No. _____

In The
Supreme Court of the United States

ANDREW BURNINGHAM, JAMES BURROUGHS, and STEVEN CULLIFORD,

Petitioners,

vs.

JOHN MORRISON RAINES, III, as Guardian of the Estate of John Morrison Raines, IV,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

John Raines stabbed his roommate, who fled to a closet and summoned police. Officers Burningham, Burroughs, and Culliford held Raines at gunpoint outside the building, as he refused commands to drop the knife, instead waving it wildly back and forth. As an officer with a video equipped Taser drew within 10 to 12 feet of him, Raines, still waving the knife, moved towards the officer, prompting the other officers to fire, wounding Raines. Finding that the Taser video of the incident was "inconclusive," as differing inferences could be drawn from its contents, the Eighth Circuit dismissed the officers' appeal of the denial of summary judgment on qualified immunity for lack of jurisdiction under *Johnson v. Jones*, 515 U.S. 304 (1995).

The questions presented by this petition are:

1. Does *Johnson v. Jones*, 515 U.S. 304 (1995) foreclose interlocutory appeal of an order denying summary judgment on qualified immunity, where the underlying evidentiary fact is undisputed, but where different inferences may be drawn from the particular fact, or do such disputes concern evaluation of the materiality of a particular fact, which, under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) is a legal issue, and therefore subject to interlocutory appeal under *Mitchell v. Forsyth*, 472 U.S. 511 (1985)?

2. Did the Eighth Circuit improperly depart from this Court's decision in *Kisela v. Hughes*, __ U.S. __, 138 S. Ct. 1148 (2018) (per curiam)

QUESTION PRESENTED – Continued

and numerous other cases by denying qualified immunity notwithstanding the absence of clearly established law imposing liability under circumstances closely analogous to those confronting the officers?

3. Did the Eighth Circuit improperly depart from this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989) and *Plumhoff v. Rickard*, 572 U.S. __, 134 S. Ct. 2012 (2014) in denying qualified immunity based upon the absence of a constitutional violation given that the undisputed facts established that petitioners acted reasonably in responding to the threat of an armed suspect moving towards another officer less than 12 feet away while wildly waving a knife?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- Andrew Burningham, James Burroughs, and Steven Culliford, individuals, defendants and appellants below, petitioners here.
- John Raines, III, an individual, as Guardian of the Estate of John Morrison Raines, IV, plaintiff and appellee below and respondent here.
- The additional parties listed in the district court and Eighth Circuit captions were not parties to the appeal and did not enter an appearance in those proceedings, which were confined to the parties listed above.

There are no publicly held corporations involved in this proceeding.

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The Eighth Circuit's opinion, the subject of this petition, is reported at 883 F.3d 1071 (8th Cir. 2018) and reproduced in the Appendix hereto ("Pet. App.") at pages 1-8. The Eighth Circuit's order denying rehearing, filed April 12, 2018, is reproduced in the Appendix at page 21. The district court's decision denying petitioners' motion for summary judgment based on qualified immunity is not reported and is reproduced in the Appendix at pages 9-20.

BASIS FOR JURISDICTION IN THIS COURT

The Eighth Circuit entered its judgment and its opinion on March 5, 2017, corrected March 6, 2018. 883 F.3d 1071 (8th Cir. 2018). Petitioners timely filed a petition for panel and en banc rehearing, and on April 12, 2018, the court denied the petition. (Pet. App. 21.)

This Court has jurisdiction to review the Eighth Circuit's March 6, 2018 corrected decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges petitioners violated the rights secured by the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Underlying Incident.

On the afternoon of March 3, 2013, John Raines carried a knife to his roommate Nathan Dodson's doorway and said to him, "I'm going to kill you." (App. 149:24-25, 150:1-4.)[1] Raines came at Dodson with the knife, and after a short struggle, Dodson was slashed in the stomach, and fled to a closet. (App. 198:18-24, 199:1-7.) Raines dropped the knife, and pulled at the closet door, but Dodson held it shut tight as he called 911. (App. 150:7-10.) Dodson told the 911 operator that he had been stabbed by his roommate and that he was scared, and gave his location. (Exhibit A [911 call]; timestamp: 01-30.)

Raines picked up the knife and went outside to wait for the police. (App. 150:11-25.) Officer Burningham was the first to arrive and as he approached Raines standing near the vestibule of the apartment building asked him "what's going on?" (App. 293:16-20, 298:14-18, 299:13-16.) Raines did not respond, but Burningham noticed blood on Raines's left wrist and arm, as well as the knife in Raines's hand down by his side. (App. 293:21-25, 294:7-18.) Burningham ordered Raines to drop the knife, drew his weapon, and pointed it at Raines. (App. 282, 294:23-25.) Raines did not respond, and Burningham again ordered Raines to drop the knife, at which point Raines raised the knife to shoulder level and began waving it from side to side in

[1] "App." denotes the Circuit Court record below.

front of him in a wild motion, saying "Fine, fine, fine." (App. 282, 295:24-25, 301:5-8.)

Officer Culliford arrived on the scene, saw the knife in Raines's hand, and drew his weapon as well. (App. 284, 396:10-15.)[2] Raines was directly in front of Culliford, with officer Burningham just ahead and to the right at his 2 o'clock position. (App. 391:17-20.) Like Burningham, Culliford loudly commanded Raines to drop the knife, yet Raines did not comply and instead waved the knife in a slashing motion across his body. (App. 284.)

