No. 18-110

In the Supreme Court of the United States

ANDREW BURNINGHAM, JAMES BURROUGHS, AND STEVEN CULLIFORD,

Petitioners,

v.

JOHN MORRISON RAINES, III, GUARDIAN OF THE ESTATE OF JOHN MORRISON RAINES, IV,

Respondent.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

IMLA is a non-profit, nonpartisan, professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Members of IMLA regularly advise municipalities and their law enforcement agencies on issues pertaining to the use of force and qualified immunity. Given the confusion among the circuits on the issue presented in this case, IMLA has a strong interest in this dispute. As a representative of local governments committed to effective and responsible

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[1] Counsel for petitioners and respondent were notified more than ten days prior to the due date of this brief of the intention to file and have consented to the filing of this *amicus* brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.6.

policing, IMLA urges this Court to grant certiorari and reverse the court of appeals' decision.

STATEMENT OF THE CASE

Amicus curiae IMLA joins in the Statement of the case as set forth in Petitioners' Petition for Writ of Certiorari. *See* Pet. at 3-8.

SUMMARY OF ARGUMENT

This Court has repeatedly stressed the importance of qualified immunity in assuring that public servants, especially law enforcement officers, can perform their duties and exercise their judgment without undue fear of litigation. For law enforcement officers, this judgment is often exercised in tense, rapidly evolving, and dangerous circumstances. Qualified immunity recognizes these difficult conditions and provides protection from liability so long as the officer was not plainly incompetent or did not knowingly violate the law. Recently, in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), the Court stressed the special importance of qualified immunity in use of force cases and held, once again, that the qualified immunity analysis must be conducted with the particular facts of a given case.

The court of appeals decision here, relying on *Franklin ex rel. Franklin v. Peterson*, 878 F.3d 631 (8th Cir. 2017), another Eighth Circuit case on Petition for Writ of Certiorari regarding the same issues presented here, frustrates these important principles. As thoroughly addressed in the Petition, the court of appeals dismissed Petitioners' appeal based on an incorrect interpretation of *Johnson v. Jones*, 515 U.S. 304 (1995). This error insulates denials of qualified immunity from meaningful appellate review and has

produced a deep and mature circuit split that requires this Court's clarification. While *Johnson* holds "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine issue of fact for trial,'" 515 U.S. at 319-20, the court of appeals stretches this holding beyond its breaking point.

The nub of the court of appeals' decision here is: (1) the district court denied qualified immunity based on its finding that there was a dispute over whether there was probable cause to believe that John Morrison Raines, IV, ("Raines"), posed a significant threat of death or serious bodily harm when he was shot; and (2) that this determination of a triable issue is unreviewable under *Johnson*. This analysis is flawed and undermines the very purpose of qualified immunity. Here, the district court inferred from undisputed facts a triable issue regarding an element of Respondent's claim, namely, the threat posed by Raines when he was shot. But reviewing this type of inference is a core responsibility of appellate courts and is not prohibited by *Johnson*.

The court of appeals' approach improperly ignores the difference between the district court's determination that a fact-dispute is genuine, as opposed to material. The question of genuineness amounts to whether there is competent evidence in the record to establish a particular fact. Under *Johnson*, these determinations are not subject to interlocutory review. 515 U.S. at 313, 316. But "the materiality determination rests on the substantive law." *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). And, as this Court has recognized repeatedly, assessing the legal significance of particular facts is precisely what an appellate court is tasked with when exercising interlocutory review of the denial of qualified immunity. Inferring whether a particular fact dispute creates a triable issue on an element essential to liability amounts to an assessment of materiality, and, as the Tenth Circuit held in *Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016), this type of assessment is not barred by *Johnson*.

The Eighth Circuit's narrow construction of appellate jurisdiction to review the denial of qualified immunity in use of force cases is contrary to the decisions of this Court and many decisions from other circuits. In fact, as set forth in the Petition, the issue presented in this case has sparked such confusion among the circuits that circuits are not even consistent themselves on this issue. The intra-circuit conflict over the issues presented in the Petition is thus deep and mature. This type of disarray produces even more severe results than a traditional circuit split. With a traditional circuit split, no matter how entrenched, litigants have some understanding of how the issue will be resolved in their circuit because the approach of a particular circuit may be predicted. But here, with multiple intra-circuit conflicts, results vary unpredictably from panel to panel. Such chaos concerning the important issue of qualified immunity is intolerable and should be resolved by this Court.

