination that sufficient evidence exists to proceed to trial. *Id.* at 319-320.

Johnson again carefully considered the competing underlying principles of the final order doctrine and immunity for public officials in reaching its holding that no jurisdiction exists for qualified immunity appeals that seek review of a district court's sufficiency of the evidence determination. 515 U.S. at 319-20. The Court provided three reasons for its ruling. First, *Mitchell* had limited its holding to extend the collateral order doctrine to qualified immunity appeals to only purely legal questions. *Id.* at 313. Second, *Cohen*'s immediate appealability requirement necessitates that the issue be separate from the merits, and *Mitchell* "rested upon the view that 'a claim of immunity is conceptually distinct from the merits of the plaintiff's claim.'" *Id.* at 514 (quoting in part, *Mitchell*, 472 U.S. at 527). By contrast, where:

> a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such "separate" question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.

515 U.S. at 314. *Johnson* correctly observed that to take what the petitioners described as a "small

step" to expand jurisdiction over sufficiency of the evidence appeals, would be not be small. Instead, such an expansion would "do more than relax the separability requirement—it would in many cases simply abandon it." 515 U.S. 315. Third, *Johnson* balanced the competing considerations of "avoiding the cost and expense of piecemeal review on the one and hand and the danger of denying justice by delay on the other," and concluded that "immunity appeals interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law." 515 U.S. at 318.

The term after it was decided, *Behrens* reaffirmed *Johnson* :

> *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*. *Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an abstract issu[e] of law relating to

> qualified immunity, typically, the issue whether the federal right allegedly infringed was "clearly established. . . ."

Behrens, 516 U.S. at 313 (citations omitted). *Johnson* has not been undermined or abrogated in any of the Court's subsequent decisions.

Despite *Johnson*'s good standing, Petitioners propose to abandon it. To create jurisdiction over the district courts' sufficiency of the facts determinations, Petitioners seek a rule that would expand the collateral order doctrine to matters that are inextricably intertwined with the merits. All an appellant need do is frame the issue as a challenge to the factual inferences made by the district court—as apparently contrasted to the facts themselves. Not only would such a rule contradict *Cohen*, but adopting such a rule would require overturning *Mitchell* and *Johnson*.[3] Petitioners are asking for an expansion of appellate court jurisdiction that has never before been recognized. Any such expansion should be done through the rule making process not by common law decision. *Mohawk*, 558 U.S. at 106.

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[3] Petitioners proposed rule would also expand the scope of qualified immunity appeals at the motion to dismiss phase. This Court's established precedents require courts to draw the reasonable (plausible) inferences from the factual content pleaded in complaint. *E.g.*, *Iqbal*, 556 U.S. at 678. Defendants could successfully appeal the denial of qualified immunity anytime they simply raise the issue of the inference the district court relied upon in denying a motion to dismiss.

According to the Petitioners, a deviation from the Court's well-established jurisprudence is warranted by the Court's decisions in *Scott* and *Plumhoff*, but as explained below, Petitioners' interpretation of those cases is belied by the cases themselves and has not been adopted by any appellate court, much less endorsed by this Court.

B. The Rule of *Johnson v. Jones* Was Confirmed by *Scott v. Harris* And *Plumhoff v. Rickard*

Contrary to Petitioners' assertions, *Johnson*, is still the law and it has not been undermined by this Court's subsequent decisions in *Scott v. Harris*, 550 U.S. 372 (2007) or *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). To the contrary, both *Scott* and *Plumhoff* re-affirm *Johnson*'s jurisdictional limits.

In *Scott*, the Court addressed the questions of whether officers' conduct violated the Fourth Amendment in a case where a portion of the police pursuit was captured on videotape. 550 U.S. 374-78. *Scott* held that if the plaintiff's version of the facts is "blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U.S. 380. In doing so, *Scott* followed *Johnson* by only reviewing the legal issues presented by the uncontroverted record—including the uncontested videotape of the pursuit—in that

case. *Scott* did not mention *Johnson* or alter its jurisdictional holding in any way.[4]

Similarly, in *Plumhoff*, the Court addressed the legal question of whether the Fourth Amendment was violated in the context of another high-speed car chase. 134 S.Ct. at 1017-19. Like *Scott*, the Court followed *Johnson* and found jurisdiction to review only the legal questions of whether the evidence, taken in the light most favorable to the plaintiff, amounted to a Fourth Amendment violation, and if so, whether the law was clearly established. *Id*. at 2019 ("The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law."). *Plumhoff* re-affirmed that reviewing the sufficiency of the evidence is not a legal issue; that doing so is often

