No. 12-1117

In the Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

v.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS BRIEF OF THE STATE OF OHIO AND 21 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The petition for certiorari in this case lists the following two questions:

In a civil case against police officers for excessive force, a court must grant qualified immunity unless the use of force was prohibited by clearly established law. Here, the Sixth Circuit denied qualified immunity for force used in 2004 to end a vehicular pursuit that is similar to the force ruled permissible in *Scott v. Harris*, 550 U.S. 372 (2007). The Sixth Circuit denied qualified immunity by distinguishing *Scott* "in the details" from the force used three years earlier in this case. (Pet. App. at 8-9.) The Sixth Circuit applied a similar analysis in *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), where it also distinguished *Scott* to deny qualified immunity for pre-2007 conduct. As Judge McKeague noted in his extended dissent, the Sixth Circuit stands alone in this analysis. *Id.* at 504-11 (McKeague, J., dissenting). Petitioners believe this Court has an opportunity to correct the errors in the Sixth Circuit's qualified immunity analysis by agreeing to hear their case. The specific questions presented are as follows:

1. Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether the force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was supported by subsequent case decisions as opposed to prohibited by clearly established law at the time the force was used.

2. Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under Respondent's own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

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STATEMENT OF *AMICI* INTEREST

The States filing this *amicus* brief have a substantial interest in ensuring that the lower courts properly apply this Court's qualified-immunity doctrine—which immunizes state officials from damages suits unless their conduct violates "clearly established" constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The States' officials routinely defend against a variety of lawsuits under 42 U.S.C. § 1983 alleging that the officials' actions violated federal constitutional law. These types of suits, the Court has recognized, "'can be peculiarly disruptive of effective government,'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817), by shrinking the "breathing room" necessary for state officials to make important governmental decisions in areas clouded with opaque legal rules, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011). The *Amici* States seek to ensure that qualified immunity retains its vitality to prevent these negative effects on state government.

In particular, the *Amici* States ask the Court to clarify two recurring issues in qualified-immunity cases (one jurisdictional and one substantive), both of which are illustrated by the Sixth Circuit's decision below. *First*, the Sixth Circuit's contradictory orders—which originally dismissed the appeal for lack of jurisdiction, then reversed the dismissal on rehearing, and ultimately expressed uncertainty over the court's jurisdiction, Pet. App. 7, 11-12—show the continued confusion on the scope of appellate jurisdiction over qualified-immunity denials. An appellate right means little if it leaves state officials in the dark on when they can exercise the right. *Second*, the Sixth Circuit's holding—which rejected qualified

immunity based on the Fourth Amendment's general reasonableness test and on cases decided after the relevant events occurred here—shows a continued misunderstanding of the meaning of "clearly established" law. The right to fair notice underlying that legal standard means little if lower courts inconsistently apply it.

In short, the *Amici* States have an interest in the Court resolving the recurring jurisdictional and substantive issues implicated by this case in a manner that serves the important governmental purposes for which the Court established qualified immunity.

SUMMARY OF ARGUMENT

I.A. The Court has long allowed state officials to seek immediate appeals from denials of qualified immunity under the collateral-order doctrine. In *Johnson v. Jones*, 515 U.S. 304 (1995), however, the Court limited this appellate jurisdiction when those officials bring "evidence sufficiency" claims on appeal—i.e., claims disputing whether the district court properly found sufficient evidence for particular factual allegations. This case offers the Court an opportunity to provide much needed clarity over the scope of *Johnson*'s jurisdictional limits.

B. The Court should resolve this jurisdictional issue because the circuit courts have erratically applied *Johnson*. And their confusion about *Johnson*'s domain has only increased after *Scott v. Harris*, 550 U.S. 372 (2007), which rejected a district court's version of the disputed facts in the process of finding a police officer entitled to qualified immunity. *See id.* at 378-81. The decision below illustrates this ongo-

ing confusion. Even after briefing and argument, the Sixth Circuit remained unsure whether it should dismiss for lack of jurisdiction under *Johnson* or affirm under an "exception" to *Johnson*'s jurisdictional limits that it believed *Scott* had created. *See* Pet. App. 7-8, 11-12. Because this uncertainty touches a jurisdictional question that must be answered in the many cases in which it arises, the Court's clarification would benefit courts and litigants alike.

C. The Court should hold that *Johnson* sets a narrow, bright-line rule. It has no effect whatsoever on appellate jurisdiction over typical "clearly established" claims—e.g., claims challenging the district court's decision that the state officials' conduct violated clearly established law. In the course of resolving those claims, therefore, appellate courts have jurisdiction to depart from a district court's mistaken conclusions about which facts are genuinely disputed. Instead, *Johnson* should be read narrowly to limit appellate jurisdiction only over orders resolving pure evidence-sufficiency claims like the claims at issue in that case.

D. Applying that bright-line rule here, the Sixth Circuit had jurisdiction because Petitioners appealed an order resolving whether their conduct violated clearly established law. In the process of resolving this appeal, moreover, the Court has jurisdiction (as it did in *Scott*) to depart from the lower courts' rulings about which facts are genuinely disputed.

II. On the merits, the Sixth Circuit's decision committed two basic errors when it rejected qualified immunity on the ground that it could not "conclude

that the officers' conduct was reasonable as a matter of law." Pet. App. 10. *First*, the decision identifies the relevant law at perhaps the highest level of generality (the Fourth Amendment's "reasonableness" standard). To qualify as "clearly established," however, a right cannot be articulated at such a high level of generality, and instead must be sufficiently specific to provide state officials reasonable notice that their conduct violates the right. *Second*, the decision wrongly relies on cases decided years after the relevant events took place in this case. It thus overlooks that the applicable "clearly established" law must have existed at the time of the challenged conduct.

