No. 18-110

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The brief in opposition underscores why the petition should be granted. It conspicuously fails to cite *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir. 2012), a case petitioners cited both in this Court, and more critically in the Eighth Circuit, as supporting qualified immunity for petitioners. In *Estate of Morgan*, the Eighth Circuit held the use of force was lawful when officers confronted a knife-wielding suspect at a distance of 12 feet who merely lifted a foot off the ground. The Eighth Circuit was similarly silent on *Estate of Morgan*'s application to the qualified immunity determination, citing it only for the standard of review of a motion for summary judgment and standards for assessing use of force. (Pet. App. at 5-6.) And therein lies the mischief—by declaring the video inconclusive as to whether or not Raines actually stepped towards Hanson and finding a factual conflict precluding appellate review under *Johnson v. Jones*, 515 U.S. 304 (1995), the Eighth Circuit abdicated its responsibility to determine the issue of qualified immunity, i.e., that even assuming the officers were mistaken in perceiving whether Raines was actually moving towards Hanson, whether, in light of *Estate of Cook*, they could reasonably believe their actions to be proper. Officers can be mistaken and be entitled to qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("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.' "). In addition, even with respect to the merits of

the Fourth Amendment determination, an officer need only be reasonable, not correct, in his or her actions. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

As we discuss, in an effort to sidestep the Eighth Circuit's omission, respondent falsely contends that the issue was not argued below. The record reveals otherwise. And respondent's suggestion that there is no circuit split is belied by the brief's telling failure to address Judge Sutton's concurring opinion in *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013), which details the ongoing inter-circuit, and indeed intra-circuit, split among the federal appellate courts in attempting to apply *Johnson* in a coherent fashion, which is needlessly complicating appellate review and necessitating expenditure of judicial resources. *Id*. at 686.

This case is paradigmatic of the confusion among the appellate courts. It involves undisputed evidence, i.e., the video shows what it shows. The only question is whether, given what it shows, a reasonable officer might have perceived a threat to Hanson, falling within the confines of *Estate of Morgan* for purposes of qualified immunity, or ultimately establishes reasonable use of force under *Graham*. That different inferences may be drawn from the undisputed evidence, does not foreclose review under *Johnson*. As this Court made clear in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), an appellate court always retains jurisdiction to determine for purposes of both prongs of qualified immunity whether particular video evidence creates a material issue of fact. In an era in which video evidence has become

ubiquitous, it is essential that the Court grant review and set down clear guidelines for future cases.

I. PETITIONERS PRESERVED ALL ASPECTS OF THEIR QUALIFIED IMMUNITY ARGUMENT IN THE EIGHTH CIRCUIT.

Because respondent ultimately has no substantive response to petitioners' contention that even assuming they were mistaken as to whether Raines took a step toward Hanson, they would still be entitled to qualified immunity, respondent contends that petitioners did not make this argument below. Respondent's phrasing of the contention is revealing:

> 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. Holder*, 760 F.3d 855, 863 (8th Cir. 2014), it is forfeited in this Court.

(Brief in Opposition ("BIO") at 14-15.)

Hernandez stands for the unremarkable proposition that a party waives an argument not made in briefing. 760 F.3d at 863. Conspicuously, the Eighth Circuit does not cite *Hernandez* or any similar authority in its opinion here. That is because, in fact, petitioners specifically argued that even assuming a constitutional violation occurred, i.e., that Raines was not stepping toward Hanson, that nonetheless, under *Estate of Morgan*, they would be entitled to qualified immunity.

In their opening brief in the Eighth Circuit, petitioners argued:

> Even if the use of deadly force in this situation *amounted to a violation*, a reasonable officer would not know that the use of deadly force in this situation would violate a clearly established right.

(Petitioners' Opening Brief at 26 (emphasis added).)

The point was repeatedly reiterated in petitioners' reply brief:

> The plaintiff insists that "the jury could conclude that there was not an aggressive move towards Hanson by Raines." This, however, sidesteps the issue before this Court: whether a reasonable officer would know that shooting Raines *after* he raised his leg *as if* to take a step towards Officer Hanson would violate a clearly established right. Based on *Morgan v. Cook*, where this Court held that when an individual armed with a knife raises his leg as if to take a step, a seizure by shooing is justified, the officers at issue here are entitled to qualified immunity.

(Petitioners' Reply Brief at 5-6 (second emphasis added).)

> Even if Raines was, as the plaintiff insists, *not walking towards Hanson, the language in*

> *Morgan v. Cook makes it, at least, questionable as to whether an officer is justified in the use of force*.

(*Id*. at 7 (emphasis added).)

