No. 18-110

IN THE

Supreme Court of the United States

ANDREW BURNINGHAM, JAMES BURROUGHS, AND STEVEN CULLIFORD,

Petitioners,

v.

JOHN MORRISON RAINES, III, as 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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The district court below refused at summary judgment to grant defendants qualified immunity because of a genuine issue of material fact regarding whether defendants had acted contrary to clearly established law. Pet. App. 14-16.

In light of that holding, the question presented by the decision below is:

Whether the court of appeals correctly held that it lacked appellate jurisdiction over this interlocutory appeal on the ground that defendants' arguments all hinged on resolution of a genuine dispute of material fact.

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INTRODUCTION

The district court rejected petitioners' qualified-immunity defense at summary judgment because there was "a genuine issue of material fact" as to whether petitioners violated clearly established law. Pet. App. 14. Petitioners sought interlocutory review in the court of appeals, arguing that the fact was undisputed—despite the district court's holding otherwise.

The Eighth Circuit recognized its limited review powers and dismissed the appeal for lack of jurisdiction because, under *Johnson v. Jones*, 515 U.S. 304 (1995), appellate courts do not have jurisdiction to resolve factual disputes on interlocutory review of a summary-judgment decision denying qualified immunity.

Now petitioners attempt to reframe their appeal into something else entirely. Their questions presented simply assume as undisputed the material fact actually in dispute. They then assert that the Eighth Circuit dismissed the appeal because "differing inferences" could be drawn from that fact, Pet. i, even though the Eighth Circuit did not breathe a word about inferences. Petitioners also argue that the Eighth Circuit never addressed the materiality of the disputed fact but neglect to mention that they conceded the fact's materiality below. Finally, they mischaracterize Eighth Circuit precedent in an unsuccessful attempt to manufacture a one-to-one circuit split.

Petitioners do all of this to conjure questions of law out of a run-of-the-mill factual dispute. This Court has recently rejected two petitions for

certiorari in which the petitioners, like petitioners here, attempted to disguise an interlocutory appeal of a fact-based qualified-immunity defense by framing it as a legal dispute. *See Peterson v. Franklin*, No. 17-1572, 2018 WL 2303498 (Oct. 29, 2018); *Gauger v. Stinson*, No. 17-721, 138 S. Ct. 1325 (2018). The petition here should meet the same fate.

STATEMENT OF THE CASE

I. Legal background

Appellate courts generally lack jurisdiction over interlocutory appeals from denials of summary judgment because they are not "final decisions" under 28 U.S.C. § 1291. *See Johnson v. Jones*, 515 U.S. 304, 309 (1995). Appellate courts may, however, review a "small class" of interlocutory appeals that conclusively resolve an issue separate from the merits that would be effectively unreviewable on appeal from a final judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Appeals from denials of qualified immunity on "purely legal" issues fall within the "small class" of cases meeting the *Cohen* criteria for interlocutory review. *Mitchell v. Forsyth*, 472 U.S. 511, 524, 527-29 & n.9 (1985). Qualified immunity protects state officials from suit for actions taken in pursuit of their duties, provided they do not violate clearly established law. *See id.* at 525. Because qualified immunity concerns a right not to stand trial and is "conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law," it is separate from the merits and reviewable on interlocutory appeal. *Id.* at 526, 528-29.

Appellate review of denials of qualified immunity at summary judgment, however, is limited to "a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell*, 472 U.S. at 528. For that reason, appellate courts may *not* exercise interlocutory review of denials of qualified immunity based on questions of "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Johnson*, 515 U.S. at 313.

In *Johnson*, the plaintiff alleged that he was beaten by several police officers. 515 U.S. at 307. Some of the officers moved for summary judgment, arguing that they had qualified immunity because they were not present at the scene of the beating. *Id.* The district court denied the motion because the record showed a genuine issue of fact for trial: whether the officers were, in fact, present. *Id.* at 308. The court of appeals dismissed the appeal for lack of appellate jurisdiction. *Id.*

This Court affirmed, drawing support from *Cohen* and *Mitchell*. *See Johnson*, 515 U.S. at 313-15. First, the Court reiterated that appeals from interlocutory orders "are the exception, not the rule," because allowing too many interlocutory appeals would "make it more difficult for trial judges to do their basic job" and would "risk[] additional, and unnecessary, appellate court work." *Id.* at 309.