ARGUMENT

I. THE COURT HAS JURISDICTION TO DETERMINE THE DISPUTED FACTS WHEN RESOLVING WHETHER PETITIONERS VIOLATED CLEARLY ESTABLISHED LAW

This Court generally permits state officials to appeal the denial of qualified immunity, except when they challenge a district court's "evidence sufficiency" order—e.g., an order finding that the plaintiffs have supported their factual allegations with sufficient evidence on summary judgment. Because the circuit courts continue to struggle with the scope of this exception, the Court should clarify the issue. In doing so, it should hold that the Court's cases establish a bright-line rule limiting jurisdiction *only* over those pure evidence-sufficiency rulings. This jurisdictional limit, by contrast, simply does not apply if the state officials seek to appeal an order—like the one here—

finding that the officials' alleged conduct violated clearly established law.

A. The Court Has Long Allowed State Officials To Take Early Appeals From Denials Of Qualified Immunity

A circuit court usually has subject-matter jurisdiction only over a "final decision" that ends the litigation in the district court. *See* 28 U.S.C. § 1291. But, under the collateral-order doctrine adopted in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), some orders qualify as "final" and immediately appealable, "even though the district court may have entered those orders before (perhaps long before) the case has ended." *Johnson v. Jones*, 515 U.S. 304, 310 (1995). To fall within this small class of appealable orders, "'the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (citation omitted). The Court has long permitted state officials to invoke this collateral-order doctrine and to immediately appeal many, but not all, orders denying qualified immunity.

The General Rule. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court held that a district court's qualified-immunity denial meets the three necessary factors for falling within the collateral-order doctrine. *See id.* at 525-30. The third factor is the most obvious in this context. "Qualified immunity is 'an *immunity from suit* rather than a mere defense to

liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (citation omitted). In other words, if officials could not appeal qualified-immunity denials until after a final judgment, they would have to proceed through the very burdensome process that the doctrine is meant to avoid, making any post-judgment appeal of that denial effectively useless. *See id.*

As for the first factor, a qualified-immunity denial "conclusively" resolves whether such immunity should serve its purpose in the case at hand. *See Mitchell*, 472 U.S. at 527. When a district court rules that "the defendant is not immune" under "the facts . . . as asserted by the plaintiff," the court's "denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Id.* At that point, officials can do nothing more to avoid the burdens that qualified immunity seeks to prevent.

As for the second factor, the qualified-immunity question is separate from the merits of the plaintiff's claim. *See id.* at 528-29. The former focuses on whether the plaintiff asserts a constitutional right that was "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The latter focuses on whether the official's conduct even violates the Constitution to begin with. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Mitchell*, 472 U.S. at 529 n.10.

Since *Mitchell*, the Court has authorized immediate appeals for a wide array of qualified-immunity denials. The "typical[]" appealable order decides a "clearly established" claim; that is, it finds that "the federal right allegedly infringed was 'clearly established'" when the state official acted. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). But appellate jurisdiction has never been "strictly confined" to these types of claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009). Jurisdiction also exists, for example, over "the question whether the facts pleaded" in a complaint are sufficient to make out a violation of clearly established law. *Id.* Likewise, circuit courts have jurisdiction to consider the legal elements that a plaintiff must establish to prove a particular constitutional claim, *see Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006), or to assess whether a particular claim even exists at all, *see Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007).

Also since *Mitchell*, the Court has provided procedural guidance over how to handle appeals at the summary-judgment stage. In *Behrens*, the Court held that appellate courts may then reconsider their earlier qualified-immunity denials at the pleading stage, allowing state officials to take two appeals before trial. *See* 516 U.S. at 305-11. And, if a district court's summary-judgment denial does not identify its view of the disputed facts, *Behrens* holds, appellate courts may "'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.'" *Id.* at 313 (quoting *Johnson*, 515 U.S. at 319). In *Scott*, the Court held that, even

when a district court finds that sufficient evidence supports a plaintiff's particular factual allegation, an appellate court may reject the allegation if it "is blatantly contradicted by the record, so that no reasonable jury could believe it." 550 U.S. at 380.

The Exception. Only once, in *Johnson*, has the Court found appellate jurisdiction lacking over the denial of qualified immunity. In that case, the plaintiff alleged that five officers had beaten him, thereby violating his Fourth Amendment right to be free from excessive force. *Johnson*, 515 U.S. at 307. Three officers sought summary judgment on the ground that the plaintiff lacked evidence that they participated in, or even witnessed, the alleged beating. *Id.* The district court found a genuine dispute of material fact with respect to this issue. *Id.* at 308. The officers appealed, arguing that the district court "was wrong because the record contained 'not a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff, or ever observed anyone doing so.'" *Id.* (citation omitted).

This Court held that the circuit court lacked jurisdiction over this order because it "determine[d] only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, prove at trial." *Id.* at 313. This type of order did not create a "final decision" under § 1291, the Court reasoned, because it did not involve the type of claim at issue in *Mitchell*—namely, a claim asking the appellate court to apply "'clearly established' law to a given (for appellate purposes undisputed) set of facts." *Id.* Instead, the Court held that where "a defendant simply wants

to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial," the question is not "separate" from the ultimate merits question under the collateral-order doctrine. *Id.* at 314. The Court also supported this result with practical considerations, including the relative expertise of trial judges versus appellate judges in determining the genuinely disputed facts, the burdens imposed on appellate courts in sifting through the evidentiary record, and the greater likelihood that the same evidentiary issues would repeat themselves after trial. *Id.* at 315-17.

B. The Circuit Courts Have Inconsistently Applied *Johnson*'s Jurisdictional Limits

As Judge Sutton recently commented, courts have spilled much ink trying to distinguish qualified-immunity appeals jurisdictionally allowed by *Mitchell* from qualified-immunity appeals jurisdictionally barred by *Johnson*. *See Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring) (identifying "intra-circuit conflicts"); *see also* 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10, at 533 (Supp. 2013) (noting that *Johnson*'s "seemingly clear rule has encountered great difficulty in practice"). Disagreement and inconsistency existed immediately after *Johnson*. *Compare Winfield v. Bass*, 106 F.3d 525, 535-40 (4th Cir. 1997) (Wilkinson, J., concurring), *with id.* at 542-47 (Phillips, J., dissenting) (debating scope of *Johnson*). And *Scott* has only exacerbated this disagreement and inconsistency. *Compare George v.*

Morris, 736 F.3d 829, 835 (9th Cir. 2013), *with id.* at 849 (Trott, J., dissenting) (debating scope of *Scott*).