Officer Burroughs arrived next, and walking to Culliford's left, noticed the other officers had their weapons pointed towards Raines and were commanding him to drop the knife, which Burroughs then did as well. (App. 285, 535:10-13, 20-24, 540:4-6.) Raines did not drop the knife, but continued to wave it. (App. 592:11-14.)[3]

Officers Burningham, Culliford, and Burroughs surrounded Raines in a semi-circle, continuously

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[2] Several days earlier Culliford had responded to a grocery store parking lot when Raines had an ostensible mental health crisis and was taken to the hospital, but did not recognize Raines when he saw him again, until after the officers had gotten his information. (App. 707 n.1, 738, 882.)

[3] Raines later recalled the three officers with guns pointed at him, and acknowledged that it was a dangerous situation for everyone. (App. 153:7-8, 155:2-8.) When asked why he did not drop the knife, Raines responded: "I didn't like where my life was going. . . . I felt that I was either gonna end up disowned by my family or jail, you know, one or the other, the state hospital." (App. 153:25, 154:1, 154:11-13.)

telling him to drop the knife. (Exhibit B [Dashcam video], App. 282.) Raines moved his feet, shifting his weight from foot to foot, moving within a 4-foot radius. (App. 306:25.) The officers were concerned that Raines still had the ability to move into the vestibule and enter any of the other apartments, and that he stood as an obstacle to the officers entering the building to make certain someone was not dying or bleeding out. (App. 315:5-7, 567:15-19, 401:8-9.) Indeed, the officers were aware that they had little time to resolve the situation, as a potential stabbing victim was inside the building and they needed to check on him. (App. 307:2-9, 401:7-14, 585:21-25.) As Raines stared intently at one officer and then another, both Burroughs and Culliford told him that if he advanced on them they would shoot. (App. 371:18-21, 425:1.)

Officer Hanson arrived 40 seconds after Burroughs, drawing her weapon and walking up behind Raines and to his left. (App. 611.) She also loudly commanded Raines to drop the knife, and in the face of his refusal to do so, decided to attempt to use her Taser which would require her to move closer to Raines in order to get into effective range. (*Id.*) As Hanson moved towards Raines, he focused all of his attention on her. (App. 789, 791.)

A video camera on Hanson's Taser captured the incident. (Pet. App. DVD [Exhibit C, DVD with Taser

Video].)[4] As Hanson approached, Raines stepped towards her with his left foot and then his right foot, and as he moved towards her, Officers Burningham, Culliford and Burroughs, fearing for Hanson's safety, fired at Raines, as Hanson discharged her Taser. (*Id*.; App. 282-83, 287.) Raines was within 7 to 12 feet of Hanson at the time of the first shots, and Raines continued to move towards her until brought down by another volley of shots. (Pet. App. DVD; App. 667:6-7, 318:20-21, 788.) Raines was severely wounded. (Pet. App. 4.)

Three independent witnesses confirmed the officers' account. A Fire Department captain, a firefighter, and a resident in the apartment building all saw the officers repeatedly commanding Raines to drop the knife, and two of them expressly noted that the officers fired in response to Raines moving towards Hanson. (App. 613-15.)

B. The District Court Denies Petitioners' Motion For Summary Judgment Based On Qualified Immunity.

The Guardian of Raines's Estate filed suit on his behalf against Burningham, Burroughs, and Culliford, among others, alleging various claims, including a claim against the officers under 42 U.S.C. § 1983 premised upon a violation of the Fourth Amendment through use of excessive force. (Pet. App. 2.)

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[4] Petition Appendix DVD, Exhibit C, the Taser video can also be viewed at https://www.dropbox.com/s/cyynyj9ecpdnqwr/Taser%20Video.asf?dl=0.

Petitioners filed a motion for summary judgment, asserting that the Fourth Amendment claim was barred by qualified immunity. (Pet. App. 4.) The officers argued they were entitled to qualified immunity both because the undisputed evidence established that the use of force was objectively reasonable in light of Raines's movement towards Hanson and hence no constitutional violation had occurred, and that in any event, there was no clearly established law that would have put them on notice that use of force under these emergency circumstances would be unwarranted. (Pet. App. 4, 14-16.)

The district court denied the motion, holding that there were triable issues of fact as to whether the officers reasonably perceived a serious threat of harm to Hanson from Raines. (Pet. App. 14-15.) The district court also found issues of fact as to whether Culliford should have known that Raines suffered from mental illness, without indicating the significance of any such dispute in assessing whether Raines had presented a threat to Hanson. (Pet. App. 15.)

Petitioners appealed.

C. The Eighth Circuit Dismisses The Appeal For Lack Of Jurisdiction.

Following briefing and argument, on March 5, 2018, the Eighth Circuit issued its decision dismissing the appeal for lack of jurisdiction, correcting the opinion the next day. (Pet. App. 1-2.)

Writing for the court, the Honorable Ralph R. Erickson held that the video evidence was "inconclusive," in that it did not demonstrate authoritatively one way or the other whether Raines "advanced on the officers in a manner that posed a threat of serious physical harm to an officer." (Pet. App. 7.) As a result, under this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995) as interpreted by the Eighth Circuit's recent decision in *Franklin, ex rel. Franklin v. Peterson*, 878 F.3d 631 (8th Cir. 2017), the court therefore lacked jurisdiction because the denial of summary judgment turned on a factual dispute—"whether Raines advanced on Officer Hanson just before being shot." (Pet. App. 7-8.)