Second, the Court contrasted the officers' appeal with the appeal in *Mitchell*, where the "purely legal" issue of what clearly established law applied to a given set of facts was separate from the merits of the claim. *Johnson*, 515 U.S. at 313. But, in *Johnson*, the factual issue before the Court—what actually

happened—was not. *Id.* Thus, only legal issues like the one in *Mitchell* fall within the *Cohen* criteria for satisfying the final-decision rule at summary judgment. *Id.* at 313-15. The officers in *Johnson* urged the Court to take "a small step beyond *Mitchell*" and find factual disputes in qualified-immunity cases separate from the merits (and so appealable). *Id.* at 315. But the Court rejected their request, reasoning that such a move "would more than relax the separability requirement—it would in many cases simply abandon it." *Id.* Qualified-immunity appeals, the Court observed, "interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law." *Id.* at 317 (quotation marks omitted) (modifications in original).

Finally, the Court found that trial courts' "almost daily" experience deciding fact-based issues meant appellate courts had "no comparative expertise." *Johnson*, 515 U.S. at 316. Thus, "interlocutory appeals are less likely to bring important error-correcting benefits" to fact-based qualified-immunity cases. *Id.*

II. Factual background

Respondent John Raines IV has schizophrenia. Pet. App. 10. Two days before the shooting that gave rise to this suit, Raines began suffering seizure-like symptoms while on the way to work with his roommate, Nathan Dodson. *Id.* Dodson called 911. *Id.* One of the responding officers was petitioner Officer Steven Culliford. Dodson "informed Officer Culliford that Raines had recently been taken off of his schizophrenia medicine … and was having mental

health issues." *Id.* An ambulance took Raines to the hospital, and Culliford followed behind. *Id.* Raines was not put back on his medication nor seen by his psychiatrist. CA8 App. 128, 1062.

Two days later, Raines and Dodson were at their apartment when Dodson saw that Raines's "eyes were rolling in the back of his head" and he was breathing heavily. CA8 App. 197. Raines then "came at" Dodson with a pocketknife. *Id.* at 198, 216. Dodson tried to resist but Raines cut Dodson's stomach. *Id.* at 198-99, 219. Dodson then ran into a closet where he called the police. *Id.* at 199.

Police officers—including Culliford—were called to the apartment complex. Pet. App. 10-11. When petitioner Officer Andrew Burningham arrived, Raines was standing on the sidewalk outside the apartment building. *Id.* at 10. He had blood on his wrist and was holding the knife by his side. *Id.* at 10-11. Burningham drew his gun and ordered Raines to drop the knife. *Id.* at 11. Raines began saying "fine, fine, fine," holding the knife roughly at shoulder level. *Id.* He rocked back and forth, shifting his weight from foot to foot, staying within a four-foot radius. *Id.*; CA8 App. 306.

Within a minute, several other police officers, including petitioner Officer Jess Burroughs, Officer Rachel Hanson, and Detective Jason Cameron swarmed around Raines in a semi-circle with their guns drawn. Pet. App. 11-12; Pet. App. DVD. Two officers shouted that if Raines advanced toward them, they would shoot. Pet. App. 11. Raines continued to rock back and forth, holding the knife and shifting his weight from foot to foot, staying on a single section of the sidewalk. *Id.*; Pet. App. DVD.

The officers radioed for an "orange gun," which fires nonlethal ammunition, but they did not wait for it to arrive. CA8 App. 282, 709. Instead, Hanson—one of the two officers not positioned behind Raines—holstered her gun, drew her taser, and began advancing toward Raines. Pet. App. 11. Cameron followed behind Hanson to provide her with protective cover. *Id.*

At this point, the camera on Hanson's taser started recording. Pet. App. DVD. Raines continued to rock back and forth while holding the knife, generally staying in place. *Id.* Although Hanson "had approached within optimum target distance for the taser, she did not discharge it." Pet. App. 11.

Cameron was positioned directly behind Hanson so that he could shoot and kill Raines if necessary. CA8 App. 439. But he never fired a shot. Pet. App. 12. Instead, Burningham, Culliford, and Burroughs—who were positioned behind Raines and further from him than Hanson—began firing at Raines. Pet. App. 11. Raines's body moved forward. Pet. App DVD. Hanson discharged the taser only after gunshots were fired. CA8 App. 676-77; Pet. App. DVD.