1. Soon after *Johnson*, courts diverged over its proper scope. The Eleventh Circuit reads *Johnson* as creating a bright-line rule that narrowly bars pure evidence-sufficiency claims in which state officials argue *only* that the district court wrongly identified disputed facts. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir. 1996). If, by contrast, officials argue that their conduct does not violate clearly established law, *Johnson* does "not affect [the court's] authority to decide, in the course of deciding the interlocutory appeal, those evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues, *i.e.*, the legal issues." *Id.* at 1486; *see also Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1247-50 (11th Cir. 2004); *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996). Rather, in resolving these "clearly established" claims, *Johnson* merely gives appellate courts "discretion to accept the district court's findings [concerning the disputed facts], if they are adequate." *Cottrell*, 85 F.3d at 1486.

Most other courts follow vaguer rules. Rejecting this *claim-specific* test for jurisdiction, these courts instead interpret *Johnson* as setting a *fact-specific* test. Even in the process of resolving clearly established claims, therefore, these courts hold that they lack jurisdiction to determine whether a district court "properly" identified disputed facts. *George*, 736 F.3d at 835. In other words, "where the district court makes a legal finding [on the clearly estab-

lished law] and states specific facts upon which that finding is based," these courts do "not have jurisdiction to delve behind the ruling and review the record to determine if the district court correctly interpreted those facts to find a genuine dispute." *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1259 (10th Cir. 1998); *see also, e.g.*, *Via v. LaGrand*, 469 F.3d 618, 625 (7th Cir. 2006) (noting that the court "may only consider whether the defendant is entitled to qualified immunity given the factual disputes found by the district court"); *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (noting that the court must accept "the facts that the district court found sufficiently supported in the summary judgment record"); *Walker v. Horn*, 286 F.3d 705, 710 (3d Cir. 2002) (noting that "[w]e must adopt the facts assumed by the District Court").

This fact-based test, by necessity, creates a functional approach to jurisdiction. "Even if [state officials] frame[] an issue in terms of" a clearly established claim, the courts look through that claim to "determine whether [they are] simply arguing that the plaintiff offered insufficient evidence to create a material issue of fact." *White v. McKinley*, 519 F.3d 806, 813 (8th Cir. 2008). Each and every factual statement in an appellate brief thus triggers a jurisdictional inquiry. If the officials' brief—when asserting a "clearly established" claim—makes a factual statement inconsistent with the district court's fact assessment, appellate courts lack jurisdiction to consider that statement. *See, e.g.*, *Gutierrez v. Kermon*, 722 F.3d 1003, 1009-11 (7th Cir. 2013). If the courts can resolve the claim by "simply ignor[ing]" the

statement, they may do so, "'obviating the need to dismiss the entire appeal for lack of jurisdiction.'" *Kirby v. Duva*, 530 F.3d 475, 481 (6th Cir. 2008) (citation omitted). If, by contrast, the "argument on appeal depends upon and is inseparable from disputed facts," the courts must dismiss the entire appeal, including the clearly established claim, for lack of jurisdiction. *See Gutierrez*, 722 F.3d at 1011, 1014.

Under this fact-based approach, moreover, appellate courts must follow a district court's recitation of the facts, "even if [they] perceive[] an error in the district court's reading of the summary judgment record." *Via*, 469 F.3d at 623. Thus, courts have dismissed for lack of jurisdiction even when the district court's finding of a genuinely disputed fact rested on "the rankest type of inadmissible hearsay," *Ellis v. Wash. Cnty.*, 198 F.3d 225, 229 (6th Cir. 1999), or on expert opinions containing "numerous problems," *McKinney v. Duplain*, 463 F.3d 679, 691 (7th Cir. 2006). The courts even recognize that this rule can "problematically prolong th[e] case." *Id.*

But not always. Complicating matters further, the courts have adopted an exception to this exception to jurisdiction. Based on *Behrens*, the courts recognize that the bar on their record review does not apply if "the district court does not identify those factual issues as to which it believes genuine disputes remain." *Colston v. Barnhart*, 146 F.3d 282, 285 (5th Cir. 1998); *see also, e.g.*, *Via*, 469 F.3d at 625 n.3; *Doe ex rel. Doe v. City of Roseville*, 296 F.3d 431, 437-38 (6th Cir. 2002). But this second-level exception is just as vague as the *Johnson* exception it-

self, creating uncertainty over how much detail a district court must recite to trigger *Johnson*'s jurisdictional limits. *See Colston*, 146 F.3d at 285 ("We believe it unwise to attempt to articulate a test for the degree of specificity with which a district court must identify genuine issues of fact for these purposes."); *see also, e.g.*, *Krout v. Goemmer*, 583 F.3d 557, 564 (8th Cir. 2009) (finding jurisdiction to consider the record "to resolve *some* aspects of the appeals" (emphasis added)); *Armijo*, 159 F.3d at 1260 (finding record review barred for two alleged facts but not others because the district court "did not identify any other specific facts"); *Winfield*, 106 F.3d at 535 (holding that this second-level exception applies when a "district court fails to set forth *fully* the factual basis" for its conclusion (emphasis added)).

