No. _____

In The
Supreme Court of the United States

LUCAS PETERSON, et al.,

Petitioners,

v.

WALTER LOUIS FRANKLIN, II, Trustee for the Estate of Terrance Terrell Franklin,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Intractable conflict has arisen over the scope of the courts of appeals' jurisdiction to consider interlocutory appeals from denials of qualified immunity under *Johnson v. Jones*, 515 U.S. 304 (1995):

1. Is there interlocutory appellate jurisdiction to review the district court's assessment that disputed facts establish a triable question on a legal element essential to liability? For example, in this deadly force case, is there jurisdiction to consider the assessment that two assumed fact disputes establish a triable issue on whether it was reasonable to believe that the suspect posed a significant threat of death or serious bodily harm when he was shot?

2. And, more generally, is there interlocutory appellate jurisdiction to review the district court's assessment that a fact dispute establishes a dispute on another fact that is not a legal element essential to liability? For example, in this case, is there jurisdiction to consider the assessment that the assumed dispute over whether a gun had blood on it establishes a dispute over whether the suspect was in possession of the gun when he was shot?

PARTIES TO THE PROCEEDING

Petitioners, all of whom were defendants in the district court and appellants in the court of appeals, are Lucas Peterson, individually and in his official capacity; Michael Meath, individually, and in his official capacity; Janeé Harteau, Chief of Police for the Minneapolis Police Department, individually and in her official capacity; and the City of Minneapolis.

Respondent, the plaintiff in the district court and the respondent in the court of appeals, is Walter Louis Franklin, II, Trustee for the Estate of Terrance Terrell Franklin.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Lucas Peterson, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in No. 16-4429.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1) is published at 878 F.3d 631 (8th Cir. 2017). The relevant opinion of the district court (App. 20) is not published in the Federal Supplement but is available at 2016 WL 6662679.

JURISDICTION

The opinion of the court of appeals was issued on December 26, 2017. App. 1. The court of appeals denied the petitions for rehearing en banc and for panel rehearing on February 16, 2018. App. 36. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provision are the Fourth Amendment of the United States Constitution; section 1291 of Title 28 of the United

States Code; and section 1983 of Title 42 of the United States Code.

The relevant constitutional and statutory provisions are:

The Fourth Amendment of the United States Constitution:

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

Section 1291 of Title 28 of the United States Code:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]

And section 1983 of Title 42 of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

INTRODUCTION

The Eighth Circuit Court of Appeals refused to review whether Petitioners were entitled to qualified immunity based on a misapplication of *Johnson v. Jones*, 515 U.S. 304 (1995). This Court's review is needed to correct this error and resolve significant disarray in the circuit courts regarding the scope of *Johnson*.

On May 10, 2013, Terrance Franklin ("Franklin"), a suspected burglar, fled Minneapolis police officers by car and by foot. Franklin broke into and hid inside a Minneapolis home. When officers, including Petitioners Lucas Peterson and Michael Meath, found Franklin hiding in the basement behind a water heater, Franklin fought with them. Franklin punched Petitioner Peterson in the face and then tackled another officer, who was holding a submachine gun. The submachine gun was discharged twice, with bullets striking Petitioner Meath and Officer Ricardo Muro. The officer who was holding the submachine gun yelled "He's got a gun!" Franklin was then shot and killed by Petitioners Peterson and Meath.

In denying Petitioners' motion for summary judgment based on qualified immunity, the district court identified two alleged fact disputes and held that those disputes established a triable issue of fact regarding

whether it was reasonable to believe that Franklin posed a significant threat of death or serious physical injury when he was shot, an essential legal element of the deadly force claim here. The two facts were determined to be in dispute by the district court by reading the record in the light most favorable to Plaintiff and by drawing inferences in his favor. First, the district court determined that a jury could find that as much as seventy seconds transpired between when the officers were shot and when Franklin was shot. And, second, the district court determined that a jury could find that there was no blood on the submachine gun, from which the district court inferred a fact dispute over whether Franklin was holding the submachine at the moment he was shot.

Below, Petitioners argued that these two facts were not material to the dispositive issue of whether a reasonable officer would believe that Franklin posed a significant threat of death or serious physical injury when he was shot. In other words, Petitioners challenged the district court's assessment that these fact disputes sufficed to create a triable question on a legal element essential to liability. *See Walton v. Powell*, 821 F.3d 1204, 1208 (10th Cir. 2016). Reasoning that this argument was a prohibited "sufficiency of the evidence" question under *Johnson*, the court of appeals dismissed the appeal for want of jurisdiction. Judge James B. Loken dissented, concluding that, "accepting as true the alleged seventy-second gap between the shots that wounded two officers and the shots that killed Franklin, and the lack of blood on Durand's

MP5, there is no existing precedent establishing 'beyond debate' that Officers Peterson and Meath acted unreasonably in using deadly force." App. 17 (internal citations omitted).

The courts of appeals are in significant disarray over whether there is jurisdiction to hear such arguments under *Johnson*. Recent Tenth Circuit case law says yes, but recent Sixth Circuit case law says no. *Compare Walton*, 821 F.3d at 1208, *with DiLuzio v. Village of Yorkville, Ohio*, 796 F.3d 604, 609 n.1 (6th Cir. 2015). Further, *nine circuits*, including the Sixth Circuit, have issued conflicting opinions establishing a widespread and mature *intra*-circuit split.