The three officers fired at Raines from behind twenty-one times, Pet. App. 12, over the course of two rounds of fire, Pet. 6; Def. CA8 Br. 11. Some of those twenty-one shots came even after Raines had collapsed to the ground. Pet. App. DVD. Four shots struck Raines—in the left arm, the left side of his face, the left side of his chest, and in the middle of his back. Pet. App. 12; CA8 App. 616. Raines is now paralyzed from the waist down. Pet. App. 12.

III. Procedural background

A. Raines sued the officers, arguing that the shooting was an unreasonable seizure under the Fourth Amendment. Pet. App. 12. The officers moved for summary judgment, arguing that the shooting was reasonable and that they were entitled to qualified immunity because they never violated clearly established law. *Id.* at 12, 14-15.

The parties agreed on the applicable legal standard—that the shooting was unreasonable unless the officers had probable cause to believe that Raines posed an imminent threat to the officers or others. Pet. App. 14; CA8 App. 715, 844. But they did not agree on the facts. Seeking to justify their decision to shoot, the officers asserted that Raines "charged"—or, as they say in the petition (at 35), made an "aggressive advance"—toward Hanson with the knife. CA8 App. 710, 715. They also argued that Raines was blocking their entry to the building where a potential victim was waiting. *Id.* at 709.

Raines countered that he had not advanced but rather continued to rock back and forth. CA8 App. 831, 837. In support of his argument, Raines submitted the video captured by Hanson's taser camera. Raines maintained that the video shows him generally staying in place until after he was shot. *Id.* at 837. Specifically, he argued that he was propelled forward by the bullets hitting him from behind, creating the appearance of him stepping forward. CA8 App. 837. Raines also presented a sworn eyewitness affidavit stating, among other things, that the officers had unimpeded access to the building. CA8 App. 805.

After careful review of the facts, the district court rejected the officers' qualified-immunity defense, denying their motion for summary judgment. *See* Pet. App. 14-16. The court found there was sufficient evidence for a jury to find that Raines did not pose an imminent threat, which would make the shooting a violation of clearly established law. Pet. App. 14-16.

B. The officers filed an interlocutory appeal. They asked the Eighth Circuit to disregard Raines's understanding of the facts because, in their view, the video indisputably shows Raines aggressively advancing toward Hanson before he was shot. Def. CA8 Br. 17-18. Nowhere in their principal Eighth Circuit brief did the officers accept the facts that the district court had held a reasonable jury could find, including that Raines was shot before moving toward Hanson. Nor did they ever argue that the shooting would be reasonable under the Fourth Amendment in light of those facts. Instead, assuming the facts in *their* favor, they argued that there was no clearly established law prohibiting officers from shooting a man who advanced toward an officer with a knife. *Id.* at 15.

In response, Raines argued that the officers' legal arguments were foreclosed because those arguments all rested on the truth of the officers' version of the disputed facts. Pl. CA8 Br. 11-13, 19 (citing *Johnson v. Jones*, 515 U.S. 304 (1995)).

At oral argument, counsel for the officers never raised any legal arguments independent of the factual dispute. When asked by the panel whether there was any way to address the question of clearly established law without resolving the factual dispute, the officers' counsel argued that "the video shows,

and the testimony of everybody involved says he was going towards her before the shots, and so there is nothing to resolve because it is undisputed." CA8 Oral Arg. 00:10:20-00:11:32. Yet when asked if Raines disputed that he advanced toward Hanson before he was shot, the officers' counsel conceded that Raines did, in fact, dispute that contention. CA8 Oral Arg. 00:04:36-00:04:57.

In a unanimous opinion authored by Circuit Judge Ralph R. Erickson, the Eighth Circuit held that it did not have jurisdiction to resolve the factual dispute. Pet. App. 7-8.

First, the court noted that the initial inquiry in the qualified-immunity analysis was "whether the officers' shooting of Raines amounted to a Fourth Amendment violation." Pet. App. 6.