Not surprisingly given this fact-bound jurisdictional test, inconsistency has marred its application. *See Romo*, 723 F.3d at 687 (Sutton, J., concurring) (suggesting that it "happens more often than not" that the courts simply ignore this jurisdictional question). Indeed, as a well-known treatise approvingly notes, a "growing number of decisions in fact provide review of summary-judgment rulings . . . as to the showing whether there is a genuine issue" of fact. 15A C. Wright, Federal Practice § 3914.10, at 533 (Supp. 2013) (citing cases). In many cases, the court simply "gloss[es] over" this issue, despite its jurisdictional pedigree. *Id.* at 534; *see, e.g.*, *Brown v. Callahan*, 623 F.3d 249, 253-57 (5th Cir. 2010); *Demoret v. Zegarelli*, 451 F.3d 140, 148, 150 (2d Cir. 2006). In others, the court pays lip service to its jurisdictional rule but goes on to note its "disagreement with the

district court" over whether the record evidence shows "a genuine issue of material fact" on a particular factual issue. *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 403, 405 (6th Cir. 2007).

2. *Scott* has only added to the confusion on this jurisdictional issue. On one end of the spectrum, the Eleventh Circuit continues to follow its bright-line reading of *Johnson*, rejecting mistaken conclusions regarding the disputed facts when determining whether state officials violated clearly established law. *See, e.g.*, *Johnson v. Niehus*, 491 F. App'x 945, 949-53 (11th Cir. 2012). On the other, the Ninth Circuit discounts *Scott* altogether on this question, noting that it did not cite *Johnson* or discuss the limits of appellate jurisdiction. *See George*, 736 F.3d at 835-36.

Other courts fall between these extremes. They take a narrow view of *Scott*, holding that it creates another "exception" to their broad reading of *Johnson*. *Romo*, 723 F.3d at 675. Specifically, they reason that *Scott*'s "scenario"—where a district court's findings are blatantly contradicted by the record—"represent[s] the outer limit of the principle of *Johnson*." *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007). If "the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false," the courts hold, "a court of appeals may say so, even on interlocutory review." *Id.*; *see also Williams v. Herron*, 687 F.3d 971, 975 (8th Cir. 2012) (noting that the court "must take as true those facts the district court found . . . , so long as those facts are not blatantly contradicted by the

record"); *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (same).

C. The Court Should Now Hold That *Johnson* Sets A Narrow, Bright-Line Rule

The Court should take the opportunity to resolve this jurisdictional morass, considering that the decision below itself could not decide whether it should dismiss for lack of jurisdiction. *See* Pet. App. 12; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (noting that "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists"). When doing so, the Court should interpret *Johnson*, like the Eleventh Circuit, to create a bright-line jurisdictional rule. On the one hand, *Johnson* bars interlocutory appellate jurisdiction when state officials assert an "evidence sufficiency" claim on appeal—i.e., they claim merely that the district court wrongly assessed "which facts [the plaintiff] may, or may not, be able to prove at trial." 515 U.S. at 313; *see Cottrell*, 85 F.3d at 1485-86.

On the other hand, *Johnson* in no way affects appellate jurisdiction whenever state officials assert the more typical clearly established claim—i.e., they claim that the district court wrongly held that clearly established law prohibited their conduct. *See Behrens*, 516 U.S. at 313. Thus, when appellate courts resolve these jurisdictionally proper clearly established claims, *Johnson* does not prohibit those courts from determining which of the plaintiff's factual allegations must and must not be accepted under Fed. R. Civ. P. 56. *See Scott*, 550 U.S. at 378-81. Nor does *Johnson* jurisdictionally prohibit those courts

from departing from a district court's conclusion that sufficient evidence supports a particular allegation when the record illustrates the contrary. *Id.* at 380-81; *see Cottrell*, 85 F.3d at 1486.

In short, *Johnson*'s jurisdictional limit depends on the type of claim that the state officials raise on appeal. It applies only when the officials assert as their ground for reversal that the district court wrongly determined the disputed facts. It does not apply when the officials assert that the district court wrongly held that their conduct violated clearly established law. And, in the process of resolving that legal claim, appellate courts have jurisdiction to consider any subsidiary evidentiary issues.

Both precedent and logic support this result.

1. The Court's cases are best read to treat *Johnson* as establishing a bright-line rule

a. The Court's cases on this question, when considered together, are best read to support the Eleventh Circuit's view that *Johnson* prohibits jurisdiction only over pure "evidence sufficiency" claims. *Johnson* itself reasonably can be interpreted to create that bright-line rule. The Court emphasized that the claim there raised "*only* a question of 'evidence sufficiency'" about whether the district court had properly assessed the facts. 515 U.S. at 313 (emphasis added); *see also id.* at 308 (noting that the officials argued that the summary-judgment "denial was wrong because the record contained 'not a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff, or ever ob-

served anyone doing so'" (citation omitted)). And the Court held that *Cohen*'s "theory of appealability" is not met "in the context of [this] 'evidence sufficiency' *claim*." *Id.* at 314 (emphasis added). Where the "defendant *simply* wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact," the Court reasoned, the appellate question is inseparable from the question on the merits. *Id.* (emphasis added). Finally, the Court expressly contrasted this type of claim with a "clearly established" claim, noting that "if the District Court in this case had determined that beating respondent violated clearly established law, petitioners could have sought review of *that* determination." *Id.* at 318.

Behrens provides further support for this bright-line rule. There, the Court rejected the argument that it lacked jurisdiction under *Johnson* because the district court's order had found material issues of fact. *See* 516 U.S. at 312. When doing so, the Court noted that summary-judgment denials, by definition, rest on conclusions that factual issues mandate a trial. But "*Johnson* surely does not mean that *every* such denial . . . is nonappealable." *Id.* at 313. If so, *Johnson* would have overruled *Mitchell*. Instead, as *Behrens* confirms, *Johnson* holds only that the evidence-sufficiency claims made in nearly every case are "not immediately appealable merely because they happen to arise in a qualified-immunity case." *Id.* Conversely, summary-judgment orders "*are* appealable" if they resolve "whether the federal right allegedly infringed was 'clearly established.'" *Id.* *Behrens*, moreover, made clear that the circuit court on

remand—when considering such a "clearly established" claim—had jurisdiction to review "'the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" *Id.* (quoting *Johnson*, 515 U.S. at 319). It did so because the district court had not made any express findings about the genuinely disputed facts. *Id.*