The breadth of *Johnson* is exceptionally important because, as this Court has repeatedly stated, qualified immunity issues are important to society as a whole and to public officials protected by the immunity. Further, an overly broad interpretation of *Johnson* can functionally deny officials of a qualified immunity analysis particularized to the facts of the case and, more generally, of any meaningful appellate review at all.

The rule in *Walton* is correct. *Johnson* does not proscribe a court of appeals from reviewing the district court's assessment that the facts it assumed or likely assumed establish a triable question as to a legal element essential to liability. It is a core responsibility of appellate courts to decide questions of this type and, therefore, jurisdiction over them is not foreclosed by *Johnson*.

STATEMENT OF THE CASE

1. The following facts are taken from the court of appeals' recitation of "the facts as stated by the district court." App. 2. On May 10, 2013, a bystander contacted the police and identified Franklin as a burglar. App. 2–3. When Minneapolis police officers responded and found Franklin, he fled in a vehicle, striking a squad car with his vehicle. App. 3. Franklin eventually abandoned the car and broke into a home and hid in the basement. App. 3.

Minneapolis Police officers, including Petitioners Meath and Peterson, Officer Mark Durand, Muro, Sergeant Andrew Stender, and K-9 officer Nash, searched the home for Franklin. App. 3. Nash found Franklin in a small closet-like area, behind a water heater. App. 3. Nash bit on Franklin's clothing and tried to pull him from behind the water heater. App. 3. Stender ordered Franklin to "show his hands" several times, but Franklin remained in his hiding place and did not show his hands. App. 3. In an effort to get Franklin to comply with the order to show his hands, Stender struck Franklin once in the head with a closed fist. Franklin did not respond or show his hands, so Stender struck Franklin once with his flashlight. App. 3. When Franklin continued to refuse to show his hands, Stender attempted to pull Franklin from the closet. Franklin resisted being pulled from his hiding spot. App. 3.

Petitioner Meath then attempted to help by grabbing Franklin's shoulders to try and pull him out of the closet. App. 4. As Petitioner Meath struggled to get

Franklin out of the closet, he struck Franklin in Franklin's upper body two or three times with his knee. App. 4. Petitioner Peterson and Durand heard Petitioner Meath yell, "Are you grabbing for my gun?" App. 4.

Franklin then forced his way out of the closet. App. 4. Once out of the closet and free from Petitioner Meath, Franklin punched Petitioner Peterson in the face. App. 4. Petitioner Peterson grabbed Franklin but Franklin broke free. App. 4. Franklin then turned and tackled Durand, driving him into an adjacent, small laundry room. App. 4. As Franklin and Durand fell, Franklin grabbed the pistol grip of Durand's MP5 submachine gun and pulled the trigger twice. App. 4.

Both Meath and Muro were shot by the submachine gun. App. 4. Neither Petitioner Meath nor Muro saw how the submachine gun had been discharged. App. 5.[1]

After Meath and Muro were shot, Durand yelled, "He's got a gun!" App. 4.

Durand and Franklin struggled for control of the submachine gun. App. 4. At some point after Durand yelled "He's got a gun!," the flashlight that is mounted

[1] To the extent there is any possible dispute assumed or likely assumed by the district court as to whether Franklin pulled the trigger of the submachine gun, that fact was not relied on in Petitioners' appeal. Neither Petitioner Peterson nor Petitioner Meath observed Franklin pull the trigger. Instead, the reasonableness of their decision to shoot was based on other knowledge, such as, e.g., two officers being shot and then Durand yelling "He's got a gun!" Appellants' Br. 41–42, Jan. 30, 2017.

on the gun was switched on. App. 4. Petitioner Peterson followed them into the laundry room. App. 4. Eventually, Petitioner Peterson realized that Franklin had sufficient control over the submachine gun to point it at him. App. 4. As Franklin and Durand continued to struggle over the submachine gun, Petitioner Peterson moved toward them. App. 4. Petitioner Peterson reached out in the relative darkness for Franklin's head, pointed his pistol, and fired at Franklin five times. App. 4.

Meanwhile, after Petitioner Meath had been shot in the upper thigh and fallen to the ground, he looked up and saw Franklin on the ground, arms extended, with Petitioner Peterson "basically kind of on top of" Franklin. App. 4. When Petitioner Meath saw space develop between Franklin and Petitioner Peterson, he fired his pistol at Franklin. App. 4–5.

Franklin suffered gunshot wounds to his head and upper torso and was pronounced dead at the scene. App. 5.

2. On November 10, 2016, the district court issued an opinion and order granting in part and denying in part Petitioners' motion for summary judgment. App. 20–21. The district court denied the motion as to the § 1983 excessive force claim and the state-law wrongful death claim. In denying summary judgment on the excessive force claim, the district court rejected the individual officers' claims of qualified immunity.

The district court's denial of qualified immunity rested on two fact disputes that it identified from the

record: (1) that as many as seventy seconds transpired between when the officers were shot and when Franklin was shot; and (2) that there was a dispute over whether Franklin was holding the submachine gun at the moment he was shot. App. 24–26. The first dispute was based on video evidence in the summary judgment record—the video was recorded by a bystander across the street and, according to Respondent, recorded the sound of the gunshots that killed Franklin. The district court's conclusion that there was a triable issue as to whether Franklin was holding the gun when he was shot was inferred from a fact dispute as to whether there was any blood on the submachine gun. App. 25–26.