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[4] *Scott* also affirmed that "[w]hen [a case is decided on summary judgment and there have not yet been factual findings by a judge or jury], courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the [summary judgment] motion. In qualified immunity cases, this usually means adopting ... the plaintiff's version of the facts." 550 U.S. at 378 (second alteration in original) (citation and internal quotation marks omitted)); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant . . . .").

intertwined with determinations a trial court makes later in a case; and that appellate courts have "no comparative expertise" to review the sufficiency of the evidence. 134 S. Ct. at 2019 (citing *Johnson*, 515 U.S. at 309-10 & 314).

Nothing in this Court's opinions in *Scott* or *Plumhoff* support the Petitioners' interpretation of *Johnson* to suggest that appellate courts should start wading into reviewing the factual inferences district courts draw from the undisputed factual record at summary judgment. The only even arguable adjustment after *Scott* is that for the errant case in which the appellate court finds that unchallengeable evidence "blatantly contradicts" the plaintiff's version of the facts. In those rare cases, *Scott* instructs that appellate courts need not give credence to an unreliable version of the facts that no reasonable jury could rely upon. 550 U.S. at 380-81.

The Seventh Circuit's *en banc* opinion in this case correctly applied *Scott* and *Plumhoff*. App. 14-15. In *Scott*, "the question on appeal was the constitutionality of the officer's conduct in light of the facts depicted on the unchallenged videotape. So review was of the district court's decision on an issue of law, not of whether there was a genuine issue of fact for trial." App. 14. And, the same was true in *Plumhoff* where the Court "decided a purely legal issue, not a question of the sufficiency of the evidence." App. 15.

Indeed, notwithstanding the Petitioners' attempt to argue otherwise, the Seventh Circuit observed that "[n]o Supreme Court decision has criticized *Johnson*; to the contrary, the Court continues to rely on it post-*Harris*." App. 15 (citing *Plumhoff*, 134 S.Ct. at 2018–19; *Ashcroft v. Iqbal*, 556 U.S. at 671, 673–74; *Ortiz v. Jordan*, 562 U.S. 180, 188–91 (2011)); *see also Ortiz* 562 U.S. at 190 (describing qualified immunity appeals that raise legal issues as those 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" (citing *Behrens*, 516 U.S. at 313 and *Johnson*, 515 U.S. at 317)). "Nor has the Court disavowed its pre-*Harris* reliance on *Johnson* in multiple cases." App. 15 (citing *Behrens*, 516 U.S. at 312-13; *Johnson v. Fankell*, 520 U.S. 911, 922 (1997); *Crawford-El v. Britton*, 523 U.S. 574, 595, 597 n.18 (1998); *Richardson v. McKnight*, 521 U.S. 399, 402 (1997)).

In short, *Johnson* is still the law of the land despite Petitioners' desire to see if overturned.

C. No Circuit Split Exists About The Jurisdictional Limits Set Out In *Johnson v. Jones*

Just as the Seventh Circuit found, there is no split among the circuits about the clear limits that *Johnson* places on appellate jurisdiction. Nor is there a circuit "chaos" over the application of *Johnson*; that notion is an invention of the Petitioners' making. Indeed, no court has adopted

the Petitioners' extension of appellate jurisdiction to review district court's inferential finding of facts.

Petitioners allege that two competing interpretations of *Johnson*—a narrow and broad interpretation—have been adopted by panels within and among all the circuits. In their taxonomy, Petitioners have labeled as the "broad interpretation" of *Johnson*, the straightforward application of its holding that no appellate jurisdiction exists to review the district court's factual findings, as well as the reasonable inferences drawn from those facts. Gauger Pet. at 14. Petitioners label their favored interpretation of *Johnson* as the "narrow interpretation" because it would permit appellate courts to review the factual inferences district courts rely upon in denying qualified immunity. Gauger Pet. at 14. Petitioners have cleverly framed their favored interpretation of *Johnson* as the "narrow interpretation," but to be clear the proposed interpretation they advocate here would work a staggering expansion of the collateral order doctrine: Appellate jurisdiction would vest to review qualified immunity appeals whenever an inference from fact is necessary to determine if a constitutional violation occurred.