Scott takes *Behrens* a step further. It shows that appellate courts, in the process of resolving clearly established claims, have jurisdiction to determine that a plaintiff lacks sufficient evidence for a particular allegation *even when* the district court has found a genuine factual dispute over that allegation. There, the district court had concluded that the plaintiff—who brought an excessive-force claim against the officer who rammed him during a high-speed chase—presented sufficient evidence to show that he had not "posed an immediate threat to the safety of others." *Harris v. Coweta Cnty.*, No. 3:01-cv-148, 2003 WL 25419527, at *5 (N.D. Ga. Sept. 25, 2003). This Court rejected that ruling, holding that the court of appeals should have concluded that a videotape supported only the finding that the plaintiff "was driving in such fashion to endanger human life." *Scott*, 550 U.S. at 380-81. Thus, *Scott* removes all doubt *both* that an appellate court has jurisdiction over clearly established claims *and* that it can depart from a lower court's sufficiency findings in the process of resolving those claims. *See* 15A C. Wright, Federal Practice § 3914.10, at 534 (Supp. 2013) ("Surely this decision amounted to a record-based re-

view of the question whether there was a genuine issue of material fact.").

b. The circuit courts that have adopted a fact-based reading of *Johnson*, by contrast, must create artificial distinctions between the Court's cases.

Take their distinction of *Scott*. The Ninth Circuit suggests that *Scott* has nothing to say on this question because it did not cite *Johnson*. *See George*, 736 F.3d at 835-36. But *Scott* recognized that appellate jurisdiction in that case turned on the collateral-order doctrine. *See* 550 U.S. at 376 n.2 (quoting *Mitchell*, 472 U.S. at 526-27). And because *Johnson*'s scope implicates the subject-matter jurisdiction of the appellate courts, the *Scott* Court was "not free to pretermit the question." *Iqbal*, 556 U.S. at 671.

The other circuits' view of *Scott*—as creating yet another "exception" to their broad reading of *Johnson*, *Romo*, 723 F.3d at 675—fares no better. When resolving clearly established claims, these courts hold, *Scott* allows them to disregard a district court's sufficiency assessments "for *blatantly* contradicted facts." *Id.* (emphasis added). In plain English, they interpret *Scott* as establishing a "*really* wrong" test, *id.* at 679 (Sutton, J., concurring), one that triggers appellate jurisdiction when a circuit court finds that the district court's sufficiency analysis is not simply wrong but "blatantly" so, *Scott*, 550 U.S. at 380; *see Lewis*, 604 F.3d at 1225-26. This reading—resting, as it does, solely on this Court's use of adverbs—has little to commend it.

For one thing, this view of *Scott* ties an appellate court's subject-matter jurisdiction over a district

court's ruling on the genuinely disputed facts to its subjective views of that ruling's *merits*. Dating back to *Bell v. Hood*, 327 U.S. 678 (1946), however, the Court has endeavored to keep jurisdiction distinct from the merits. *See id.* at 682; *see also, e.g.*, *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2876-77 (2010). It is unlikely that *Scott* would so cavalierly change course in this one context. Instead, it is much more reasonable to read *Scott* as recognizing that *Johnson* does not at all affect appellate jurisdiction over clearly established claims.

For another, the efficiency reasons justifying *Johnson*'s limits on appellate jurisdiction cannot justify this reading of *Scott*. *See Johnson*, 515 U.S. at 316 (expressing concern with requiring appellate courts to review "a vast pretrial record"). Both the bright-line rule and the circuits' fact-based rule promote these efficiency concerns in the same manner. *Both* bar appellate jurisdiction over pure evidence-sufficiency claims. And *both* require appellate record review over clearly established claims. The only difference turns on the standard that state officials must meet ("wrong" versus "really wrong") before appellate courts may reject sufficiency rulings in the process of resolving those claims. Accordingly, this reading of *Scott* merely puts another layer of complexity on top of an already complex jurisdictional inquiry without adding any countervailing efficiency benefits. *See Romo*, 723 F.3d at 679 (Sutton, J., concurring) ("If *Johnson* is designed to protect appellate courts from record review, how does a 'blatantly contradicted by the record' standard help?").

The problems do not end with *Scott*. These courts also interpret *Behrens* to establish an equally unusual dichotomy. They recognize that they *do* have jurisdiction to consider evidentiary issues if the district court's order denying qualified immunity does not adequately identify the facts that it found genuinely disputed. *See, e.g.*, *Colston*, 146 F.3d at 285. Yet it is strange to tie the scope of an appellate court's subject-matter jurisdiction to whether a district court's written opinion adequately details its views of the genuinely disputed facts. After all, district courts "generally do not write summary judgment opinions in this way." *Romo*, 723 F.3d at 681 (Sutton, J., concurring). And this jurisdictional dichotomy runs contrary to the principle that appellate courts "'review[] judgments, not statements in opinions.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987)); *cf. Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011). Finally, it seems somewhat arbitrary (and unfair to parties on both sides of the issue across the range of cases) to link the scope of appellate jurisdiction to whether or not a district court makes "adequate" findings.

To be sure, *Johnson* notes that, when resolving clearly established claims, "court of appeals *can* simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." 515 U.S. at 319 (emphasis added). But there is a big difference between *can* and *must*. This language need not set a rigid, jurisdictional rule—as opposed to a discretionary rule allowing appellate courts to determine "the best use of

the opportunity presented by the appeal." 15A Wright, Federal Practice § 3914.10, at 534 (Supp. 2013); *see Cottrell*, 85 F.3d at 1486. Indeed, the latter reading comports with the Court's recent efforts to clarify the narrow domain of the term "jurisdiction." *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

All told, the Court's cases in this area are best read to treat *Johnson*'s jurisdictional limit as a bright-line rule that applies only to pure evidence-sufficiency claims.