From these two fact disputes the district court reasoned that Respondent had raised "a genuine dispute as to whether [the officers'] story is true" and therefore there was a triable dispute over whether it was reasonable to believe that Franklin "pose[d] a significant threat of death or serious physical injury to the officer or others" when he was shot. App. 29.

3. Petitioners Peterson and Meath immediately appealed from the district court's denial of qualified immunity. Appellants' Br. 15, Jan. 30, 2017. And all Petitioners appealed from the district court's denial of summary judgment on the state-law wrongful death claim, asserting that it was inextricably intertwined with the qualified immunity issue. Appellants' Br. 1, 44, Jan. 30, 2017.

a. On appeal, Petitioners argued that under the facts assumed or likely assumed by the district court, no triable question remained as to whether only a plainly incompetent officer would have believed that Franklin posed a significant threat of death or serious physical injury when he was shot. Appellants' Br. 14–43, Jan. 30, 2017. Petitioners asserted that the district court assumed or likely assumed the facts as set forth above because the district court recited all of these facts without indicating that they were in dispute, and, further, the district court had to have assumed those facts because "nothing in the record controverted them." Appellants' Br. 20, Jan. 30, 2017. Petitioners pointed out that the only facts identified by the district court as being in dispute were the seventy-second timing and whether there was blood on the gun, and the district court's related inference, whether Franklin was in possession of the gun when he was shot.

On appeal, Petitioners challenged the district court's inference that Franklin was not in possession of the submachine gun, asserting that this inference required expert blood-spatter evidence, of which there was none. Additionally, Petitioners argued that the court of appeals need not accept the seventy-second gap, because it was blatantly contradicted by the video, which, in fact, contains no sound of any gunshots. Petitioners also asserted that, even if the court rejected these two arguments, the fact disputes over timing and whether Franklin possessed the gun when he was shot were immaterial. Therefore, the district court erred by concluding from those facts that there was a triable

issue as to the legal issue of whether a reasonable officer would believe that Franklin posed a significant threat of death or serious physical injury when he was shot. Appellants' Br. 14–43, Jan. 30, 2017.

b. On December 26, 2017, the court of appeals issued an opinion dismissing Petitioners' appeal for want of jurisdiction under *Johnson v. Jones*. The court of appeals held that Petitioners' appeal asserted prohibited arguments about "evidence sufficiency."

In spite of stating that "we recite the facts as stated by the district court" just before repeating facts identical to those above, the court of appeals reasoned that some of the recited facts had not been assumed by the district court without identifying which facts those were. App. 2, 6. Instead, the court of appeals reasoned that the district court had held that there was a "genuine dispute as to whether the story told by the officers is true." App. 6. According to the court of appeals, there was therefore an unreviewable question of evidence sufficiency as to whether "the officers faced a threat of serious physical harm when they used deadly force." App. 6.

To the extent the court of appeals held that aspects of "the story told by the officers" were not true, it did not specify which facts it, or the district court, considered to be in dispute. The following material facts were recited by the district court without identification of any contradictory evidence: Franklin fought with the officers; two officers were shot; Durand yelled "He's got a gun!" after the officers were shot and before

Franklin was shot. The court of appeals neither stated that any of these record-supported facts were in dispute, nor addressed Petitioners' assertion that the district court likely assumed—indeed, must have assumed—these facts because "nothing in the record controverted them." Appellants' Br. 20, Jan. 30, 2017.

The court of appeals reasoned that Petitioners were impermissibly challenging "the inferences raised by the estate from the evidence presented" as to whether it was reasonable to believe "that Franklin posed a threat of serious bodily harm or death." App. 13. This inference, or assessment,[2] was beyond the court's jurisdiction because "[t]he district court did not make any legal determinations" but instead simply held that "[w]hether each officer reasonably believed Franklin posed a sufficient threat depends on what occurred—a determination the district court held it could not make based on the evidence presented thus far." App. 14. The court of appeals then concluded that it lacked jurisdiction to entertain Petitioners' arguments based on the materiality of the identified fact disputes. App. 14.

Judge Loken disagreed and dissented. The dissent reasoned that the basic facts—that Franklin fought with the officers, grabbed the submachine gun, and

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[2] Courts have used differing terms to describe the conclusion that an identified fact dispute establishes a triable question as to another fact. *Walton* describes such a conclusion as an "assessment," while *DiLuzio* describes it as an "inference." Regardless of the precise term used, the analytical maneuver conducted by the district court is the same.

shot two officers—were "uncontroverted." App. 17. The dissent went on to conclude that "accepting as true" the seventy-second gap and "the lack of blood on [the submachine gun]," Petitioners Peterson and Meath were entitled to qualified immunity. App. 17.

c. On January 8, 2018, Petitioners filed petitions for en banc rehearing and panel rehearing. Appellants' Pet., Jan. 8, 2018. The petitions were denied without comment on February 16, 2018. App. 36.

REASONS FOR GRANTING THE WRIT

I. This Case Presents a Question of Exceptional Importance.

Four points highlight the importance of the issues presented in this petition. First, the overly broad interpretation of *Johnson* applied by the court below and other courts of appeals functionally denies public officials of a qualified immunity analysis particularized to the facts of their case. Second, this Court has repeatedly explained that qualified immunity issues, in general, are important to society as a whole and to public officials protected by the immunity. Third, this broad interpretation of *Johnson* allows the district court to shield its denial of qualified immunity from any meaningful appellate review. Finally, this jurisdictional issue is of particular societal importance because it recurs in officer-involved shootings that result in the death of an individual.