As discussed below, maintaining a robust qualified immunity defense is vital to local government agencies, their employees, and society as a whole. It allows the

exercise of judgment without undue fear of and room for reasonable mistakes made under tense, rapidly evolving, and dangerous circumstances. In spite of this importance, the court of appeals' incorrect interpretation of *Johnson* substantially weakens qualified immunity, insulating denials of the defense from appellate review and denying public officials a qualified immunity analysis with facts particular to their cases at the earliest stage of litigation. The error with the Eighth Circuit's holding is compounded given the video evidence available in this case. The lower court's opinion is wrong—it is inconsistent with the Court's previous decisions as well as other circuit decisions. Given the conflict and pervasive confusion among the circuits, this Court's intervention is needed to provide clarity on this important and recurring issue. For these reasons, *Amicus Curiae* IMLA respectfully requests this Court grant the Petition and reverse.

ARGUMENT

I. Preserving robust qualified immunity protection is vital to local government entities, their employees, and society as a whole.

This Court has repeatedly stressed the importance of maintaining a strong qualified immunity defense. In the last ten years, for example, the Court has issued a number of opinions reversing federal courts' denials of qualified immunity cases. *See, e.g.*, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, n.3 (2015) (collecting cases). The Court has explained that these opinions were necessary "because qualified immunity is important to society as a whole." *White v.*

Pauly, 137 S. Ct. 548, 551 (2017) (summarily reversing denial of qualified immunity without briefing or oral argument) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Indeed, the importance of qualified immunity issues is borne out by the volume of qualified immunity cases that have occupied this Court's docket, including the recent decisions in *Kisela*, 138 S. Ct. at 1155 (summarily reversing denial of qualified immunity without briefing or oral argument) and *District of Columbia v. Wesby*, 138 S. Ct. 577, 582 (2018) (reversing denial of qualified immunity).

A primary rationale of qualified immunity is assuring that the public officials can exercise judgment and discretion without undue fear of litigation. As Petitioners note, this Court has explained qualified immunity ensures that public officials may discharge their duties in uncertain circumstances without undue fear of litigation and the threat of potential liability. "[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.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). As the Court noted, robust qualified immunity protection is a necessary prophylactic measure against "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.

The qualified immunity doctrine also protects scarce government resources. These resources not only include

the monetary expenses, but also "the diversion of official attention from pressing public issues." *Id.* The effect of the lower court's decision in this case is particularly harmful to this aspect of qualified immunity because of its potential effect on cases involving body-worn camera (BWC) and other video footage. BWCs are being increasingly used by law enforcement agencies across the country. *Body-Worn Camera Publications Provide Overview of Expanding Market* (July 12, 2017), https://nij.gov/topics/law-enforcement/technology/Pages/body-worn-camera-overview-of-expanding-market.aspx (last visited Aug. 17, 2018). BWC technology is perceived to be uniquely important in several different ways, including as a means to collect and preserve evidence, as a de-escalation tool, as improving transparency, as improving police community relationships, and as decreasing litigation costs, to name a few. Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, 19-25 (2014), https://www.ojpdiagnostic center.org/sites/default/files/spotlight/download/Police_Officer_Body-Worn_Cameras.pdf (last visited Aug. 17, 2018). But the cost of the technology is high, encompassing not only the devices and supporting computer hardware, but also the storage costs associated with the large amounts of data generated by the BWCs. *Id.* at 32-35. For many agencies, the cost of the technology may be prohibitive, but the predicted decrease in litigation costs is a perceived benefit that provides additional motivation for adopting the new technology.

Here, the court of appeals' decision below risks undercutting this benefit to society as a whole. In the record before the court of appeals was a video showing

the actions of the suspect in the moments before he was shot—it showed him wildly waving a knife back and forth, then taking one step toward an officer, and then another. In other words, the footage captured the underlying facts upon which Petitioners' qualified immunity defense was based. The court should have watched the footage and then decided whether, given Raines' actions, only a plainly incompetent officer would have believed him to pose a significant threat of bodily harm or death. Instead, the court abdicated its responsibility to decide this legal issue and forced defendants to continue the costly litigation. Cases with BWC footage are going to become increasingly common. But if the court of appeals' incorrect application of *Johnson* stands, much of the promised litigation-cost savings of BWC technology will be lost because the availability of interlocutory appeals to terminate a lawsuit before trial will be severely constrained. If that is the case, local governments may opt not to bear the costs of BWC technology for their officers.