2. General principles further prove that *Johnson* should be read as establishing a bright-line jurisdictional rule

General principles confirm that the Court should interpret *Johnson*, like the Eleventh Circuit, to set a bright-line rule barring appellate jurisdiction *only* over pure evidence-sufficiency claims. That rule follows from: (1) general principles of subject-matter jurisdiction; (2) specific jurisdictional principles in the collateral-order context; (3) qualified immunity's underlying purposes; (4) qualified immunity's substantive test; and (5) the presumption against unnecessarily deciding constitutional questions.

Basic Jurisdictional Principles. "Jurisdictional rules should be as clear and mechanical as possible." *Helm v. Resolution Trust Corp.*, 18 F.3d 446, 447 (7th Cir. 1994) (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their

claims, but which court is the right court . . . ." *Hertz*, 559 U.S. at 94. Conversely, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Id.*; *see also In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) (Easterbrook, J.) ("The chief and often the only virtue of a jurisdictional rule is clarity.").

The bright-line rule promotes these goals. It generally allows appellate courts to assure themselves of jurisdiction merely by scanning the district court's order and the argument headers in the state officials' appellate brief. So long as the brief asserts an abstract legal claim (typically, that the district court erred by finding that clearly established law prohibited their conduct), appellate jurisdiction is secure. The court can then proceed to the merits of the qualified-immunity inquiry without wasting further energy on its jurisdiction. While formalistic, that is a virtue, not a vice, of a jurisdictional test. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980).

Now consider the other circuits' fact-based rule. Under their view, jurisdictional questions pervade the entire appeal. Even when state officials "frame" their appeal as a proper "clearly established" claim, the courts still must analyze jurisdiction with respect to each and every factual statement that the officials make. *See White*, 519 F.3d at 813. A jurisdictional question gets triggered whenever a factual assertion appears to contradict the district court's order. *See Gutierrez*, 722 F.3d at 1009-11.

To their credit, these courts recognize the difficulties with their approach. The Sixth Circuit, for ex-

ample, has conceded that its rule often does not permit it to "adequately assess [its] jurisdiction to hear interlocutory appeals on qualified immunity *until the appeal is fully briefed and argued*." *Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998) (emphasis added). Other courts, too, note that their rule creates a "hazy line" between proper and improper appeals. *Gutierrez*, 722 F.3d at 1011; *see also Camilo-Robles v. Hoyos*, 151 F.3d 1, 8 (1st Cir. 1998) (noting that "the dividing line between appealable and non-appealable denials of summary judgment is blurred"); *Winfield*, 106 F.3d at 529 (noting that "application of [the rule] may prove to be more difficult"). These courts thus set the very "'sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible.'" *Hertz*, 559 U.S. at 94 (quoting *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)).

Indeed, this case shows that these courts may sometimes *never* be able to determine their jurisdiction. Pet. App. 12. A motions panel initially granted Respondent's motion to dismiss for lack of jurisdiction. Pet. App. 7. But it reversed itself on rehearing. *Id.* Ultimately, after the merits were reached, the court threw up its hands on this question, concluding that "[w]hether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same." Pet. App. 12; *but see Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998). A jurisdictional rule that cannot be resolved until after the merits—if at all—is, to put it mildly, not a good jurisdictional rule.

Collateral-Order Principles. Under the collateral-order doctrine, the Court does "not engage in an 'individualized jurisdictional inquiry'" in each case, instead focusing on "'the entire category to which a claim belongs.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (citations omitted). The Court has thus permitted immediate appeals for *general categories* of cases—even if the "factual complexities" in some of the cases within these categories make immediate appeal a waste of time. *Puerto Rico*, 506 U.S. at 147 (orders denying Eleventh Amendment immunity); *see also, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (orders denying absolute immunity); *Abney v. United States*, 431 U.S. 651, 662 & n.8 (1977) (orders rejecting double-jeopardy claims). And the Court has denied immediate appeals for other *general categories* of cases—even if "an immediate appeal might result in substantial savings of time and expense" in some of the cases within these categories. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (orders on *forum non conveniens*); *see also, e.g.*, *Mohawk*, 558 U.S. at 108-09 (orders on attorney-client privilege); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994) (orders refusing to enforce settlement).

The bright-line rule respects this framework. It splits qualified-immunity appeals into discrete categories of claims—evidence-sufficiency claims (which are jurisdictionally improper) and clearly established claims (which are jurisdictionally proper). Even if some "clearly established" appeals contain "factual complexities" that make the appeals a poor investment, *Puerto Rico*, 506 U.S. at 147, that does not bar

jurisdiction in this context any more than in any other context. Conversely, even if some "evidence sufficiency" appeals could be quickly resolved—leading to "substantial savings of time and expense," *Van Cauwenberghe*, 486 U.S. at 529—appellate courts still lack jurisdiction over those appeals.

The fact-bound rule, by contrast, flunks this framework. Because it is fact-based rather than claim-based, a circuit court cannot simply look to the state officials' claim, but must analyze the factual arguments made in support. "[I]n each individual case," therefore, these courts "engage in ad hoc balancing" about whether the state officials' factual statements remain sufficiently loyal to the district court's order, a fact-specific approach that *Johnson* itself criticized. 515 U.S. at 315. This approach, in other words, comes close to improperly "reduc[ing] the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985); *see Romo*, 723 F.3d at 683 (Sutton, J., concurring) (criticizing broad reading of *Johnson* because it turns "every case" into "a class of an appealable or non-appealable decision unto itself").

Qualified Immunity's Purposes. By restricting damages suits against state officials, qualified immunity "gives [those] officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (internal quotation marks omitted).

And because fear of the litigation process itself can deter state officials from taking necessary action, the doctrine provides an immunity from suit so as to make the "breathing room" real rather than theoretical. *See Anderson*, 483 U.S. at 646 n.6. Thus, the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (noting that qualified immunity will work "only if unjustified lawsuits are quickly terminated").