1. The court of appeals' misapplication of *Johnson* allows an end-run around this Court's requirement that qualified immunity be analyzed with facts particularized to the case. This Court has repeatedly instructed the lower courts to conduct a fact-specific analysis of qualified immunity. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152–53 (2018). "Today, it is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotation marks and citations omitted). Instead, "the clearly established law must be particularized to the facts of the case. Otherwise, [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*

The court of appeals' erroneous application of *Johnson* functionally deprives public officials of a qualified immunity analysis particularized to the facts of the case. For example, here, the district court inferred that there was a triable issue as to whether it was reasonable to believe that Franklin posed a significant threat of death or serious physical injury when he was killed, an essential element of Respondent's claim. In dismissing the appeal, the court of appeals held that challenging this assessment was an impermissible evidence-sufficiency argument. The court of appeals never determined which facts the district court assumed or likely assumed, because its erroneous interpretation of *Johnson* prevented reaching that point of

the analysis. The court of appeals' holding means that a fact-particularized analysis of a denial of qualified immunity is not possible where the district court infers a fact dispute regarding an essential legal element from unspecified fact disputes. *See* App. 10. Under this interpretation of *Johnson*, a district court's denial of qualified immunity becomes unreviewable if it reasons: (1) "Defendants contend the following facts," (2) "Plaintiff contends the following facts," and (3) "because a jury could disbelieve unspecified aspects of the story told by defendants there is a triable issue as to an essential element of the plaintiff's claim and summary judgment is denied." Allowing a denial of qualified immunity to be insulated from meaningful appellate review in this fashion will wrongfully diminish the scope of the qualified immunity defense to which government officials are entitled.

Further, once the summary judgment stage is passed, defendants are unlikely to ever obtain a qualified immunity analysis particularized to the facts of their case. For example, the practice in the District of Minnesota is to use special verdict forms that frame excessive force claims in the most general terms. In a deadly force case, the jury might simply be asked to determine whether a defendant used excessive force. *See, e.g.*, Special Verdict, *Crawford v. Turner*, Civ. No. 13-2562 (DWF/JJK) (D. Minn. Jan. 26, 2016), ECF No. 186. The clearly-established prong of the qualified immunity standard is a question of law, but once the verdict comes back, assuming it is for the plaintiff, the judge has no idea what specific facts upon which the

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

If this incorrect application of *Johnson* stands, district courts will be able to convert the rule of qualified immunity into a rule of virtually unqualified liability by inferring a general fact dispute concerning an essential legal element from unspecified fact disputes.

2. In the last ten years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. *See, e.g.*, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, n.3 (2015) (collecting cases). The Court has explained that these opinions were necessary "both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White*, 137 S. Ct. at 551 (summarily reversing denial of qualified immunity without briefing or oral argument) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Indeed, the importance of qualified immunity issues is borne out by the volume of qualified immunity cases that have occupied this Court's docket, including the recent decisions in *Kisela*, 138 S. Ct. at 1155 (summarily reversing denial of qualified immunity without briefing or oral argument) and *District of Columbia v. Wesby*, 138 S. Ct. 577, 580 (2018) (reversing denial of qualified immunity).

3. More generally, insulating inferences from appellate review can shield a denial of qualified immunity from, not just a fact-particularized appellate review, but *any* meaningful appellate review. Under a broad interpretation of *Johnson*, a district court could infer from any identified fact issue that a dispute exists over a material fact. No matter how legally unsound the inference, under such circumstances the district court's denial of qualified immunity would be unreviewable. Under this broad interpretation of *Johnson*, any genuine, but immaterial, fact dispute could be laundered into a material one by merely *inferring* the former from the latter.

4. The importance of the issues presented in this Petition is heightened because they recur, often appearing in cases involving force that results in death. In such cases, it is not uncommon for a court to decide whether inconsistencies with the officers' testimony and other evidence allow an assessment that there are disputes regarding essential legal elements. *See, e.g.*, *Williams v. Holley*, 764 F.3d 976, 981 (8th Cir. 2014); *George v. Morris*, 736 F.3d 829, 835 (9th Cir. 2013). When qualified immunity is denied in this way, the

disputed facts are not specifically identified and no particularized fact analysis is conducted, as was the case here. Under the lower court's interpretation of *Johnson*, there is no jurisdiction to review the district court's opinion in this situation. But under *Walton*, for example, there is jurisdiction for a thorough review. Given the societal importance of cases involving police action that result in death and the uncertainty surrounding interlocutory appeal jurisdiction in these circumstances, clarification by this Court is needed.

II. The United States Courts of Appeals Are in Total Disarray over the Breadth of *Johnson*.

A mature and deep conflict has developed over the courts of appeals' jurisdiction to hear interlocutory appeals from denials of qualified immunity under *Johnson*. To explain this disarray, this section is organized as follows: first, a brief synopsis of this Court's rulings; second, a discussion of two conflicting cases from the Tenth and Sixth Circuits; and, third, case law from *nine circuits*, including the Sixth Circuit, establishing that the conflict is both mature and deep.