Petitioners filed a petition for panel and en banc rehearing, citing this Court's then newly issued decision in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam). In *Kisela*, the Court held that an officer was entitled to qualified immunity for shooting an individual armed with a knife who, although acting in a less aggressive manner than Raines, nonetheless could reasonably be viewed as posing a threat to others. *See* 138 S. Ct. at 1151, 1153 (Hughes had been slashing at a tree earlier, holding a knife at her side when shot after refusing the command to drop the weapon). The Eighth Circuit denied the petition. (Pet. App. 21.)

REASONS WHY CERTIORARI IS WARRANTED

This Court has repeatedly recognized the importance of qualified immunity in assuring that law

enforcement officers may perform their duty to protect public safety, without fear of entanglement in litigation and potential liability, and make decisions in tense, rapidly evolving circumstances. Most recently, in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018), the Court reaffirmed the special importance of qualified immunity in use of force cases which, by their nature, turn on the particular facts in a given case.

The Eighth Circuit's decision here undermines these important principles. The Eighth Circuit, along with other circuits, is effectively insulating orders denying summary judgment based on qualified immunity in use of force cases from appellate review, based on an erroneous interpretation of *Johnson v. Jones*, 515 U.S. 304 (1995). These courts have concluded that even if a particular evidentiary fact is undisputed, if conflicting inferences may be drawn from the fact, *Johnson* forecloses appellate review. To be sure, other circuits have properly interpreted *Johnson* as permitting review of such orders—a deep and ongoing circuit split that in and of itself justifies review—but the rule espoused by the Eighth Circuit and other courts eviscerates interlocutory review of qualified immunity in use of force cases and, thus, undermines the very purpose of the immunity.

Both prongs of the qualified immunity inquiry are adversely impacted by the rule adopted by the Eighth Circuit. As this Court noted in *Plumhoff v. Rickard*, 572 U.S. ___, 134 S. Ct. 2012 (2014), when an evidentiary fact is essentially undisputed, the question whether there is a genuine issue of material fact as to

the reasonable use of force in evaluating the merits of a Fourth Amendment claim is one for the appellate court, notwithstanding a district court's determination that a jury might ultimately find the force to be excessive. The question in such cases is whether the officer could reasonably perceive a threat necessitating the use of the force at issue. In the context of use of force, there are many circumstances in which an officer may confront a situation where various inferences about a suspect's conduct can be drawn, but an officer does not need ultimately to be correct in his or her assessment of the situation, only reasonable.

The same is true in analyzing the second prong of qualified immunity: whether the law was clearly established in light of the circumstances confronted by an officer. This Court has emphasized that qualified immunity protects all but those who are plainly incompetent or those who knowingly violate the law, as it affords protection to officers who make a reasonable mistake of fact, i.e., draw an incorrect inference in a particular situation. In short, that different inferences can be drawn from certain evidentiary facts does not bar the application of qualified immunity, let alone foreclose interlocutory appellate review.

The approach taken by the Eighth Circuit and other circuits improperly ignores the difference between a district court's determination under Federal Rule of Civil Procedure 56, that a dispute about a fact is genuine, as opposed to material. The former is an inquiry whether there is competent evidence to establish a particular fact, and *Johnson* holds that such

determinations are not subject to interlocutory review. 515 U.S. at 313, 316. However, as this Court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), "the materiality determination rests on the substantive law," and as this Court recognized in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Behrens v. Pelletier*, 516 U.S. 299 (1996), and *Plumhoff*, assessing the legal significance of a particular fact is a proper task for an appellate court in exercising interlocutory review over the denial of a motion for summary judgment based on qualified immunity.

The mischief of the Eighth Circuit's approach is underscored by the court's refusal to address petitioners' qualified immunity arguments on the pretext of a material factual dispute. Although petitioners submit that the Taser video supports their contention that Raines moved towards Hanson, even if it were somehow "inconclusive," they would still be entitled to qualified immunity. Petitioners were confronted with circumstances requiring the very sort of split second decision at issue in *Kisela*, and if anything Raines posed a far more imminent threat, and acted in a far more aggressive manner than the suspect in *Kisela*, where the Court found that the officer's conduct did not violate clearly established law. Even if petitioners were mistaken about whether Raines was actually stepping towards Hanson, they would be entitled to qualified immunity, which encompasses reasonable mistakes of fact, as well as mistakes of law, *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), and indeed the Fourth Amendment does not require officers to be

correct in their assessments, only reasonable, *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The Eighth Circuit's unduly crabbed view of interlocutory jurisdiction in qualified immunity appeals will have a particularly pernicious impact on cases, like this one, involving video evidence of the use of force. Given cell phones, the use of dashboard cameras in both civilian and law enforcement vehicles, and the widespread adoption of body cameras for law enforcement personnel, video evidence is increasingly used in excessive force cases. The basic evidentiary fact of such video evidence, i.e., when and where a recording was made, is generally undisputed. If a dispute about the inferences that can be drawn from otherwise undisputed video evidence is sufficient to defeat appellate jurisdiction, the net result is insulating such orders denying qualified immunity from appellate review, which is contrary to this Court's decisions in *Plumhoff* and *Scott v. Harris*, 550 U.S. 372 (2007).

This Court's intervention is necessary to assure compliance with this Court's decisions in *Mitchell*, *Plumhoff*, and *Scott* concerning interlocutory review of the denial of qualified immunity and proper application of the doctrine to shield officers from entanglement in litigation when they have acted reasonably in light of existing law. Review is also warranted in order to clarify the scope of appellate jurisdiction under *Johnson*, and curtail the ongoing and open-ended litigation of jurisdictional questions in appeals from the denial of summary judgment based on qualified immunity. The petition should be granted.