These purposes point to the bright-line rule. By interpreting *Johnson* to set a *narrow* rule, it maximizes the chances for appellate courts to resolve immunity questions at "the earliest possible stage," *Hunter*, 502 U.S. at 227, allowing state officials to avoid costly, fact-intensive litigation in the trial court whenever possible. And by interpreting *Johnson* to set a *clear* rule, it ensures that state officials do not waste unnecessary resources on jurisdictional issues far afield from the merits of the qualified-immunity test or the plaintiff's constitutional claim.

The fact-bound rule merely frustrates these goals. Because it creates "hazy" lines, *Gutierrez*, 722 F.3d at 1011, it forces parties to suffer the "'costs of litigating [jurisdictional] questions and [the] delays attributable to resolving them.'" *Pearson*, 555 U.S. at 237 (citation omitted). The fact-bound test thus runs counter to the actual reason for interlocutory appeals. It risks more, not less, burdensome litigation, including, for example, a routine round of motions practice in the appellate court before even reaching

the qualified-immunity denial on appeal. *See, e.g.*, Pet. App. 7.

Qualified Immunity's Test. In the qualified-immunity context, "clearly established" law means law that would put a reasonable official on notice "that what he is doing violates" the Constitution. *Anderson*, 483 U.S. at 640. It is thus not enough for a plaintiff to identify a constitutional right "at a high level of generality." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). Rather, the asserted right must be "'particularized'" so that its "'contours'" would be "clear to a reasonable official" untrained in legal reasoning. *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (citation omitted). In other words, "this inquiry 'must be undertaken in light of the *specific context of the case*, not as a broad *general proposition*.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citation omitted; emphases added).

The bright-line rule best fits this definition of "clearly established" law. That is because appellate courts cannot apply this definition to particular cases without taking a deep dive into the facts. *See* 15A Wright, Federal Practice § 3914.10, at 528-29 (Supp. 2013) (noting "the intense fact-dependency of the immunity determination"). As Judge Wilkinson put it, "[i]nescapably, [appellate courts] must say what the given facts are before [they] can determine whether or not certain given facts showed a violation of clearly established law." *Winfield*, 106 F.3d at 536 (Wilkinson, J., concurring) (internal quotation marks omitted). Because the test, by definition, requires appellate courts to consider the specific facts of each

case, the bright-line rule allows them to do so without worrying about their jurisdiction over each and every fact apparent to them on the record.

The fact-based rule, by contrast, merely hamstrings appellate courts when undertaking this fact-intensive inquiry. In many cases, it will prove difficult to tell whether a district court based its qualified-immunity denial on an "(unreviewable) factual inference[]" or on a "(reviewable) legal conclusion[]." *See Romo*, 723 F.3d at 685 (Sutton, J., concurring). In others, it will prove difficult to tell whether the denial turned on an (unreviewable) finding of a "genuine" factual dispute or on a (reviewable) finding that an undisputed fact was "material." *See Winfield*, 106 F.3d at 538 (Wilkinson, J., concurring) (noting that the dissent overlooked this distinction).

Iqbal further illustrates this basic point. There, the plaintiff argued that *Johnson* barred appellate jurisdiction over a district court's holding that a complaint alleged enough factual details to state a claim that high-level officials had engaged in discrimination. *See* 556 U.S. at 669, 671. The Court disagreed. Whether "a particular complaint sufficiently alleges a clearly established violation of law," the Court reasoned, "cannot be decided *in isolation from the facts pleaded*." *Id.* at 673 (emphasis added). But that is equally true at the summary-judgment stage. *See Lewis*, 604 F.3d at 1226 n.2. The only difference is that the court no longer looks to "the defendant's conduct *as alleged in the complaint*," but to the defendant's conduct *as shown by the evidence*. *Behrens*, 516 U.S. at 309. At either stage, an appel-

late court cannot answer the "clearly established" question without digging into the facts that have been "alleged" or "shown." *Pearson*, 555 U.S. at 232.

Constitutional Avoidance. Finally, this Court has traditionally expressed reluctance about unnecessarily answering difficult constitutional questions if an easier avenue exists for resolving the case. *See id.* at 235. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). Indeed, the Court relied on this presumption when holding that lower courts should have flexibility to resolve the "clearly established" prong of the qualified-immunity test without ever determining whether a constitutional violation occurred at all. *See Pearson*, 555 U.S. at 241.

This traditional canon equally supports the bright-line rule. In some cases, a mistaken sufficiency-of-the-evidence finding could turn what otherwise would be a straightforward constitutional question into a much closer one. If an appellate court may immediately correct the sufficiency finding when resolving the appeal, it could allow for an easier avenue to decide the case without wading into difficult questions about whether a clearly established constitutional right existed. *Cf. Lewis*, 604 F.3d at 1226 n.2 (recognizing that courts generally "decline to opine on the legal consequences of factual scenarios that [they] would hold implausible as a matter of law

because doing so risks offering advisory opinions"). In other words, a flexible approach—rather than a "rigid order of battle"—makes as much sense here as it does elsewhere. *See Pearson*, 555 U.S. at 234; *cf. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007).

* * * *

One final issue deserves brief mention. It might be argued that the bright-line rule turns *Johnson* into a lawyer's game, one that risks abusive appeals that ostensibly raise "clearly established" claims but that merely disguise a refusal to accept disputed facts. But these risks exist however *Johnson* is interpreted—as the Court itself seemed to note. *See* 515 U.S. at 318; *see also Romo*, 723 F.3d at 685 (Sutton, J., concurring) (noting that the "distinctions and complexities" from a broad reading of *Johnson* merely "increase the odds that appellate jurisdiction will turn on the quality of the lawyer"). Further, "'[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims.'" *Behrens*, 516 U.S. at 310 (quoting *Abney*, 431 U.S. at 662 n.8). The only difference between the jurisdictional rules concerns the label that a court should place on the summary disposition—whether a summary dismissal for lack of jurisdiction (under the fact-bound rule) or a summary affirmance on the merits of the qualified-immunity question (under the bright-line rule). If anything, the latter offers more, not less, deterrent value for abusive appeals, as it could have binding effect throughout the remainder of the suit. *See*

United States v. Hatter, 532 U.S. 557, 566 (2001) ("The law of the case doctrine presumes a hearing on the merits.").