No court has adopted their taxonomy or the rule they advocate. Rather, all appellate courts reviewing qualified immunity appeals in *Johnson*'s wake have applied its law-fact jurisdictional divide without deviation. *See, e.g.*, *Walton v. Powell*, 821 F.3d 1204, 1209–10 (10th Cir. 2016) (Gorsuch, J.) ("Under *Johnson*, it is for the district court to tell

us what facts a reasonable jury might accept as true. But under *Plumhoff*, it is for this court to say whether those facts, *together with all reasonable inferences they permit*, fall in or out of legal bounds—whether they are or are not enough *as a matter of law* to permit a reasonable jury to issue a verdict for the plaintiff under the terms of the governing legal test for causation or any other legal element.") (emphasis added); *Mallak v. City of Baxter*, 823 F.3d 441, 446 (8th Cir. 2016) (*Scott* and *Plumhoff* did not alter jurisdictional holding that no appellate jurisdiction exists to review the sufficiency of the evidence in case where defendants argued record lacked evidence of improper motive); *Penn v. Escorsio*, 764 F.3d 102, 106 & n.2 (1st Cir. 2014); *George v. Morris*, 736 F.3d 829, 835 (9th Cir. 2013) (rejecting the argument that *Scott* altered *Johnson* and its progeny on scope of appellate jurisdiction); *Via v. LaGrand*, 469 F.3d 618, 624 (7th Cir. 2006); *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (*en banc*); *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 62 (3d Cir. 2002) (rejecting the argument that *Johnson* did not apply to disputes about intent as opposed to conduct and holding that *Johnson's* jurisdictional boundaries "clearly applies to factual disputes about intent, as well as conduct."); *Koch v. Rugg*, 221 F.3d 1283, 1297 (11th Cir. 2000) (interpreting *Johnson* and *Behrens* to find no jurisdiction over appeal in racial discrimination case where defendants appeal was sufficiency of the evidence in the record to infer discriminatory intent "which is prototypically a factual determination derived from circumstantial evidence by the trier of fact").

Because no Circuit divide, let alone "chaos," exists in the application of *Johnson*, Petitioners base their position relying, almost exclusively, on a single concurrence in *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013); a position the majority rejected and no other circuit has adopted. In addressing the concurrence, the *Romo* majority explained that:

> "[r]elying on *Scott v. Harris,* 550 U.S. 372 [] and policy considerations, the concurrence suggests a "reading" of *Johnson* under which defendants may generally challenge on interlocutory appeal a district court's determination that the summary judgment standard has been met with respect to factual inferences (although, in concept at least, not to facts that underlie such inferences). Such an approach is facially contradicted by the Supreme Court's instructions in *Johnson* to 'take, as given, the facts that the district court assumed when it denied summary judgment' and, when that is unclear, to 'determine what facts the district court ... likely assumed.' *Johnson,* 515 U.S. at 319 []. The Court considered and dismissed the criticisms of this approach that the concurrence raises. *See id.*

Id. at 675. Not only has the Sixth Circuit repeated its rejection of the specific argument petitioners

make here, *see, e.g.*, *DiLuzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604, 609 (6th Cir. 2015) (discussing *Romo*, 723 F.3d at 673-74), but the Seventh Circuit has likewise considered Petitioners' specific argument and rejected it as contrary to *Johnson*. *Hurt v. Wise,* -- F.3d --, 2018 WL 507595, at *5 (7th Cir. Jan. 23, 2018) (Wood, J.), *petition for rehearing filed* (rejecting the defendants' argument to "revisit the inferences that the district court found could reasonably be drawn from [the plaintiffs'] recorded interrogation" because to do would go "beyond our jurisdiction on this interlocutory appeal [and] [n]othing in *Scott* undermines this point.").

Nor does the distinction between a fact and inference from a fact make sense. At some level, every fact is inferential. For example, whether to accept a witness's statement that a light was green turns on an inference of whether the witness could see the light from her vantage point. Likewise, whether to conclude that a defendant intended a certain result of his actions turns on inferences about the likelihood of such a result based on all of the circumstances surrounding his actions, including, for example, whether his actions were consistent with his ordinary practice. And whether a witness is accurately recalling certain events turns on inferences about the state of the witness's memory. As these examples demonstrate, inferences are at play even in the most basic facts that can be in contention.