I. REVIEW IS NECESSARY TO ASSURE MEANINGFUL INTERLOCUTORY REVIEW OF ORDERS DENYING QUALIFIED IMMUNITY ON SUMMARY JUDGMENT AND RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS CONCERNING THE APPEALABILITY OF SUCH ORDERS.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability When Making Split Second Decisions Under Tense, Rapidly Evolving Circumstances In The Course Of Protecting The Public.

An officer is entitled to qualified immunity when his or her conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. In short, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id*.

This Court has recognized that qualified immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 n.3 (2015); *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017). It assures that officers, when

confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' ").

As the Court observed in *Harlow*, failure to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.* at 814. Those concerns are magnified in the context of use of deadly force, where by definition, an officer is confronted by the imminent threat of serious harm to himself, or to others, and where hesitation could have deadly consequences.

Indeed, in the last two terms, this Court has issued per curiam reversals of lower court denials of qualified immunity in deadly force cases. In doing so, the Court emphasized that such cases, which are necessarily highly fact-dependent and concern tense, hectic circumstances, require courts to closely analyze existing case law to determine whether the law was clearly established within the particular circumstances confronted by the officers in question.

In *White v. Pauly*, the Court held that an officer who arrived belatedly to the scene of an evolving firefight could reasonably rely on the actions of other officers in determining it was necessary to shoot a suspect who fired at the officers. 137 S. Ct. at 550-51. The Court observed that the highly unusual circumstances of the case should have alerted the lower court to the fact that the law governing such situations was not clearly established, and the officer was, indeed, entitled to qualified immunity. *Id.* at 552.

In *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018), the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who received a 911 call reporting a woman hacking a tree with a kitchen knife and acting erratically. *Id.* at 1151. Shortly after arriving at the scene, the officer saw a woman standing in a driveway. The woman, separated from the street and the officer by a chain-link fence, was soon approached by another woman, who was carrying a kitchen knife and matched the description that had been related to the officer via the 911 caller. *Id.* With the knife-wielding woman only six feet away from what appeared to be her potential victim, and separated by the chain-link fence, which impaired the potential victim's ability to flee and the officer's ability to physically intervene, when the woman refused commands to drop the knife, the officer fired and wounded her. *Id.*

In reversing the Ninth Circuit, the Court underscored the importance of applying qualified immunity to use of force cases, again emphasizing the highly

fact-specific nature of such claims, and the relevance of the exceedingly narrow window of time in which officers usually have to make such life or death decisions. *Id.* at 1153 (observing that "Kisela had mere seconds to assess the potential danger to Chadwick"). As the Court noted:

> Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

Id. at 1153 (citing *Mullenex*, 136 S. Ct. at 309, 312).

This Court has repeatedly recognized the importance of qualified immunity, particularly in the context of use of force cases, as the court observed in *White*. Nonetheless, the lower federal courts have been somewhat recalcitrant in following this Court's dictates concerning the need to apply the doctrine with rigor, particularly at the pre-trial stage, thus repeatedly requiring this Court's intervention. 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases).

The same concerns for vindicating the important purposes of qualified immunity, which have led the Court to repeatedly grant review to reaffirm its jurisprudence concerning the need to define clearly established law with a high degree of specificity, similarly

require this Court's intervention in this case. When interlocutory review of the denial of qualified immunity is not available, the "social costs" outlined in *Harlow* fall disproportionately on officers. It is necessary for the Court to grant review to repudiate a limitation on interlocutory jurisdiction that undermines the principles of qualified immunity and allows an appellate court to avoid the substantive inquiry entirely.

B. The Rule Adopted By The Eighth Circuit And Other Circuit Courts Which Bars Interlocutory Review Of The Denial Of Summary Judgment On Qualified Immunity Based On Conflicting Inferences From Otherwise Undisputed Evidence, Is Contrary To The Decisions Of This Court And Undermines Qualified Immunity.

The district court denied petitioners' motion for summary judgment on the ground that there was a material issue of fact, based upon the Taser video, whether Raines presented a serious threat of harm to Officer Hanson. (Pet. App. 14.) In dismissing the officers' appeal for lack of jurisdiction, the Eighth Circuit concluded that the district court's finding that there was a material issue of fact necessarily foreclosed appellate review under this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995). (Pet. App. 7.) In so holding, the court sidestepped any need to assess whether the factual dispute was indeed material to the

qualified immunity defense, i.e., whether it undermined petitioners' claim to qualified immunity.

The narrow view of appellate jurisdiction, espoused by the Eighth Circuit here, and, as we discuss below, adopted by other circuit courts, is contrary to the decisions of this Court and undermines the important protections of qualified immunity.

In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), the Court held that where a district court denies a motion for summary judgment on qualified immunity based upon its determination of what constituted clearly established law, the order is immediately appealable. The Court reasoned that such an order fell within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949). *Id.* at 527. This is because determination of the legal question, as to whether the law was clearly established, was independent of the merits of the underlying claim. *Id.* at 527-28. More significantly, interlocutory appellate review is required because qualified immunity is an immunity not simply from liability, but from participation in litigation at all. Hence, the benefits of that protection would be lost if an officer was required to undergo a full trial, before being able to obtain review of a district court's failure to grant immunity. *Id.* at 525-27.