1. Under 28 U.S.C. § 1291, an appellate court has jurisdiction to hear appeals from "final decisions" of the district court. In 1949, in *Cohen v. Beneficial Industrial Loan Corp.*, this Court held that certain collateral orders issued by the district court were "final decisions" that are immediately appealable. 337 U.S. 541 (1941). In *Mitchell v. Forsyth*, the Court applied the

collateral order doctrine to a denial of qualified immunity and held that a district court's denial of a defendant's motion for summary judgment was an immediately-appealable "collateral order" where (1) the defendant was a public official asserting a defense of "qualified immunity" and (2) the issue appealed concerned whether the facts showed a violation of "clearly established" law. 472 U.S. 511, 528 (1985). In doing so, the Court recognized that an order denying qualified immunity was "effectively unreviewable," because the immunity's protection from having to undergo a trial would be irretrievably lost if appellate review waited until after a trial.

In *Johnson v. Jones*, this Court interpreted *Mitchell*, holding that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine issue of fact for trial.'" 515 U.S. 304, 319 (1995).

Behrens v. Pelletier, issued less than a year after *Johnson*, reversed the Ninth Circuit's dismissal of an interlocutory appeal from a denial of qualified immunity. 516 U.S. 299 (1996). The district court had denied the petitioner's motion for summary judgment based on qualified immunity, and the Ninth Circuit had dismissed the appeal for lack of jurisdiction. The *Behrens* respondent argued, inter alia, that dismissal of the appeal should be affirmed because the district court had denied summary judgment based on a determination that "material issues of fact remain" and *Johnson*

prohibited interlocutory review of such an order. 515 U.S. at 312–13. *Behrens* rejected the argument, reasoning that denials of summary judgment often included a determination that there are controverted issues of material fact, and *Johnson* cannot mean that every such denial of summary judgment is non-appealable. *Id.* The Court continued that because the district court, in denying petitioner's summary judgment motion, did not identify the particular conduct that it deemed adequately supported, the court of appeals was required "'to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" *Id.* (quoting *Johnson*, 515 U.S. at 319).

More recently, this Court decided a pair of cases with similar factual underpinnings: *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). In *Scott*, the plaintiff alleged that a police officer used excessive force when he rammed the plaintiff's fleeing car during a high-speed chase. *Scott*, 550 U.S. at 374. The reasonableness of the force turned on whether it was reasonable to believe that the plaintiff's flight posed a danger to the public. *Id.* at 380. The district court denied defendant's motion for summary judgment based on qualified immunity, holding that material issues of fact remained. *Id.* at 376. This Court ultimately held that defendant was entitled to qualified immunity because the plaintiff's story was "blatantly contradicted by the record," namely a video recording of the chase. *Id.* at 379–81. *Scott* does not

mention *Johnson*, but this Court referenced *Scott* in *Plumhoff*.

In *Plumhoff*, the police fatally shot a fleeing driver, the plaintiff sued claiming excessive force, and the accused officers moved for summary judgment on qualified immunity grounds. *Estate of Allen v. City of West Memphis*, No. 05-2489, 2011 WL 197426, *1–3 (W.D. Tenn., Jan. 20, 2011), *aff'd*, 509 F. App'x 388 (6th Cir. 2012), *rev'd sub nom. Plumhoff*, 134 S. Ct. 2012. The district court denied the motion by drawing certain inferences from the evidence: e.g., "it is not clear that his evasion of arrest was sufficiently dangerous to justify deadly force," *id.* at *9; "a reasonable jury could determine that the belief that danger was imminent was not reasonable," *id.* at *10; "the officers had no reason to believe that the suspects were violent or would continue to pose a threat if they were not apprehended," *id.* On interlocutory appeal, the Sixth Circuit accepted those inferences and affirmed. 509 F. App'x at 392–93. In reversing, however, this Court considered the same evidence but drew the opposite inferences: "all that a reasonable police officer could have concluded was that [the driver] was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road," *Plumhoff*, 134 S. Ct. at 2022. But the Court did not discuss its approach to reviewing such assessments and inferences, or the jurisdictional effect thereof. Further, the inferences drawn by this Court were from video evidence, like those in *Scott*.

2. The jurisdictional rule established by this Court in *Johnson* and its progeny has proven difficult for the courts of appeals to apply consistently. Differing approaches from two opinions issued by the Tenth and Sixth Circuits illustrate these difficulties as they pertain to the issues presented in this Petition.

In *Walton*, the Tenth Circuit considered whether it had jurisdiction to entertain an appeal from a denial of qualified immunity in a First Amendment retaliation case involving the plaintiff's termination from a civil service position. 821 F.3d at 1207. The district court had denied qualified immunity because it determined that there was a genuine fact dispute over whether the motivation for the plaintiff's firing was her political affiliation, which amounted to causation, an essential legal element of the plaintiff's claim. The plaintiff argued that the court of appeals lacked jurisdiction under *Johnson* to consider this "evidence sufficiency" issue. *Id.* at 1208.

Walton characterized *Johnson* as having three exceptions: (1) when the district court at summary judgment fails to identify the particular charged conduct that it deemed adequately supported by the record, the appellate court should review the entire record de novo to determine which factual inferences a reasonable jury could and could not make; (2) when the "version of events" the district court holds a reasonable jury could find "is blatantly contradicted by the record," the appellate court may also do its own de novo review of which facts a reasonable jury could accept; and (3) appellate courts need not accept the district court's

assessment of the reasonable factual inferences that arise from a complaint subject to a motion to dismiss. *Id.* at 1208; *see also Lewis v. Tripp*, 604 F.3d 1221, 1225–26 (10th Cir. 2010).