For additional support, Petitioner Gauger provides a string cite of cases that he claims

adopted the "narrow interpretation" of *Johnson*, Pet. Gauger at 14. But except for the concurring opinion in *Romo,* none of the cited authorities adopted this so-called "narrow" view. In fact, many of the cases applied the straightforward, "broad" application of *Johnson* in which appellate courts review only legal issues and in doing so rely on the facts the district court credited and reasonable inferences derived therefrom. *See, e.g.*, *Anderson v. Cornejo*, 355 F.3d 1021, 1023 (7th Cir. 2004) (emphasis added) ("Thus it is possible, consistent with *Johnson*, to cover the question whether the plaintiffs have a good legal theory as well as the immunity defense; but, as *Johnson* and *Saucier* hold, [] *this must be done by taking the evidence and reasonable inferences in plaintiffs' favor*.") (emphasis added); *Schieber v. City of Philadelphia*, 320 F.3d 409, 415 (3d Cir. 2003) ("[W]here the District Court has adopted a set of facts for the purpose of ruling on the qualified immunity issue, we must accept those facts when reviewing a denial of immunity."); *Brown v. Callahan*, 623 F.3d 249, 255 (5th Cir. 2010) (assuming the district court's facts and inferences from those facts, the court found as question of law that the elements for deliberate indifference were not satisfied); *Nelson v. Shuffman*, 603 F.3d 439, 446 (8th Cir. 2010) ("Our review is limited to determining whether the official is entitled to qualified immunity based on the summary judgment facts as described by the district court."); *Jeffers v. Gomez*, 267 F.3d 895, 905–06 (9th Cir. 2001) ("From *Behrens* and its progeny we conclude that we may consider the legal question whether, taking all facts and inferences

therefrom in favor of the plaintiff, the defendant nevertheless is entitled to qualified immunity as a matter of law."); *Morton v. Kirkwood*, 707 F.3d 1276, 1280 (11th Cir. 2013) (rejecting a *Scott* claim that the uncontroverted record blatantly contradicted plaintiff's version of facts in high speed car chase).[5]

The appellate courts are not confused on this issue and the Court should deny the petition.[6]

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[5] Several of Petitioners' "narrow interpretation" cases were cases that dealt with situations where the district court failed to identify the facts on which its qualified immunity decision was based, so the appellate court, per this Court's instruction in *Behrens*, 516 U.S. at 312-13, had to review the factual record *ab initio* to determine the facts in the light most favorable to the plaintiff that supported the district court's decision. *See* Gauger Pet. at 14 (citing *Lewis v. Tripp*, 604 F.3d 1221, 1226 (10th Cir. 2010); *Winfield v. Bass,* 106 F.3d 525, 533 (4th Cir. 1997)). Those cases are not applicable here were the district court identified the facts it assumed for its denial of qualified immunity.

[6] The Petitioners also raised the issue of how appellate courts have interpreted *Scott* where there are allegations that plaintiff's version of the facts is "blatantly contradicted" by undisputable evidence in the record. *See* Gauger Pet. at 17-18 (contrasting the Third and the Tenth Circuit's decisions *Moldovan v. v. City of Warren*, 578 F.3d 351 (6th Cir. 2009) and *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) with the Fourth, Eighth, and Eleventh Circuits in *Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 277 (4th Cir. 2011), *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010), *Morton v. Kirkwood*, 707 F.3d 1276, 1284-85 (11th Cir. 2013)). Even were this Court was inclined to clarify *Scott* on this point, this case is not the vehicle to do so because there is no issue of whether Mr. Stinson's version of the facts is blatantly

D. Petitioners' Proposed Legal Rule Is Unworkable

The petitions should be denied because there is no legal rule that could be fashioned to separate qualified immunity appeals that challenge the sufficiency of the factual inferences a district court relied upon from the sufficiency of the facts from which the inferences were drawn. It strains the even the most creative legal imagination to contemplate a rule that appellate courts could implement to narrowly slice their jurisdiction in this manner.

Rather, to do so would squarely overrule *Johnson* because it would essentially permit appellate review of the sufficiency of the evidence in many, if not most, constitutional tort cases. Many constitutional torts are regularly determined based on inferences from the factual record or on circumstantial evidence. Conspiracy claims are a classic example; conspirators almost never announce that they are conspiring. *See, e.g.*, *Thompson*, 71 U.S. at 473 ("It is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence, as knaves have usually sufficient cunning to have no witnesses present who can testify directly to their fraudulent contrivances."). Instead, to prove a conspiracy, a litigant must present facts and reasonable inferences from facts that allow a trier of fact to reach a conclusion that a conspiracy

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contradicted by some other uncontroverted evidence in the record.