In *Johnson v. Jones*, the plaintiff asserted that various defendants had either unlawfully beat him, or failed to stop other officers from doing so. 515 U.S. at 307. The officers moved for summary judgment based

on qualified immunity, arguing that there was no evidence they had participated in the beating. *Id.* at 307-08. The district court denied summary judgment, finding that there was evidence that defendants were, contrary to their statements, in or near the room where the beating occurred, and that this created a genuine issue of material fact barring summary judgment. *Id.* at 308. The defendants appealed and the appellate court dismissed for lack of jurisdiction. *Id.*

This Court affirmed, noting that *Mitchell* held that an order denying summary judgment that was based upon the district court's application of law, i.e., assessing whether or not it was clearly established for purposes of qualified immunity, was subject to immediate review. *Johnson*, 515 U.S. 304. In *Johnson* however, the defendants were not contesting whether the district court properly applied the law, but rather, whether the district court was correct in assessing that there was sufficient evidence to support plaintiff's account of what transpired. As the Court observed, the question whether a factual dispute is "genuine" is the sort of task performed by trial courts, not appellate courts. *Id.* at 313, 316.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court reaffirmed the broad scope of appellate review afforded by *Mitchell*. There, the district court had denied defendants' summary judgment motion on qualified immunity, based on its determination that there was a genuine issue of material fact, but without specifying the particular conduct that was subject to the factual dispute. *Id.* at 312-13. The plaintiff argued that

the order was not appealable under *Johnson*, but this Court rejected the contention, noting that "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable." *Id.* The Court emphasized that "*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." *Id*. at 313. Instead, "summary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity" such as whether the law was clearly established with respect to the conduct at issue. *Id.*

Thus, the Court held that the order was appealable, and that in light of the district court's failure to specify precisely what conduct was disputed, the task for the appellate court was "'to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed'" and then apply the law to those facts. *Id.* (citing *Johnson*, 515 U.S. at 319).

In *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. ___, 134 S. Ct. 2012 (2014), this Court reaffirmed the principle that an appellate court is free to review a district court's determination of the legal significance of evidentiary facts, i.e., whether there is a material dispute, that precludes summary judgment based on qualified immunity. In

Scott, the plaintiff, who was fleeing police in a vehicle, was severely injured when an officer terminated the high-speed pursuit by striking plaintiff's vehicle with his car. *Id.* at 374-75. The plaintiff filed suit, alleging excessive force, and the district court denied the officer's motion for summary judgment, finding that there was a material issue of fact whether the force was excessive, and that the law governing use of force to terminate pursuits was clearly established. *Id.* at 375-76. The Eleventh Circuit affirmed. *Id.* at 376.

This Court reversed, finding that the force employed was reasonable as a matter of law. *Id.* at 376, 381-86. In so holding, the Court emphasized that there was no dispute concerning the evidentiary facts of the case, most significantly, because there was a video tape of the incident. *Id.* at 378 ("There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened."). As a result, the Court held that despite the district court's conclusion that there was a material issue of fact based on plaintiff's characterization of the evidence, as a matter of law, no reasonable jury could find the force excessive in light of the undisputed evidence in the form of the video:

> When opposing parties tell two different stories, one of which 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.

> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life.

Id. at 380.

The Court reaffirmed this principle in *Plumhoff*. There too, officers terminated a high-speed pursuit of fleeing suspects through the use of force—eventually firing several rounds after the suspect's vehicle had collided with several police vehicles. 134 S. Ct. at 2017-18. The district court denied the officers' motion for summary judgment on qualified immunity. The court found a triable issue of fact as to whether the force was excessive and stated that the law was clearly established with respect to the use of such force. 134 S. Ct. at 2018. A Sixth Circuit motions panel initially dismissed the appeal under *Johnson* but subsequently deferred decision on the issue to a merits panel. *Id.* The panel determined that jurisdiction was proper under *Scott*, but affirmed the district court's order. *Id.*

This Court reversed. *Id.* at 2016-17. The Court held that *Johnson* did not foreclose appellate review because there was no dispute about what happened, i.e., what the officers did or the circumstances prompting the use of force:

> 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. Thus, they raise legal

> issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.

Id. at 2019.

The Court observed: "The District Court order here is not materially distinguishable from the District Court order in *Scott v. Harris*, and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under § 1291." *Id.* at 2020. As a result, the Court addressed the merits of the qualified immunity claim and concluded that the use of force was reasonable, that in any event, the law was not clearly established, and hence, the officers were entitled to qualified immunity. *Id.* at 2021-23.

This Court's decisions in *Mitchell*, *Johnson*, *Behrens*, *Scott*, and *Plumhoff* recognize that the question of whether a factual dispute is material is necessarily a question of law, and therefore appropriate for appellate review. This is consistent with the Court's observation in *Anderson v. Liberty Lobby, Inc*., that under Federal Rule of Civil Procedure 56, "the materiality determination rests on the substantive law," and "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." 477 U.S. at 248.

Indeed, in *Anderson*, the Court emphasized the distinction between the materiality inquiry, which is necessarily tied to the relevant law, and the inquiry as to whether there is a genuine issue of fact, with the latter merely focusing on the evidentiary basis of any factual dispute. *Id.* at 248 ("[M]ateriality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.").

The rule espoused by the Eighth Circuit here which allows appellate courts to avoid their obligation to assess the materiality of any factual dispute in the context of a motion for summary judgment upon simple declaration by the district court that differing inferences may be drawn from otherwise undisputed facts, cannot be reconciled with the decisions of this Court. It distorts the law governing review of motions for summary judgment and undermines application of qualified immunity by foreclosing interlocutory review. As this case illustrates, the Eighth Circuit's narrow view of appellate jurisdiction has a particularly pernicious impact on the growing number of qualified immunity motions that turn on video evidence.