The court continued:

> To be sure, *Johnson* requires us to accept as true the facts the district court expressly held a reasonable jury could accept. And in our recitation above and analysis below we do just that, treating as true all the facts the district court held a reasonable jury could find even as we are quite confident Mr. Powell would dispute nearly all of them. But *Johnson* does not also require this court to accept the district court's assessment that those facts suffice to create a triable question on any legal element essential to liability. That latter sort of question is precisely the sort of question *Johnson* preserves for our review.

Id. In other words, the *Walton* court held that a court of appeals has jurisdiction to review the district court's fact-inferences insofar as those inferences are that a "legal element essential to liability" is in dispute.

The *Walton* court based its reasoning, in part, on this Court's decision in *Plumhoff*. Consistent with the above description of *Plumhoff*, *supra* at 21, *Walton* noted *Plumhoff* held that "*Johnson* only forecloses courts of appeals from reconsidering a district court's assessment of 'evidence sufficiency, i.e., which facts a party may, or may not, be able to prove at trial.' " *Id.* at 1209 (internal citations omitted). But, according to

Walton's interpretation of *Plumhoff*, *Johnson* does not prohibit "a court of appeals from deciding whether the facts as determined by the district court are sufficient . . . to state a triable question under each legal element essential to liability. Deciding 'evidence sufficiency' questions of this sort is, instead, 'a core responsibility of appellate courts.'" *Id.* The *Walton* court went on to conclude that the Tenth Circuit has faithfully applied this rule since *Plumhoff* was issued. *Id.* at 1209 (citing *Leatherwood v. Welker*, 757 F.3d 1115, 1117–19 (10th Cir. 2014); *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 878 (10th Cir. 2014)).

The Sixth Circuit has, however, explicitly rejected this interpretation of *Johnson* and *Plumhoff*. In a pre-*Plumhoff* case, the Sixth Circuit held that a defendant may not challenge *any* inferences drawn by the district court from any identified, record-supported facts. *Romo v. Largen*, 723 F.3d 670, 673–74 (6th Cir. 2013). In *DiLuzio*, the Sixth Circuit considered whether *Plumhoff* implicitly overruled *Romo*. 796 F.3d at 609. *DiLuzio* recognized that *Plumhoff* did not defer to the district court's inferences from identified record-based fact disputes, but that, instead, this Court drew its own, opposite inferences. *Id.* Nevertheless, the Sixth Circuit held that *Romo* was still good law because *Plumhoff* did not explicitly address the inference issue, and was distinguishable because it involved inferences from "incontrovertible video evidence" rather than "inferences drawn in the light most favorable to the plaintiff from the plaintiff's record-supported evidence, as we have here and as is the typical case." *Id.* As such,

the *Romo* rule remains the law in the Sixth Circuit, in contradiction with the law in the Tenth Circuit.

In a concurring opinion in *Romo*, Judge Jeffrey S. Sutton demonstrates that, in a messy intra-circuit split, the courts of appeals have applied two conflicting interpretations of *Johnson*, one narrow and one broad. 723 F.3d at 678.

> I submit that there are two ways to read *Johnson*. One applies it only to prototypical "he said, she said" fact disputes, in which the defendants (usually government employees) refuse to accept the truth of what the plaintiffs (usually individual claimants) say happened. When the appeal boils down to dueling accounts of what happened and when the defendants insist on acknowledging on appeal only their accounts, the underlying basis for an interlocutory appeal disappears.
>
> The other applies the decision not just to whether the defendant officers accept the plaintiff's evidence-supported version of what happened but also to whether the defendants accept the district court's reading of the inferences from those facts: here, whether Officer Largen lied about seeing a Dodge Ram on the road. Under that view (and the majority's view), when a district court determines that there is a "genuine issue of fact" for trial by drawing an inference in favor of the plaintiff, the appellate court may not second-guess that inference, indeed lacks jurisdiction to do so.

Id. Judge Sutton disagreed with the *Romo* majority's broad interpretation of *Johnson* and argued for his narrow reading, which permits more extensive appellate jurisdiction than even *Walton* allows. Under Judge Sutton's reading of *Johnson*, *all* inferences from prototypical fact disputes are fair game, not just those that implicate a legal element essential to liability. *See id.* at 678–79.

3. Case law from the courts of appeals demonstrates that the conflict in interpreting *Johnson* is both deep and mature.

a. The reviewability of the district court's assessment that there is a triable question on a legal element essential to liability has caused a deep intra-circuit split in nearly every circuit: *First Circuit*, *compare Penn v. Escorsio*, 764 F.3d 102, 111–12 (1st Cir. 2014) (appeal dismissed based on no jurisdiction to consider district court's assessment of fact issue on knowledge of risk and failure to act, which were legal elements essential to liability on deliberate indifference claim), *with Hunt v. Massi*, 773 F.3d 361, 366 (1st Cir. 2014) (jurisdiction to consider district court's assessment of fact issues on elements essential to liability on use of force claim); *Second Circuit*, *compare Soto v. Gaudett*, 862 F.3d 148, 162 (2d Cir. 2017) (no jurisdiction, intent element of use of force claim), *with Hargroves v. City of New York*, 411 F. App'x 378, 383 (2d Cir. 2011) (jurisdiction, probable cause element of false arrest); *Third Circuit*, *compare Ziccardi v. City of Philadelphia*, 288 F.3d 57, 63 (3d Cir. 2002) (no jurisdiction, actual knowledge element of deliberate indifference), *with*