occurred. *See, e.g.*, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158 (1970) (reversing grant of summary judgment in civil rights conspiracy claim because court found based on facts in record "it would be open to a jury, in light of the sequence that followed, *to infer from the circumstances* that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service.") (emphasis added). Similarly, any constitutional tort that requires a showing of motive or intent, such as malice in the malicious prosecution context or fabrication of evidence is often proved through inferences. *See, e.g.*, *Gregory v. City of Louisville*, 444 F.3d 725, 744 (6th Cir. 2006) (evidence of fabrication by forensic examiner's report could be "reasonably infer[ed]" from evidence that forensic examiner's findings were "far afield of what any reasonable forensic examiner would find from the evidence" in malicious prosecution case); *United States v. Nocar*, 497 F.2d 719, 725 (7th Cir. 1974) ("As courts have frequently pointed out, knowledge and intent must often be proven by circumstantial evidence."). Even excessive force cases involve a district court making factual inferences on the intent the officer had at the time. *See, e.g.*, *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005) (reasonableness inquiry in excessive force cases "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom,") (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002)). In fact, *Johnson* itself involved a district court's inference from "circumstantial evidence" that there was sufficient

evidence in the record that the three defendants had beaten or been present while the other two defendants had beaten the plaintiff. 515 U.S. at 307-308 ("[T]he court held that there was 'sufficient circumstantial evidence supporting [Jones'] theory of the case."). Yet, the Supreme Court declined to review these inferences, finding instead that appellate jurisdiction was lacking because the challenge was to the sufficiency of the evidence. *Id.* at 313.

If the Petitioners' framework were adopted, any time a plaintiff alleged conspiracy, fabrication, malicious prosecution, discrimination, excessive force, or any time a Circuit required a particular *mens rea* under Section 1983, *de novo* appellate review of a district court's summary judgment ruling would become available. What Petitioners propose here is far from the narrow scope of the collateral order doctrine *Cohen* and its progeny intended.

To be clear, what Petitioners are proposing is something very different from the Court's decisions in *Harris* and *Plumhoff*. Were Petitioners following *Johnson*, *Harris*, and *Plumhoff*, they would be seeking review of whether, as a legal matter, the facts on which the district court relied and the reasonable inferences drawn from them constitute a constitutional violation of clearly established law. Instead, Petitioners would like the appellate court to have jurisdiction to go a step back in the process and reweigh the evidence supporting certain factual inferences that the district court found were

reasonable in light of the entire record. Specifically, Petitioners would like review of the reasonable inferences from all the evidence in the record that Petitioners fabricated the bitemark evidence, withheld evidence of their doing so and the circumstantial evidence the district court credited to find that the petitioners reached an agreement to conspire.

To invite lower courts to engage in this kind of review will open wide qualified immunity appeals to what is effectively *de novo* review of the evidence in qualified immunity appeals.

E. The Petitions Are Fact-Bound And The Court Should Deny Certiorari

These petitions really involve a simple contest of the facts. Petitioners challenge the district court's determination that when viewing the entire record in the light most favorable to Stinson, sufficient evidence exists to support Stinson's claims that Petitioners conspired together to fabricate evidence of his guilt and that they withheld *Brady* evidence from him in violation of his due process rights.

What these petitions seek is for another court to re-review the district court's determination that sufficient evidence exists to submit the factual questions to a jury. That is evident from the Petitioners appeals in the Seventh Circuit, in which they gave lip service to the correct legal standard

and then proceeded to contest or completely ignore key factual assumptions "despite the centrality of them to the district court's analysis and Stinson's fabrication and *Brady* claims." App. 19. Petitioners factual challenges included both the fact of the initial meeting among Johnson, Gauger and Jackelen, and the attendant contents of that meeting (notwithstanding the fact that Gauger admits it occurred and was not disclosed until long after Stinson's wrongful conviction); and the fact that Dr. Johnson had reached out first to Dr. Rawson in its analysis with Petitioner Gauger. App. 20. Petitioners' failure to acknowledge, let alone credit Stinson's version of the facts, which the district court had properly credited, revealed that instead of presenting "legal questions," the appeal was really an attempt to back-door a sufficiency of the evidence challenge. Similarly, the *en banc* dissent used the correct legal vernacular in its opinion, stating that it was accepting all the facts in the light most favorable to Stinson, but then proceeded to make its own assessment of the district court's factual inferences, also ignoring other record evidence when doing so. App. 35-37. This is precisely the sort of fact-bound, sufficiency of the evidence inquiry that this Court should not seek to wade into.

CONCLUSION

For the reasons set forth above, the Court should deny the petitions for certiorari.

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