The Eighth Circuit dismissed the petitioners' appeal for lack of jurisdiction, finding that the Taser video was "inconclusive as to whether or not Raines advanced on the officers in a manner that posed a threat of serious physical harm to an officer." (Pet. App. 7.) In so holding, the court therefore did not determine whether, even assuming the video was equivocal about

whether Raines was actually attacking Hanson, the petitioners might reasonably have perceived such a threat, even if they were ultimately incorrect. Similarly, the court did not address whether, under clearly established law, the officers would be on notice that their actions under such tense, rapidly evolving circumstances might give rise to liability. In sum, on the pretext of a factual dispute concerning inferences that could be drawn from otherwise undisputed evidence—after all, the video shows what it shows—the Eighth Circuit sidestepped its core obligation, as established by this Court's decisions, to undertake meaningful inquiry with respect to defendants' entitlement to qualified immunity.

The ubiquity of cell phone, civilian, and law enforcement dashboard cameras, and the increasing use of body cameras on police personnel, has made video evidence a prime component in motions for summary judgment concerning qualified immunity. The Eighth Circuit's decision here underscores the need for this Court to intervene at this time and provide clear guidelines for future cases. In addition, it is vital that the Court assure adherence to its precedents concerning the importance of qualified immunity and the obligation of appellate courts to conduct a rigorous inquiry as to the clearly established law, thus foreclosing the sort of end run around the Court's decisions that underlies the Eighth Circuit's opinion here. The petition should be granted.

C. The Circuit Courts Are Divided On The Scope Of Interlocutory Jurisdiction Under *Johnson*.

The Eighth Circuit's decision here is not only inconsistent with the decisions of this Court, but also contrary to the decisions of other circuits. Indeed, it is emblematic of a general confusion concerning the scope of interlocutory review following the Court's decision in *Johnson*.

In *Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016), the district court denied the defendant's motion for summary judgment based upon qualified immunity, finding that there was a triable issue of fact concerning whether plaintiff was improperly discharged in retaliation for conduct protected under the First Amendment. *Id.* at 1207. Writing for the court, then Circuit Judge Gorsuch noted that before the court could turn to the merits of any qualified immunity inquiry, it had to "work our way through the parties' procedural puzzles." *Id.* The plaintiff contended that this Court's decision in *Johnson v. Jones* barred the appellate court from assessing the district court's conclusion that a reasonable jury could find her dismissal was the result of her political affiliation. *Id.* Judge Gorsuch acknowledged, "[w]e can see how Ms. Walton might read *Johnson* as standing for so much," but rejected the contention. *Id*. at 1208.

In doing so, Judge Gorsuch noted the complexity that *Johnson* had brought to qualified immunity cases, observing that "what was supposed to be a labor-saving

exception has now invited new kinds of labor all its own." *Id.* Judge Gorsuch concluded that *Johnson* does not foreclose an appellate court from assessing the legal significance of facts, whether such facts are identified by the district court, apparent from the record—including video evidence of the sort considered by this Court in *Scott* and *Plumhoff*—or conceded by the moving party on summary judgment. *Id.*

In sum, while "*Johnson* requires us to accept as true the facts the district court expressly held a reasonable jury could accept," it "does not *also* require this court to accept the district court's assessment that those facts suffice to create a triable issue in any legal element essential to liability. That latter sort of question is precisely the sort of question *Johnson* preserves for our review." *Id*. Were the rule "otherwise and we could not consider the sufficiency of the (given) facts to sustain a lawful verdict, a great many (most?) qualified immunity summary judgment appeals would be foreclosed and *Mitchell*'s promise of assuring a meaningful interlocutory opportunity to vindicate what is supposed to be an immunity from trial would be 'irretrievably lost.'" *Id.* at 1209 (citing *Plumhoff*, 134 S. Ct. at 2019).

The Eighth Circuit's decision here cannot be reconciled with *Walton*. As then Judge Gorsuch noted in *Walton*, an appellate court is not divested of jurisdiction to decide a qualified immunity appeal simply upon the district court's declaration that different inferences may be drawn from otherwise undisputed evidence—here the Taser video. It is incumbent upon an

appellate court to assess the legal significance of those facts, which here would require the court to determine, after reviewing the Taser video, whether, for purposes of qualified immunity an officer, in light of existing law, might reasonably perceive that Raines posed a threat to Hanson, even if a jury might ultimately conclude that the officer was in error.

Although the Eighth Circuit's conflict with the Tenth Circuit's decision in *Walton* would, in and of itself, warrant this Court's intervention, the need for this Court's guidance is underscored by an acknowledged general confusion among the appellate courts about the scope of interlocutory jurisdiction under *Johnson*. In his concurring opinion in *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013), Judge Sutton agreed with the majority that resolution of the underlying qualified immunity argument was straightforward, but that "deciding how to apply *Johnson v. Jones*," and "deciding whether we have jurisdiction over this interlocutory appeal," was not. *Id*. at 677.

Departing from the majority in analysis, if not result, Judge Sutton concluded—consistent with the Tenth Circuit's approach in *Walton*—that under *Johnson* an appellate court had jurisdiction to decide a qualified immunity appeal where the district court denial was based upon the determination that the facts, while undisputed, might give rise to conflicting inferences. *Id.* at 678. This is because "[e]ven if the *genuine-issue* question somehow is purely factual in nature, the issue of *materiality* is not," and determining "[w]hich facts are material to a constitutional claim will always

be a legal question" for an appellate court. *Id*. at 683 (emphasis in original). In his view, *Johnson* forecloses review only where there is a specific dispute about a particular evidentiary fact, what he termed "'I didn't do it' appeals," and does not bar review when there is simply a difference as to the inferences that may be drawn from undisputed evidence. *Id*. at 681. As Judge Sutton noted, "[i]t is difficult to think of qualified immunity appeals that do not involve inference drawing by the district courts, whether implied or explicit," and if that were sufficient to call appellate jurisdiction into question the issue would be present in "many, if not most, qualified immunity appeals." *Id.* at 680-81.