Schieber v. City of Philadelphia, 320 F.3d 409, 415 (3d Cir. 2003) (jurisdiction, creation or increase of risk of injury, essential element of claim); *Fourth Circuit*, *compare Culosi v. Bullock*, 596 F.3d 195, 202 (4th Cir. 2010) (no jurisdiction, intent element of excessive force), *with Winfield v. Bass*, 106 F.3d 525, 532 (4th Cir. 1997) (jurisdiction, failure to act element of claim); *Fifth Circuit*, *compare Hamilton v. Kindred*, 845 F.3d 659, 663 (5th Cir. 2017) (no jurisdiction, elements of bystander liability), *with Brown v. Callahan*, 623 F.3d 249, 255 (5th Cir. 2010) (jurisdiction, ignored known risk element of constitutionally deficient medical care); *Sixth Circuit*, *compare Regan v. Todd*, 616 F. App'x 823, 825 (6th Cir. 2015) (no jurisdiction, probable cause element of false arrest), *with Chappell v. City of Cleveland*, 585 F.3d 901, 906 (6th Cir. 2009) (jurisdiction, threat of serious harm element of excessive force); *Eighth Circuit*, *compare Franklin v. Peterson*, 878 F.3d 631 (8th Cir. 2017) (no jurisdiction, significant threat of death or serious bodily harm element of excessive force), *with Williams*, 764 F.3d at 981 (jurisdiction, significant threat of death or serious bodily harm element of excessive force);[3] *Ninth Circuit, compare Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (no jurisdiction, essential element of deliberate indifference), *with Jeffers v. Gomez*, 267 F.3d 895, 907 (9th Cir. 2001) (jurisdiction, improper motive element); *Eleventh Circuit*, *compare Koch v. Rugg*, 221 F.3d 1283, 1297 (11th Cir. 2000) (no

[3] The court of appeals below all but admitted that its decision was contradictory to the court's previous decision in *Williams*. App. 13–14 n.3.

jurisdiction, discriminatory intent element), *with Sparks v. Ingle*, No. 17-11685, 2018 WL 360429, at *2 (11th Cir. Jan. 11, 2018) (jurisdiction, subjective knowledge element).

Accordingly, the conflict over the breadth of *Johnson* is deep, having engulfed nearly every circuit. Further, with the exception of the Tenth Circuit, the conflict is intra-circuit. This type of disarray produces even more severe results than a traditional circuit split. With a circuit split, no matter how entrenched, litigants have a modicum of predictability because the approach of a particular circuit may be determined. But here, with nine circuits having intra-circuit conflict, results vary unpredictably from panel to panel. Such chaos concerning the important issue of qualified immunity is intolerable and should be resolved by this Court.

b. The conflict, which began shortly after *Johnson* was issued, is also mature. As an early example, the Fourth Circuit issued a divisive seven-to-five decision denying an en banc rehearing on a *Johnson* issue. *See Elliott v. Leavitt*, 105 F.3d 174, 178 (4th Cir. 1997). In 1998, the Fifth Circuit struggled to determine whether there was interlocutory appeal jurisdiction to consider challenges to assessments made by the district court based on materiality arguments. *Colston v. Barnhart*, 146 F.3d 282, 285 (5th Cir. 1998); *see Fuentes v. Riggle*, 611 F. App'x 183, 189 (5th Cir. 2015) (jurisdiction to consider materiality described as settled law).

The turmoil continues today. For example, post-*Plumhoff* cases in the First, Second, Fifth, Sixth, and Eighth Circuits, *see supra* at 27, are inconsistent with the Tenth Circuit's interpretation of *Plumhoff* in *Walton*. Of course, those same circuits have also issued decisions consistent with the *Walton* decision, some of which also post-date *Plumhoff*, *see supra* at 27.

Johnson was issued twenty-three years ago; the confusion in its application began immediately and continues. There is no reason to expect that percolation of these issues in the courts of appeals will garner anything other than further disarray.

c. Commentators addressing *Johnson* also highlight the difficulties in applying its rule to determine whether jurisdiction exists. *Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 Wash. and Lee L. Rev. 3, 11 (1998); Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 Nev. L.J. 1351, 1380 n.111 (2015) (noting challenges to the stability of the *Johnson* doctrine); Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539, 594 (1998) (noting problems with the application of the *Johnson* rule); and Nicole B. Lieberman, *Note, Post-*Johnson v. Jones *Confusion: The Granting of Back-Door Qualified Immunity*, 6 B.U. Pub. Int. L.J. 567, 579 (1997) (noting confusion surrounding *Johnson* and its application).

III. This Case Presents an Excellent Vehicle for Resolving the Breadth of *Johnson*.

This case gives this Court the right opportunity to decide the extent to which there is jurisdiction to review a district court's inferences from record-supported facts under *Johnson*.

1. One of Petitioners' primary arguments to the court of appeals was that the district court erred when it inferred from specified fact disputes a triable dispute over whether it was reasonable to believe that Franklin posed a significant threat of death or serious physical injury. Whether it was reasonable to believe that Franklin posed such a threat is a legal element essential to liability in the deadly force claim at issue here. Eighth Circuit Manual of Model Jury Instructions—Civil, Instruction 4.40 (2017). Accordingly, the issue of whether there is jurisdiction to review the district court's assessment that disputed facts are sufficient to create a triable question as to a legal element essential to liability was squarely presented to and decided by the court of appeals.