Next, the court recognized the correct standard for answering that question: "The use of deadly force is not constitutionally unreasonable if an officer has probable cause to believe that the suspect poses a threat of serious physical harm," but "where a person poses no immediate threat to the officer and no threat to others, deadly force is not justified." Pet. App. 6 (quotation marks and citation omitted). Although the "officers testified that they all believed Raines aggressively advanced on Officer Hanson just prior to the shots being fired," the court recognized that the officers' subjective beliefs were not dispositive: "[w]hether the officers reasonably believed Raines posed a sufficient threat depends on what occurred." *Id.* at 7. And that is a question that the Eighth Circuit could not answer because appellate courts "lack jurisdiction to determine whether the evidence could support a finding that

particular conduct occurred at all." *Id.* (quotation marks and citation omitted).

The video evidence did not convince the court to disregard Raines's version of the facts. The court observed that it can resolve factual disputes on summary judgment when "the record plainly forecloses the district court's finding of a material factual dispute." Pet. App. 6 (quotation marks and citation omitted). But that was not the case here: "Unlike in *Scott v. Harris*, 550 U.S. 372, 379-80 (2007)," the court noted, "where irrefutable video evidence resolved any factual disputes regarding the parties' conduct, the video evidence in this case is inconclusive as to whether or not Raines advanced on the officers in a manner that posed a threat." Pet. App. 7.

"Having reviewed the evidence in the record," the panel concluded "that there is a key factual question in this case about whether Raines advanced on Officer Hanson just before being shot, *which is both material and disputed*." Pet. App. 7 (emphasis added). The panel recognized that, under *Johnson*, 515 U.S. at 319-20, courts of appeals lack jurisdiction over factual disputes in interlocutory appeals from denials of qualified immunity. Pet. App. 6. Thus, the panel could not reach the officers' remaining arguments, all of which turned on resolving the factual dispute in the officers' favor. *Id.* at 7. The court therefore dismissed the appeal for lack of jurisdiction. *Id.* at 8.

The officers' petition for panel rehearing and rehearing en banc was denied without dissent. Pet. App. 21.

REASONS FOR DENYING THE WRIT

The Eighth Circuit correctly concluded that it lacked jurisdiction over this fact-based interlocutory appeal. In response to this straightforward application of settled law, petitioners fabricate a legal standard that the Eighth Circuit never applied and use it to contrive the shallowest of circuit splits. The petition should be denied.

I. The Eighth Circuit correctly held that it lacked jurisdiction to decide this interlocutory appeal.

A. Orders denying summary judgment based on qualified immunity are not appealable to the extent they turn on genuine disputes of material fact. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (citing *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995)). Here, the court of appeals looked to the district court's consideration of the record evidence and held that "there is a key factual question in this case about whether Raines advanced on Officer Hanson just before being shot." Pet. App. 7. That question of fact, the Eighth Circuit correctly concluded, was both genuinely disputed and material. *Id.*

The factual dispute here is genuine. A dispute is genuine when the parties tell "two different stories," and, based on the record, a "reasonable jury could believe" the nonmovant's version of the facts. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). To be sure, a dispute is not genuine just because a party says so—there must be sufficient evidence to make the nonmovant's version plausible. *See id.* The district court here made that required sufficiency determination, concluding that the officers and

Raines told two plausible different stories about whether Raines took a step before the police shot him and that, based on the record, a reasonable jury could believe Raines's version of the events. Pet. App. 14-15. Despite the officers' repeated contrary contentions, *e.g.*, Def. CA8 Br. 14; Pet. 35, the video does not indisputably show that Raines advanced toward the officers before he was shot, Pet. App. DVD. The "threatening" step happens in frame 24 of the video. *Id.* It is disputed whether Raines was shot in frame 23 (or, alternatively, frame 24) as Raines argued; in frame 24, as the officers argued; or in frame 25, as one of the officers' experts contended. CA8 App. 837. Given this evidence, a reasonable jury could resolve the dispute in Raines's favor and conclude that he never advanced before being shot.