BWC footage of officer-involved shootings will play an increasingly important role in federal litigation. In fact, a quick non-exhaustive internet search yielded five examples of BWC footage of officer involved shootings that were released since just July 1, 2018. Jonathan Lloyd, *LAPD Releases Video of Shooting That Killed Woman Held at Knifepoint*, NBC Bay Area News (July 31, 2018), https://www.nbcbayarea.com/news/california/Knife-Attack-LAPD-Stabbing-Police-Shooting-Van-Nuys-Church-Body-Camera-Video-489642431.html (last visited Aug. 17, 2018); *"No One Has to Die": Body Camera Video Released of Deadly Police Shooting in Vineland*, NBC10 (July 19, 2018), https://www.nbcphiladelphia.com/news/local/Body-Camera-Video-Released-

of-Deadly-Police-Shooting-in-Vineland-488672041.html (last visited Aug. 17, 2018); William Lee, et al., *Chicago police release body camera footage of fatal officer-involved shooting that prompted protests*, Chicago Tribune (July 15, 2018), http://www.chicagotribune.com/news/local/breaking/ct-met-man-shot-and-killed-by-police-identified-additional-protests-planned-20180715-story.html (last visited Aug. 17, 2018); Nate Gartrell, et al., *Video: Police release body cam footage in fatal I-80 police shooting*, The Reporter (July 12, 2018), http://www.thereporter.com/article/NG/20180712/NEWS/180719950 (last visited Aug. 17, 2018); Jim Walsh, *Body cam footage of AC police shooting released*, Courier Post (July 3, 2018), https://www.courierpostonline.com/story/news/crime/2018/07/03/atlantic-city-new-jersey-police-shooting-body-cam-timothy-deal-killed/756677002/ (last visited Aug. 17, 2018). In each of these videos, facts are established upon which claims of qualified immunity might be based. True enough, aspects of an incident may not be caught on camera or may have occurred before the camera was rolling, and if such facts are subject to conflicting testimony or other evidence, then they might create a genuine dispute. But a defendant asserting qualified immunity has a right to a fact-particularized analysis of the clearly established prong of the defense—and that analysis should be based on facts shown to be incontrovertible by the BWC video. By holding that there is no jurisdiction to consider a district court's inference that there is a triable issue as to a legal element essential to liability—in this case, the threat posed by Raines—the court of appeals completely frustrates any review based on those facts rendered undisputed by video footage. As the Petition demonstrates, this issue is subject to a deep and

mature circuit conflict. With the proliferation of BWC technology, the resolution of this conflict is critical.

The protection afforded to civil servants by qualified immunity is especially important in officer-use of force cases, which almost always involve "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). By all accounts, modern police work in the United States of America is a dangerous profession. The Federal Bureau of Investigation ("FBI") publishes an annual report of law enforcement officers killed and assaulted in the line of duty. For example, in 2017, the FBI collected assault data from 12,198 law enforcement agencies that employed 596,604 officers. Federal Bureau of Investigation, 2017 Law Enforcement Officers Killed and Assaulted (2018). These officers provided service to more than 269 million people, or 82.8% of the nation's population. *Id.* The reports provide key insight into the dangers that the nation's law enforcement officers confront on a daily basis. In the last ten years, from 2008-2017, 544,443 law enforcement officers were assaulted while on duty. *Id.* at table 85, https://ucr.fbi.gov/leoka/2017/tables/table-85.xls. This number is staggering considering that over this same ten-year period, an average of 555,700 officers were employed and subject to the report. *Id.* This means that over ten years, about as many officers are assaulted as are employed. Further, of the 544,443 assaulted officers, 22,130 were assaulted with firearms, 9,652 were assaulted with a knife or other cutting weapon, and 80,269 were assaulted with some other "dangerous weapon." *Id.* And during this ten-year period, *496 officers were feloniously killed*. *Id.* at table 1, https://ucr.fbi.gov/leoka/2017/tables/table-1.xls.

Moreover, the trends in this data demonstrate that things are only getting more dangerous for law enforcement. As of July 31, 2018, 2018 has seen a 56% increase in the number of officers feloniously killed as compared to the same period in 2017—from 25 to 39. Federal Bureau of Investigation, 2018 Law Enforcement Officers Killed (2018). From 2014 to 2017, firearm assaults on officers have steadily increased, resulting in 35.5% more firearm assaults. 2017 Law Enforcement Officers Killed and Assaulted (2018) at table 85, https://ucr.fbi.gov/leoka/2017/tables/table-85.xls. And assaults in general have increased by 22.9% over this same three-year period. *Id.*

There can be no doubt that being a law enforcement officer means performing one's service under threat to life and limb. In such circumstances, the protections afforded by qualified immunity should not be chiseled away. Law enforcement officers, when faced with threats to the safety of others and themselves must be able to act in the manner they think is best based on their judgment, training, and experience without an undue fear of litigation or its consequences.