Contrary to respondent's argument, the Eighth Circuit was perfectly aware of what petitioners were arguing—it simply declined to reach the qualified immunity issue at all based upon its perceived issue of fact concerning what inferences might be drawn from the video, i.e., the video was equivocal.

Respondent also attempts to manufacture an issue of fact by contending that under his view of the evidence, he made no movement toward Hanson until he was shot by the officers. (BIO at 15.) Yet, petitioners' point is that the video belies any such construction—Raines' movements prior to any shots being fired could be viewed by officers, even if mistakenly, as a movement toward Hanson. That is the point of having the video evidence reviewed.

As petitioners noted, the circumstances here were at least as harrowing as those confronted by the officers in *Estate of Morgan*—a suspect armed with a knife, who had already stabbed another individual, behaving in an erratic fashion, and requiring split-second decision-making. In *Estate of Morgan*, a suspect's merely raising a foot in a tense, rapidly evolving situation was found sufficient to justify the use of force. If anything, Raines' conduct was far more threatening, or at least could be reasonably perceived as so, than the situation confronted by the officers in *Estate of Morgan*.

II. REVIEW IS NECESSARY TO RESOLVE THE ACKNOWLEDGED CIRCUIT SPLIT CONCERNING APPELLATE JURISDICTION UNDER *JOHNSON*, ESPECIALLY AS IT PERTAINS TO THE RAPIDLY INCREASING USE OF VIDEO EVIDENCE IN QUALIFIED IMMUNITY CASES.

Respondent does not seriously contest that the circuit courts are in the state of confusion concerning the appealability of qualified immunity orders under *Johnson*. As noted, in his concurring opinion in *Romo*, Judge Sutton amply describes the depth and breadth of the conflict extending between circuits and even within circuits, with appealability being determined on an ad hoc, and unnecessarily resource-consuming basis. Instead, respondent's only reference to *Romo* and the circuit split is to suggest that the Eighth Circuit agrees with *Romo* (BIO at 21 n.5), and that the Eighth Circuit does not simply accept the district court's determination that a genuine issue of fact exists at face value (*id*. at 18 & n.4). But the inconsistency of the Eighth Circuit's approach, particularly where video evidence is involved, is underscored by what transpired in this case.

The Eighth Circuit, as have other courts, has conflated this Court's statement in *Scott* to the effect that a court need not give credence to a plaintiff's set of facts for purposes of summary judgment when the facts are indisputably contradicted by video evidence, with appellate jurisdiction to review the denial of qualified immunity where video evidence forms the basis of

the officers' immunity claim. (Pet. App. at 7 ("Unlike in *Scott v. Harris* [citation omitted], 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 of serious physical harm to an officer.").)

Yet, as noted in the petition (Pet. at 22-23), in *Plumhoff*, the Court expressly found jurisdiction under *Johnson* because there was no dispute about the circumstances confronted by the officers. Hence, the only questions posed for an appellate court were legal in nature, i.e., based upon what was depicted in the evidence, could it be said the officers used excessive force, and even assuming that such a finding could be made, would they be entitled to qualified immunity based upon the absence of clearly established law, issues which the court resolved in favor of defendants. 572 U.S. at 772-79. The Court's holding as to clearly established law in *Plumhoff* underscores precisely why review is necessary in this case—the Court made it clear that even where a video is equivocal, or even suggests the officers committed a Fourth Amendment violation, an appellate court is not relieved of the obligation to determine the legal issue whether, in light of the circumstances depicted on the video, an officer is entitled to qualified immunity based upon the absence of clearly established law. Nonetheless, under the Eighth Circuit's view, if the video is inclusive as to the merits of the Fourth Amendment claim, there is no appellate jurisdiction at all. That is not and cannot be the law.

The video here depicts harrowing and rapidly evolving circumstances in which police officers were required to make a split-second decision. This Court's decisions in *Scott*, and particularly *Plumhoff*, make it clear that appellate courts have an obligation to determine legal issues related to what is depicted on a video, i.e., to the extent there is a factual dispute, whether it is ultimately material to the disposition of the qualified immunity inquiry. By simply deeming the video "inconclusive" the Eighth Circuit abdicated its duty to resolve petitioners' legal contention that based upon the circumstances depicted in the video, the conduct, *even if mistaken*, was reasonable both for purposes of use of force, but more significantly, for purposes of application of qualified immunity due to the absence of clearly established law. The Eighth Circuit's decision underscores the confusion among the appellate courts concerning *Johnson*, and particularly, application of *Johnson* in the context of qualified immunity claims premised upon video evidence under *Scott* and *Plumhoff*. It is essential that the Court grant review to set down clear guidelines for future cases.