The factual dispute is also material. A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A seizure by shooting is unreasonable unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). The factual dispute—whether Raines advanced before being shot or if the force of being shot in the back pushed him forward—is undoubtedly relevant to the jury's determination of whether the officers' use of force was unreasonable, as the officers conceded when they said that whether Raines advanced is one of the "material facts." Def. CA8 Br. 18-19. Indeed, the officers' own expert witness acknowledged that

the officers' use of force would not be justified unless Raines advanced before the officers fired a shot.[1]

Because the factual dispute here is both genuine and material, the case is controlled by *Johnson*. Before answering the "abstract issue[] of law" allowed on interlocutory appeal—"whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions," *Johnson*, 515 U.S. at 312, 317 (citation omitted)—the Eighth Circuit would have had to resolve the genuine and material factual dispute. That means that the court of appeals would have had to delve into the record, weigh competing evidence, and decide in the first instance the precise moment that Raines was shot. But despite the officers' invitation to resolve this disputed fact in their favor, the court correctly recognized that it lacked jurisdiction to do so. Pet. App. 7.

B. Instead of addressing the Eighth Circuit's conclusion that a material fact is disputed, the officers assume the video can resolve that dispute on the faulty premise that video evidence will invariably reveal indisputable facts. Pet. 25 ("the video shows what it shows"). That is not correct. Though a video may often reveal indisputable facts, that is sometimes not so, and it is not so here.

A famous moment in sports history—the "immaculate reception"—helps clarify why the

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[1] "Q: If Raines hadn't made the move towards Hanson, then the use of deadly force would not be justified? A: Not at that moment." CA8 App. 775.

existence of a video does not necessarily solve a material dispute. In a tense National Football League playoff game, the Pittsburgh Steelers trailed the Oakland Raiders by one with about twenty seconds remaining. The Steelers quarterback passed the ball but as the receiver was about to catch it, he was hit by a defender. The ball bounced off one of them and into the hands of a third player, a Steelers' running back, who then ran for a winning touchdown as the clock ran out. If the ball bounced off the receiver alone, the running back's catch was illegal, and there was no touchdown. If, on the other hand, the ball bounced off the defender, the catch was legal, and the Steelers were the rightful winners. There was video footage of the play. But despite multiple camera angles, the video is simply inconclusive. Decades later, who touched the ball first is still hotly disputed. Like this case, the video's *existence* was undisputed, but what the video showed was, and still is, in dispute.[2]

C. Now, for the first time, the officers contend that regardless of whether Raines advanced toward Hanson before the officers started shooting, the officers' actions were reasonable because they believed that he did. Pet. 35-36. But nowhere in their principal Eighth Circuit brief did the officers even suggest this argument. Because the argument was forfeited in the Eighth Circuit, *see, e.g.*, *Hernandez v.*

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[2] *Top Ten Controversial Calls: Immaculate Reception*, NFL.COM, http://www.nfl.com/videos/nfl-network-top-ten/0ap2000000113823/Top-Ten-Controversial-Calls-Immaculate-Reception (last visited Nov. 12, 2018).

Holder, 760 F.3d 855, 863 (8th Cir. 2014), it is forfeited in this Court. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015).

Even if this issue were properly before this Court, it would not merit review. The officers still do not actually say, and have never said, that if the facts were viewed in the light most favorable to Raines, the shooting would have been reasonable. After all, to make that argument, the officers would have to accept that their shots caused Raines to move in the first place. Then, they would have to explain how it would be reasonable to believe that Raines advanced toward Hanson before the shots were fired. But they do none of that. Instead, they make a vague argument about reasonable inferences from the video's existence—without specifying what the video shows—and then fault the Eighth Circuit for not addressing this argument, Pet. 24-25, 35-36, which, again, the officers themselves did not raise below.

D. The decision below is not, as the officers contend, inconsistent with *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), and *Graham v. Connor*, 490 U.S. 386 (1989).

In *Kisela* and *Plumhoff*, the material facts were not genuinely disputed, so the Court had appellate jurisdiction under *Mitchell v. Forsyth* to decide the sole legal question: whether the defendants violated clearly established law. Here, by contrast, the officers asked the court of appeals to resolve a genuine

dispute of material fact, over which that court lacked appellate jurisdiction under *Johnson v. Jones*.[3]

Graham is even further afield. It did not consider qualified immunity. It simply directed courts to apply the Fourth Amendment's reasonableness standard in police use-of-force cases. 490 U.S. at 388. The district court did just that. Pet. App. 14. And, as explained above (at 8-9), petitioners did not present *any* misapplication of law to the Eighth Circuit—only the factual dispute over Raines's movement—which is