As Judge Sutton further observed, the conflicting views as to when a denial of summary judgment on qualified immunity is appealable under *Johnson* have injected jurisdictional disputes into a vast number of qualified immunity appeals. Moreover, the landscape is a confusing one. As Judge Sutton notes, "nearly twenty years after *Johnson*, every circuit in the country has some decisions that adopt my reading of it and some that adopt the majority's." *Id.* at 686. Adding to the chaos is the fact that even within the circuits there is little agreement on uniform application of *Johnson*, with panels of the same circuit applying the decision in vastly disparate manner. *Id.* (collecting cases). As Judge Sutton points out, in "every other circuit, save possibly for the D.C. and Federal Circuits, there are opinions supporting my view or otherwise involving appellate court review of inferences on the merits," yet, at the same time "there are also decisions in every

other circuit, save for the D.C. and Federal Circuits, that suggest the opposite." *Id.*

The result of this confusion is ongoing litigation that needlessly consumes the already scarce resources of the appellate courts:

> In view of these intra-circuit conflicts, it should not go unmentioned that additional litigation over appealability, an inevitable outcome of any uncertainty over the scope of it, adds to appellate work loads: one hundred and eighty degrees away from *Johnson*'s goal. I would resolve that problem and the others mentioned above by adopting a narrow interpretation of *Johnson*: Once the appellant accepts the record-supported facts alleged by his opponent, the court of appeals has jurisdiction to give fresh review to whether one party should win as a matter of law or whether the case should go to a jury.

Id.

This case presents the Court with the opportunity to provide clarity on application of *Johnson*, and curtail the ongoing and open-ended litigation of jurisdictional questions in appeals from the denial of summary judgment based on qualified immunity. The case is perhaps the clearest example of a dispute about materiality—the underlying fact, i.e., the Taser video, is itself undisputed. The only question is the legal significance of what is depicted on the video, which is precisely the inquiry this Court conducted in *Scott* and *Plumhoff*. As we discuss, petitioners submit that the video confirms

their entitlement to qualified immunity. At the very least, the Court of Appeals should not have abdicated its responsibility to address the merits of petitioners' qualified immunity claim simply by declaring the existence of a factual conflict that forecloses review under *Johnson*.

Review is therefore necessary to vindicate the important principles underlying qualified immunity, and to provide guidance to the appellate courts on an issue that needlessly consumes judicial resources.

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *KISELA V. HUGHES* AND OTHER DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED OR THE UNDISPUTED EVIDENCE DEMONSTRATES THAT NO VIOLATION OCCURRED.

In improperly dismissing petitioners' appeal for lack of jurisdiction, the Eighth Circuit abdicated its responsibility to conduct a searching inquiry into whether petitioners were entitled to qualified immunity. Contrary to this Court's decisions in *Plumhoff v. Rickhard* and *Scott v. Harris* in particular, it failed to evaluate the Taser video with an eye towards determining whether under clearly established law no reasonable officer would believe use of force was reasonable in light of what the video depicted. Nor did it assess whether, as a basic matter, petitioners could reasonably perceive a threat to Officer Hanson

justifying the use of force, thus precluding an excessive force claim on the merits. This failure to address either prong of qualified immunity, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), was flatly improper and departed from the controlling decisions of this Court.

A. No Clearly Established Law Put Petitioners On Notice That Their Use Of Force Might Violate The Fourth Amendment.

As noted, this Court has repeatedly admonished the lower appellate courts that other than in an obvious case, "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citing *Mullenix v. Luna*, 136 S. Ct. at 309); *White v. Pauly*, 137 S. Ct. at 551. Here, no existing precedent squarely governs the facts confronted by petitioners so as to put them on notice that their use of force might be deemed improper under the Fourth Amendment. Indeed, if anything, existing case law underscored that their use of force was proper.

The undisputed evidence established that petitioners were confronted with tense, rapidly evolving circumstances. Mr. Raines had stabbed his roommate, who called the police while bleeding from the wound, and the officers were aware of the need to enter the apartment to assure that he received medical care. They repeatedly commanded Raines to drop the knife, yet he refused to do so, and instead continued to wave

the knife in a highly agitated state. Two independent witnesses confirmed that petitioners shot Raines when he moved towards Hanson, who was attempting to get close enough to him to use a Taser.

Notwithstanding the Eighth Circuit's statement that the Taser video is somehow "inconclusive," petitioners submit that it supports their account of the incident, as well as the account related by independent witnesses—that Raines moved towards Hanson, or, at the very least, could reasonably be perceived as moving towards Hanson in a threatening manner. (Pet. App. DVD.) Raines, acting erratically, and armed with a knife, was less than 12 feet from Hanson, thus requiring a split-second reaction by petitioners and leaving them with little or no margin for error. No case law would have suggested that petitioners' use of force in these circumstances could be deemed unreasonable.

In fact, under this Court's decision in *Kisela*, it is plain that petitioners are entitled to qualified immunity. In *Kisela*, the Court found that the law was not clearly established so as to deprive an officer of qualified immunity for using deadly force against an individual who was standing 6 feet away from a potential victim, and holding a knife, but not actively threatening the person. The Court emphasized that the officer was aware that the knife-wielding individual had been acting erratically earlier, and had only seconds to react. 138 S. Ct. at 1153. That is precisely the situation here. If anything, Raines was much more actively threatening than the plaintiff in *Kisela*.