There are also normative reasons for protecting the doctrine of qualified immunity. This Court has proscribed the use of the 20/20 vision of hindsight in evaluating an officer's actions. Indeed, in the face of violence being committed or threatened against oneself or others, there can be no fault or culpability associated with a mistaken response. In other words, in the rapidly evolving, tense, uncertain, and dangerous reality of law enforcement, qualified immunity does and should shield officers from liability from reasonable mistakes, even when those mistakes may

raise constitutional concerns. A lot is asked of police officers—it is one thing to hold someone liable for work performed behind a desk, but it is quite another to judge, with hindsight and analysis conducted in a calm courtroom, the performance of an officer who is constantly wondering from where the next punch—or gunshot—is going to come. Qualified immunity rightly protects officers from liability by acknowledging and accounting for the difficult and dangerous conditions under which law enforcement officers often work.

II. The court of appeals' ruling should be reversed because it significantly undermines qualified immunity.

The lower court's overly broad application of *Johnson* undercuts qualified immunity in at least two critical ways. First, it creates an end-run around this Court's requirement that qualified immunity be analyzed with facts particularized to the case. This Court has repeatedly instructed the lower courts to conduct a fact-specific analysis of qualified immunity. *See Kisela*, 138 S. Ct. at 1152-53. As this Court explained in *White:* "[t]oday, it is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality." *White*, 137 S. Ct. at 552 (internal quotation marks and citations omitted). Instead, "the clearly established law must be particularized to the facts of the case. Otherwise, [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*

The court of appeals' erroneous application of *Johnson* functionally deprives public officials of a

qualified immunity analysis particularized to the facts of the case. For example, here, the district court inferred that there was a triable issue as to whether there was probable cause to believe that Raines posed a significant threat of death or serious physical injury when he was shot, an essential element of Respondent's claim. In dismissing the appeal, the court of appeals held that challenging this assessment was impermissible under *Johnson*. The court of appeals never analyzed whether, for example, such a belief was reasonable based on Raines wildly waving a knife back and forth and then taking a first and second step toward an officer who did not have her pistol drawn. Such facts were uncontroverted courtesy of the video footage, as was the officers' knowledge that a 911 caller—who was still waiting for help—had reported that Raines had just stabbed him. The court of appeals' erroneous interpretation of *Johnson* prevented a fact-particularized analysis of qualified immunity based on these undisputed facts. The decision therefore frustrates this Court's mandate to analyze the clearly established prong with facts particular to the case.

Further, once the summary judgment stage is passed, defendants are unlikely to ever obtain a qualified immunity analysis particularized to the facts of their case. For example, a district court may use special verdict forms that frame excessive force claims in the most general terms. In a deadly force case, like this one, the jury might simply be asked to determine whether a defendant used excessive force. The clearly-established prong of the qualified immunity standard is a question of law, but once the verdict comes back, assuming it is for the plaintiff, the judge has no idea what specific facts the jury based its verdict on. As

such, the judge is unable to analyze the clearly-established prong with particularized facts. This issue has long been the subject of legal commentary. *See, e.g.,* Henk J. Brands, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 Colum. L. Rev. 1045, 1065 (1990). Under the overly broad interpretation of *Johnson* applied by the court below, if no fact-particularized analysis is done at the summary judgment stage, it will be irretrievably lost once the jury returns a verdict form that finds nothing more detailed than that the force was unreasonable.

Second, and more generally, insulating inferences from appellate review—as the court of appeals did here when it determined it did not have jurisdiction to review the district court's inference regarding the threat posed by Raines—can shield a denial of qualified immunity from, not just a fact-particularized appellate review, but *any* meaningful appellate review. A district court could infer from any identified fact issue that a dispute exists over a material fact. No matter how legally unsound the inference, under the lower court's interpretation of *Johnson*, the district court's denial of qualified immunity would be unreviewable. If the lower court's incorrect application of *Johnson* stands, the rule of qualified immunity risks being converted into a rule of virtually unqualified liability.