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[3] Even if the officers were willing to accept the facts in the light most favorable to Raines (which they aren't), and questions of the scope of clearly established law were before the Court (which they aren't), nothing in *Kisela* or *Plumhoff* would control the outcome of this case. In those cases, the officers had to intervene to protect innocent third parties. In *Kisela*, the third party was six feet away from an armed individual, and because the officer was on the other side of a fence, the officer would not have been able to intervene had the situation further deteriorated. 138 S. Ct. at 1151. And, in *Plumhoff*, the officers shot someone conducting a high-speed getaway on public streets, going over 100 miles per hour, who, after colliding with a police car, attempted to escape and would have continued to "pose a deadly threat for others on the road." 134 S. Ct. 2022. In contrast, taking the facts in the light most favorable to Raines, Raines was neither an immediate threat to the officers nor to public safety. Raines never advanced on an officer. At least five officers had their weapons drawn and surrounded Raines, ensuring that if he tried to attack anyone, the officers could take decisive action. The nearest officer, herself approaching Raines, was, as she put it, within "pretty much optimal distance" to use nonlethal force. CA8 App. 667. And the officers had access to the building (to protect Dodson and any other third parties) and, in fact, actually accessed the building. CA8 App. 805. Nevertheless, the officers opened fire.

precisely why the Eighth Circuit lacked appellate jurisdiction.

II. No circuit split is implicated by the decision below.

Petitioners' circuit-split argument is doubly flawed. First, they rely on a fabricated Eighth Circuit standard to construct one side of a one-to-one circuit split. Then, for what they say is the other side of the split, they cite a Tenth Circuit precedent for a rule that the Eighth Circuit itself has adopted.

A. To create the appearance of a circuit split, the officers first had to invent an Eighth Circuit rule of law that does not exist. The officers contend that the Eighth Circuit espouses a "narrow view of appellate jurisdiction" that has been "adopted by other circuit courts." Pet. 18. They say this narrow view is that, under *Johnson*, "the district court's finding that there was a material issue of fact necessarily foreclosed appellate review," full stop. *Id.* at 17. Thus, under petitioners' view, the Eighth Circuit relied on *Johnson* to "sidestep[]" the legal question whether a disputed fact is material. *Id.*

But that narrow view cannot be found in the decision below. Instead, as discussed above (at 14-15), the officers never presented a legal question that did not first require resolution of a factual dispute. Thus, the Eighth Circuit applied its well-settled law and concluded that "whether Raines advanced on Officer Hanson just before being shot" was "both material and disputed." Pet. App. 7. And the operative legal question, "whether the officers reasonably believed Raines posed a sufficient threat[,] depends on what occurred." *Id.*

Nor can the narrow view be found in any Eighth Circuit precedent. Indeed, the Eighth Circuit's rule is exactly the opposite of what the petitioners say it is. *See, e.g.*, *Jackson v. Gutzmer*, 866 F.3d 969, 975 (8th Cir. 2017) (rejecting the appellee's argument that there was no appellate jurisdiction solely because the district court found a genuine dispute of fact). In the Eighth Circuit, "[t]he pretrial denial of qualified immunity is an appealable final order to the extent it turns on an issue of law." *Id.* And in cases where the defendant challenged the factual determinations made by the district court but also raised legal arguments that were independent of the factual dispute, the Eighth Circuit has exercised interlocutory jurisdiction over the purely legal issues.[4]

Given that the Eighth Circuit denied rehearing en banc without dissent, Pet. App. 21, it does not appear that the court viewed the decision here as breaking from this longstanding precedent. And, as the Eighth Circuit just confirmed, the decision below reflects the unexceptional rule that an appellate

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[4] *See, e.g.*, *Wallace v. City of Alexander*, 843 F.3d 763, 766-67 (8th Cir. 2016); *Ellison v. Lesher*, 796 F.3d 910, 913, 915-17 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 915 (2016); *Walton v. Dawson*, 752 F.3d 1109, 1118 (8th Cir. 2014); *Williams v. Herron*, 687 F.3d 971 (8th Cir. 2012); *Brown v. Fortner*, 518 F.3d 552, 557-58 (8th Cir. 2008); *White v. McKinley*, 519 F.3d 806, 812-14 (8th Cir. 2008); *Henderson v. Munn*, 439 F.3d 497, 501 (8th Cir. 2006); *Pace v. City of Des Moines*, 201 F.3d 1050, 1053 (8th Cir. 2000). The Eighth Circuit has continued to apply the same rule after the decision below. *See Thompson v. City of Monticello*, 894 F.3d 993, 997 (8th Cir. 2018).

court lacks interlocutory jurisdiction "to reach [a] 'legal' argument" that would first require the court "to cast aside the district court's factual presumptions, analyze the factual record, and resolve genuine factual disputes against the non-moving party." *Berry v. Doss*, 900 F.3d 1017, 1021 (8th Cir. 2018).