To the extent the decisions of this Court define clearly established law for purposes of qualified immunity, then *Kisela* mandates that petitioners be granted qualified immunity.

Even assuming one must look at Eighth Circuit law to determine whether the law was clearly established with respect to petitioners' use of force for purposes of qualified immunity (an issue the Court has left open),[5] the relevant case law makes it clear that qualified immunity is appropriate. In *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir. 2012), police officers responded to a domestic violence report and confronted the suspect on his porch. *Id*. at 495. The suspect's girlfriend came out and advised the officers that he had a knife, at which point an officer twice commanded him to drop the knife. *Id*. at 496. The suspect, while holding the knife to his side, "raised his right leg as if to take a step in [Officer] Cook's direction," and the officer fired, killing the suspect. *Id.*

The district court granted summary judgment, finding that the force was reasonable because the officer had probable cause to believe that the suspect's movement towards the officer with a knife posed an immediate threat. *Id.* On appeal, the plaintiff argued

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[5] This Court has noted that "[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 591 n.8 (2018); *see also Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (reserving question whether court of appeals decisions can be "a dispositive source of clearly established law").

that simply lifting a foot off the ground could not be viewed as an immediate threat, but the Eighth Circuit disagreed, concluding that "[g]iven the totality of the circumstances, however, the court did not err in concluding that Cook had probable cause to believe that Morgan posed a threat of imminent, substantial bodily injury to Cook." *Id*. at 497. Critical to the court's conclusion was the fact that the suspect was holding a knife in his hand, the distance between the officer and the suspect was "minimal, totaling 12 feet at most"; Morgan would not drop the knife when ordered to; and he made an aggressive advance towards Cook. *Id.*

Here, petitioners confronted a similar, indeed if anything, more dangerous situation than the circumstances that justified the use of force in *Estate of Morgan*. Here too, the distance between Hanson and Raines was minimal, totaling 12 feet at most, and Raines repeatedly disobeyed commands to drop the knife, and made an aggressive advance towards Hanson.

The Eighth Circuit's conclusion that the Taser video evidence created an issue of fact as to Raines's conduct that foreclosed application of qualified immunity under *Estate of Morgan*, is untenable. As a threshold matter, petitioners submit that review of the video reveals that in fact Raines made an aggressive move against Hanson, stepping towards her. (Pet. App. DVD.) Moreover, even if the video is somehow "inconclusive," on whether Raines *actually* stepped towards Hanson, the key inquiry for purposes of qualified immunity is whether the officers could have *reasonably*

perceived Raines as moving in that direction. That they might have been mistaken, i.e., that a jury could draw a different inference from the video, does not foreclose qualified immunity, as this Court has emphasized that qualified immunity embraces not just mistakes of law, but also mistakes of fact. *Pearson*, 555 U.S. at 231 ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' ").

Under both *Kisela* and *Estate of Morgan*, petitioners are plainly entitled to qualified immunity.

B. The Undisputed Evidence Established That Petitioners' Use Of Force Was Reasonable.

This Court has recognized that where the undisputed video evidence establishes that the force used was objectively reasonable, an officer is entitled to summary judgment. *Plumhoff*, 134 S. Ct. at 2021-22; *Scott*, 550 U.S. at 386. Petitioners submit that is the case here.

In *Graham v. Connor*, this Court held that claims for excessive force under the Fourth Amendment must be evaluated based upon the objective reasonableness of an officer's conduct. 490 U.S. at 395-97. That evaluation "requires careful attention of the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers

or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. "The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1546 (2017) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Moreover, the reasonableness of force must be evaluated based on the information officers possessed at the time. *Saucier v. Katz*, 533 U.S. 194, 207 (2001); *Mendez*, 137 S. Ct. at 1546-47; *Graham*, 490 U.S. at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . "). Critically, the Court has emphasized that the reasonableness of "a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The circumstances petitioners confronted were certainly "tense, uncertain, and rapidly evolving." As noted, petitioners submit that review of the Taser video confirms the account of petitioners and independent witnesses that petitioners fired at Raines in response to his movement towards Hanson while waving a knife. Thus, despite the district court's conclusion that the video created an issue of fact as to whether

the use of force was reasonable, and the Eighth Circuit's statement that the video is "inconclusive," as in *Plumhoff* and *Scott*, independent review of the video belies the characterizations of the lower courts.

In addition, even assuming the officers were ultimately mistaken in their assessment that Raines was attacking Hanson, and his movements were somehow equivocal, that does not mean the force was excessive under the Fourth Amendment. As noted, *Graham* only requires that an officer act reasonably, not that he or she must ultimately be correct in their assessment in any given situation. The standard enunciated by the Court in *Graham* concerns probable cause to use force, and just as "[t]he Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises," so too "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." 490 U.S. at 396 (citations omitted). An officer need only believe that there is probable cause to believe the force is necessary, and as the Court has observed, "the probable-cause requirement: . . . '[D]oes not deal with hard certainties, but with probabilities.'" *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality); *Hill v. California*, 401 U.S. 797, 804 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . .").

Viewed through the prism of *Graham*, *Plumhoff*, and *Scott*, petitioners submit that the Taser video

establishes that petitioners acted reasonably in perceiving a threat to Hanson and using force to halt that threat. For this reason too, review is warranted.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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