In sum, the Court should provide much needed clarity on this jurisdictional issue with a clear rule: Appellate courts have jurisdiction so long as (1) a district court denies qualified immunity on the ground that clearly established law prohibited a state official's conduct and (2) the official's appellate claim challenges that legal holding.

D. Applying This Rule Here, The Court Has Jurisdiction And Need Not Defer To The District Court's Recitation Of The Record

Under this rule, there can be no doubt that the Sixth Circuit and this Court have jurisdiction over Petitioners' appeal. The district court resolved the purely legal question whether their conduct violated clearly established law at the time they took the challenged actions. Pet. App. 41-42. On appeal, Petitioners challenged the district court's qualified-immunity denial on, among others, the ground that the law was not clearly established when they acted. *See* Defendants-Appellants' Br. at 15-23. These facts secure appellate jurisdiction.

Further, when resolving whether Petitioners' conduct violated clearly established law, the Court's jurisdiction does not require it to defer to the district court's recitation of the facts. Instead, it has jurisdiction to depart from the district court's analysis concerning which facts are genuinely disputed. *See Scott*, 550 U.S. at 378-81.

II. WHATEVER THE FACTS, THE SIXTH CIRCUIT ERRED IN DETERMINING THE "CLEARLY ESTABLISHED" LAW

This case also gives the Court an opportunity to reaffirm the meaning of "clearly established" law. As Petitioners explain in detail, the decision below contains two flaws on the merits—one analytical, one temporal. Analytically, the Sixth Circuit defined "clearly established" law at too high a level of generality, rather than with the detail that would helpfully guide state officials. Temporally, the Sixth Circuit relied on cases that had not even been decided at the time the officials acted. These errors, if they were to become the norm, would hamper state officials' dual efforts to protect the public and respect civil liberties.

The Analytical Problem. The Sixth Circuit denied immunity at this stage because it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. The court's ambiguous use of the word "reasonable" admits of two readings. It could mean that the officers' use of force was "unreasonable" under the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Or it could mean that the officers did not deserve qualified immunity because their conduct violated clearly established law "of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Either interpretation contains a qualified-immunity error.

The first reading collapses the question whether the state officials violated the claimant's constitutional rights and the question whether those constitutional rights were clearly established. The Court

has acknowledged that treating the issues as one question may have "surface appeal" in the Fourth Amendment context, given the oddity of saying an officer "'reasonably' acted unreasonably." *Anderson*, 483 U.S. at 643. But the familiar two-step of qualified immunity applies "'across the board.'" *Id.* at 642 (citation omitted). And (if the first reading is right) the Sixth Circuit failed to separate the constitutional inquiry from the immunity inquiry here "just as it [sh]ould for any other claim of official misconduct." *Saucier v. Katz*, 533 U.S. 194, 203 (2001).

The second reading violates this Court's repeated direction to examine the relevant legal rule at a specific enough "level of generality" to ensure the "contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 639-40; *see also al-Kidd*, 131 S. Ct. at 2084; *Saucier*, 533 U.S. at 202; *Wilson v. Layne*, 526 U.S. 603, 615 (1999). If this second reading is correct, the Sixth Circuit answered the immunity question—was "the officers' conduct . . . reasonable as a matter of law," Pet. App. 10—at the level of the Fourth Amendment's text. *See al-Kidd*, 131 S. Ct. at 2084 ("The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."). It is hard to imagine a more abstract definition of the claimed right, and equally hard to imagine a less helpful guidepost for state officials. Whether the Sixth Circuit intended the first reading or the second, its holding that it could not "conclude that the officers' con-

duct was reasonable as a matter of law" fundamentally misapprehends how qualified immunity works.

The Temporal Problem. The Sixth Circuit also failed to cite any binding cases existing at the time of the conduct in question here. The reasonableness of an official's action must be "assessed in light of the legal rules that were 'clearly established' *at the time it was taken*." *Anderson*, 483 U.S. at 639 (emphasis added). Yet the primary authority on which the Sixth Circuit relied—*Scott*—post-dated Petitioners' actions by nearly three years.

In its *entire* qualified-immunity analysis, moreover, the Sixth Circuit cited only one case pre-dating the events—a case granting qualified immunity and arising in a jurisdiction that did not bind the officials here. *See Adams v. St. Lucie Cnty. Sheriff's Dep't*, 998 F.2d 923, 923 (11th Cir. 1993) (adopting reasoning in *Adams v. St. Lucie Cnty. Sheriff's Dep't*, 962 F.2d 1563, 1573-79 (11th Cir. 1992) (Edmondson, J., dissenting)). That is a thin reed on which to hang personal liability, especially without considering cases from the Eighth Circuit (where the officers were stationed) or the Sixth (where the events occurred). Having identified no clearly established law existing at the time of the officers' conduct—indeed, having not even used the phrase "clearly established"—the Sixth Circuit erred in its application of the qualified-immunity test.

At day's end, these mistakes—defining clearly established law at a high level of generality and relying on cases decided after the challenged conduct—are not mere abstract errors. They have the real-world

potential to harm the States' efforts to protect their citizens. Qualified immunity's "breathing room" protects state officials, to be sure. *al-Kidd*, 131 S. Ct. at 2085. But more than that, it protects "the public interest" by ensuring that the officials' "action[s] [are] taken 'with independence and without fear of consequences'" in settings with unclear legal rules. *Harlow*, 457 U.S. at 819 (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

CONCLUSION

The Court should hold that the Sixth Circuit had jurisdiction over Petitioners' appeal, but reverse the Sixth Circuit's decision on the merits.

Respectfully submitted,

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