B. Relying on their fabricated Eighth Circuit standard, the officers then contend that the decision below contributes to a "deep and ongoing circuit split." Pet. 9. The officers assert that other circuits follow the same "narrow view" as the Eighth Circuit, Pet. 18, but they fail to offer even a single opinion from another circuit reflecting the standard that they invent for the Eighth Circuit.

As for the other side of the fictitious split, the officers point to just one panel decision. That decision stands for the uncontroversial proposition that appellate courts have jurisdiction to assess the legal significance of undisputed facts. *Walton v. Powell*, 821 F.3d 1204, 1209-10 (10th Cir. 2016) (Gorsuch, J.). The plaintiff in *Walton* alleged that New Mexico's governor fired her from a civil-service position because of her political affiliation. *Id.* at 1207. The parties disputed the relevant facts, such as whether the governor was even aware of the plaintiff's political affiliation. *See id.* at 1208. The district court denied the governor's motion for summary judgment because of the factual dispute. *Id.* at 1207. On appeal, the governor argued that the plaintiff's version of the facts was insufficient to state a claim under the First Amendment. *Id.* at 1209. And the plaintiff responded that the court lacked jurisdiction because the district court had denied summary judgment due to a

genuine dispute of material fact. *Id.* at 1207. The Tenth Circuit decided it had jurisdiction to reach the governor's legal argument, reasoning that, although it could not resolve a factual dispute, it did have jurisdiction to assess whether the facts assumed by the district court—viewed in favor of the plaintiff—"fall in or out of legal bounds." *Id.* at 1208-10.

Nothing in *Walton* is inconsistent with the decision below. The appellant in *Walton* advanced legal arguments independent of the factual dispute. The officers' arguments below, on the other hand, all hinged on resolving the factual dispute in their favor.

Indeed, the Eighth Circuit has adopted the same rule as the Tenth Circuit. For example, in *New v. Denver*, the appellee asserted that the Eighth Circuit lacked jurisdiction over an interlocutory appeal under *Johnson* "because the district court's ruling [denying qualified immunity] was based upon a genuine issue of material fact." 787 F.3d 895, 899 (8th Cir. 2015). The parties disputed whether leaves found by the defendant police officer were marijuana leaves, but, on appeal, the officer argued that he was entitled to qualified immunity even under the plaintiff's version of the facts. *Id.* at 898-99. The Eighth Circuit, at the officer's urging, assumed the plaintiff was correct that the leaves were not marijuana and then exercised jurisdiction over the legal question whether the officer could have reasonably believed otherwise. *Id.* at 900. Like *Walton*, *New* addressed a legal issue

that did not require first resolving the factual dispute.[5]

III. Petitioners' second and third questions presented are not properly before this Court.

As explained above, the Eighth Circuit correctly held that it lacked appellate jurisdiction in a garden-variety application of *Johnson v. Jones*, 515 U.S. 304 (1995), and the petition presents no issue worthy of this Court's attention. The petition's second and third questions presented should be denied for another, independent reason. Those questions concern whether, *on the merits*, petitioners are entitled to qualified immunity, which the Eighth Circuit never considered because it held that it lacked jurisdiction to review petitioners' fact-bound interlocutory appeal. Because this Court is "a court of final review and not first view," *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)), the question whether petitioners are entitled to qualified immunity is not properly before this Court. Put another way, this Court may not consider the merits of the officers' qualified-immunity defense, if at all, unless the court of appeals rules on the merits in the first instance.

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[5] The officers also rely on a concurring opinion that recognized that when defendants refuse to accept a plaintiff's version of the facts and instead "insist on acknowledging on appeal only their accounts, the underlying basis for an interlocutory appeal disappears." *Romo v. Largen*, 723 F.3d 670, 678 (6th Cir. 2013) (Sutton, J., concurring). That is precisely the case here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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