III. REVIEW IS APPROPRIATE AND WARRANTED TO COMPEL COMPLIANCE WITH THIS COURT'S DECISIONS CONCERNING APPLICATION OF QUALIFIED IMMUNITY AND USE OF FORCE UNDER *GRAHAM V. CONNOR*.

Plaintiff contends that the qualified immunity issues both as to clearly established law and the merits

of the Fourth Amendment claim are not properly before the Court, as they have not yet been resolved by the Eighth Circuit. (BIO at 21.) Not so. As this Court has recognized, where an appellate court declines appellate jurisdiction of a qualified immunity claim and the issues are properly presented on petition for writ of certiorari, such issues of law are appropriately resolved in this Court. That in fact is the express holding of *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), where the Court found the circuit court had improperly declined jurisdiction over the immunity claim and the Court addressed the merits of the immunity claim itself:

> The Court of Appeals thus had jurisdiction over Mitchell's claim of qualified immunity, and that question was one of the questions presented in the petition for certiorari which we granted without limitation. Moreover, the purely legal question on which Mitchell's claim of immunity turns is "appropriate for our immediate resolution" notwithstanding that it was not addressed by the Court of Appeals.

Here, the legal questions concerning qualified immunity must be resolved in petitioners' favor. As noted in the petition (Pet. at 32-33), in its recent decisions in *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017) and *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1153 (2018), this Court emphasized that use of force cases are particularly fact-specific and hence, in order to overcome qualified immunity, a plaintiff must point

to existing precedent that " 'squarely governs' " the specific facts at issue.

Respondent cites no case law that meets this stringent standard and, indeed, this Court's decision in *Kisela* makes it clear that no such clearly established law would have suggested petitioners' conduct was improper, even if mistaken. Here, Raines acted in a far more aggressive fashion than did Hughes, and respondent's attempt to minimalize the fraught nature of the situation confronted by the officers is belied by what is depicted in the video.

Respondent's strained attempts to distinguish *Kisela* only underscore the decision's controlling application here. Respondent asserts that in *Kisela*, the officers "had to intervene to protect innocent third parties" (BIO at 16 n.3), which seems to suggest that officers have lesser authority to protect fellow officers than they do members of the public—a proposition that is troubling in discounting officers' safety, and in any event, unsupported by any decision of this or any other court. Respondent also asserts that he was never an immediate threat to the officers nor the public safety, which is belied by his agitated and threatening behavior as depicted on the video, as well as the fact that he had already stabbed his roommate. The suggestion that respondent never advanced on an officer (*id*.) is similarly belied by the video on which he could reasonably (even if mistakenly) be perceived as advancing on Hanson. Odder still, respondent asserts that here, unlike in *Kisela*, there were at least five officers with weapons drawn "ensuring that if he tried to

attack anyone, the officers could take decisive action" (*id*.), yet, of course, that is precisely what the officers did, and have now found themselves entangled in litigation. Finally, Raines' suggestion that Hanson was in optimal distance to use non-lethal force, ignores the fact that if respondent was perceived as moving toward Hanson, no authority requires her to take a chance that the non-lethal force will not be successful in halting an attack or renders the actions of other officers to reasonably protect her somehow improper.

It is virtually impossible to distinguish this case in any reasonable fashion from *Kisela*, let alone the Eighth Circuit's decision in *Estate of Morgan*, 686 F.3d at 496, where the Eighth Circuit found the use of force lawful when employed against a similarly knife-wielding suspect who did nothing more than lift a leg, which was perceived by the officers as a threatening move. The absence of clearly established law mandates qualified immunity for petitioners.

Finally, respondent ignores a foundational premise of this Court's decision in *Graham v. Connor* with respect to the determination of the underlying merits of the Fourth Amendment claim—that officers can be mistaken, yet act reasonably under the Fourth Amendment. (Pet. at 38 (citing *Graham*, 490 U.S. at 396).) The video depicts precisely the sort of tense, uncertain, and rapidly evolving circumstances that this Court recognized in *Graham* cautioned against applying 20/20 vision of hindsight in evaluating the use of force. (Pet. at 37 (citing *Graham*, 490 U.S. at 396-97).) Petitioners submit that the video shows Raines moving towards

Hanson, or at least could be reasonably (even if mistakenly) perceived as doing so, hence rendering the use of force reasonable. This was an unfortunate situation. Respondent irrationally, yet indisputably stabbed his roommate with a knife, confronted officers, refused repeated commands to drop the knife, and acted in a highly agitated manner that ultimately prompted the use of force. Under this Court's jurisprudence, no liability should be imposed on petitioners. The petition should be granted.

CONCLUSION

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

Respectfully submitted,

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