The importance of the issues presented in the Petition is heightened because they often recur in cases involving force that results in death. The lower court's decision extends beyond cases with video footage, like this one, to any interlocutory appeal where the district court denies qualified immunity based on an inference

from the record or the legal determination that a particular fact is material. For example, in many officer conduct cases where the challenged conduct resulted in the death of a suspect, the only evidence of the incident is the officers' testimony and any relevant physical evidence that might be available. Under such circumstances, it is not uncommon for a district court to decide whether inconsistencies with the officers' testimony and other evidence allow an assessment that there are disputes regarding essential legal elements, especially the threat posed by the suspect before the force was used. *See, e.g.*, *Williams v. Holley*, 64 F.3d 976, 981 (8th Cir. 2014); *George v. Morris*, 736 F.3d 829, 835 (9th Cir. 2013). When qualified immunity is denied in this way, and the disputed facts—such as, whether the suspect was armed or whether the suspect took a step toward the officers—are not specifically identified and no particularized fact analysis is conducted. Under the lower court's interpretation of *Johnson*, there is no jurisdiction to review the district court's opinion in this situation. But under the correct interpretation of *Johnson* there is jurisdiction for a thorough review. Given the societal importance of cases involving police action that result in death and the uncertainty surrounding interlocutory appeal jurisdiction in these circumstances, clarification by this Court is needed.

III. The court of appeals' decision that there was no jurisdiction to consider Petitioners' appeal was incorrect.

There is jurisdiction under *Johnson* to consider whether there is sufficient evidence to create a triable issue as to a legal element essential to liability. That was the issue decided by the Eighth Circuit below—whether Petitioners could challenge the district court's inference from the record that there was a dispute over whether there was probable cause to believe that Raines posed a significant threat of bodily harm or death when he was shot. App. 4-5. This type of evidence sufficiency question is precisely what the Tenth Circuit held was reviewable in *Walton* in its interpretation of *Johnson*. Petitioners argued that, based on the facts shown in the video—that Raines was waiving a knife, disobeyed repeated orders to drop the knife, and then took one step and a second step toward an officer who was armed only with a taser—the district court erred by inferring that there was a triable issue as to whether Raines posed a significant threat of death or serious physical injury when he was shot. The inferred fact was a legal element essential to Respondent's deadly force claim, and there is jurisdiction under *Johnson* and its progeny to "[d]ecid[e] 'evidence sufficiency' questions of this sort." *Walton*, 821 F.3d at 1209. Moreover, "if the rule were otherwise and [courts of appeals] could not consider the sufficiency of the (given) facts to sustain a lawful verdict, many qualified immunity summary judgment appeals would be foreclosed and *Mitchell* [*v. Forsyth*'s] promise of assuring a meaningful interlocutory opportunity to vindicate what is supposed to be an immunity from trial would be 'irretrievably lost.'" *Id.*

In this case, what facts, precisely, called into question whether Raines posed a significant threat of serious bodily harm or death when he was shot? Was it whether he was holding a knife and waving it? Was it whether he refused to obey orders to drop the knife? Was it whether he took one step, and then a second step toward an officer? Was it whether the officers had reason to believe that he had slashed his roommate who was hiding in a closet awaiting the help of first responders? By holding that there is no jurisdiction to consider whether the evidence created a triable question as to a legal element essential to liability, the court of appeals did not need to ever specify the facts particular to the case. As such, if the court of appeals' rule is allowed to stand, it will allow the lower courts to avoid this Court's mandate that qualified immunity be analyzed with facts particularized to the case. *See Kisela*, 138 S. Ct. at 1152-53.

Instead of conducting the required fact-specific qualified immunity analysis, the court of appeals simply concluded that the video evidence was inconclusive. App. 7. But by doing so the appellate court missed the crux of the clearly established prong. The issue is whether only a "plainly incompetent" officer would have observed the specific facts shown on the video and believed that Raines posed a significant threat of serious bodily harm or death. Whether Raines in fact "advanced" on the officers—whatever that means—is not the issue. The issue is whether an officer, knowing about the 911 call, seeing Raines waving the knife, seeing him refuse to drop it, and then seeing him take one step and a second toward an officer armed only with a taser, could have reasonably believed that Raines posed sufficient threat to justify

deadly force. These are the incontrovertible facts in the video and record, and the appellate court should have determined whether shooting Raines under these particularized facts amounted to a violation of a clearly established right. It did not.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* IMLA respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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