The fact that the court of appeals read the district court's opinion to indicate that there were unspecified facts in dispute does not affect this conclusion. Petitioners believe that this reading of the district court's opinion is incorrect, but this does not affect the conclusion that the issues in this Petition are properly preserved for this Court. Because the court of appeals suggested that the district court assumed that unspecified facts were in dispute, it was required, under

Behrens, to address Petitioners' assertion that the facts they relied on in their appeal were likely assumed by the district court because nothing in the record contradicted them. As such, the court of appeals should have conducted a review of the record to determine what facts the district court likely assumed. Instead of reaching this step, the court of appeals simply held that *Johnson* prevented a review of the district court's determination there was sufficient evidence to create a triable dispute over whether it was reasonable to believe that Franklin posed a significant threat of death or serious physical injury when he was shot, a legal element essential to liability. The first issue presented in this Petition—whether there is jurisdiction to consider this type of evidence sufficiency question—was therefore squarely before the court of appeals and decided by it.

2. The more general question of whether there is jurisdiction to consider all inferences made by the district court from record-supported fact disputes was also preserved. On appeal, Petitioners argued that it was error to infer a fact dispute over whether Franklin was in possession of the submachine gun from an absence of blood on the submachine gun. Whether Franklin actually possessed the submachine gun when he was shot is not an essential element of the deadly force claim. As such, the more general issue of whether there is jurisdiction to review any factual inference from a prototypical fact was before the court of appeals and decided by it. This is the type of assessment that is reviewable under Judge Sutton's concurrence in *Romo*.

3. On March 26, 2018, in *Johnson v. Stinson*, this Court denied a petition for a writ of certiorari regarding an issue similar to the ones presented in this Petition. 138 S. Ct. 1325 (2018). The petition in *Johnson v. Stinson* asked this Court to decide the following issue: is there jurisdiction under *Johnson* to review "the disputed application of the inferences drawn by the District Court from the facts." Petition for a Writ of Certiorari at i, *Johnson v. Stinson*, 138 S. Ct. 1325 (2018) (No. 17-749). The petitioners basically framed the issue as Judge Sutton did in *Romo*, and this parallels the second issue presented in this Petition. This issue, however, was not cleanly presented in *Johnson v. Stinson*. The Seventh Circuit had based its dismissal for lack of jurisdiction on the conclusion that the petitioners had challenged specific, prototypical facts: whether there was a meeting between a forensic expert and detectives and whether one expert had had a conversation with a second expert. *Stinson v. Gauger*, 868 F.3d 516, 525–26 (7th Cir. 2015). Accordingly, the *Johnson v. Stinson* petition had a palpable vehicle problem—the case was not decided in the court of appeals on the issue presented in the petition. Further, *Johnson* did not present the more limited issue of whether there is jurisdiction to review the district court's assessment that disputed facts are sufficient to create a triable question as to a legal element essential to liability, the first issue present in this Petition. The denial of the petition in *Johnson* is therefore no impediment to the conclusion that this case is an excellent vehicle to present the issues raised in this Petition.

IV. The Eighth Circuit's Decision That There Was No Jurisdiction to Review the District Court's Inference That There Was a Triable Question As to an Essential Legal Element Was Wrong.

1. *Walton* was decided correctly: there is jurisdiction under *Johnson* to consider whether there is sufficient evidence to create a triable issue as to a legal element essential to liability. This type of evidence sufficiency question was presented to the court of appeals below and is precisely what the Tenth Circuit held was reviewable in *Walton*. Petitioners argued that based on the facts assumed or likely assumed by the district court, the district court erred by inferring that there was a triable issue as to whether Franklin posed a significant threat of death or serious physical injury when he was shot. The inferred fact was a legal element essential to Respondent's deadly force claim, and there is jurisdiction under *Johnson* and its progeny to "[d]ecid[e] 'evidence sufficiency' questions of this sort." *Walton*, 821 F.3d at 1209. Moreover, "if the rule were otherwise and [courts of appeals] could not consider the sufficiency of the (given) facts to sustain a lawful verdict, a great many (most?) qualified immunity summary judgment appeals would be foreclosed and *Mitchell*'s promise of assuring a meaningful interlocutory opportunity to vindicate what is supposed to be an immunity from trial would be 'irretrievably lost.'" *Id.*

Further, as discussed above, *supra* at 14–16, the approach by the court of appeals here prevented Petitioners from having a qualified immunity analysis

particularized to the facts of their case. What facts, precisely, in "the story told by the officers" were in genuine dispute and material to the purely legal question of whether a clearly established law was violated? Was it whether Franklin fought with the officers? Was it whether Franklin shot the officers? Was it whether two officers were shot at all? Was it whether Officer Durand yelled "He's got a gun!" after the officers were shot and before Franklin was shot? By holding that there is no jurisdiction to consider whether the evidence was sufficient to establish a triable question as to a legal element essential to liability, the court of appeals did not need to ever specify the facts particular to the case. Indeed, it specifically held that such a particularized fact-based argument could not be conducted—the district court's opinion was insulated from review. App. 14 ("The district court did not make any legal determinations based upon facts . . . it merely held that the factual dispute at this stage prevents such an analysis.").[4] As such, if the court of appeals' rule is allowed to stand, it will allow the lower courts to avoid this Court's mandate that defendants have a qualified immunity defense particularized to the facts of the case. *See Kisela*, 138 S. Ct. at 1152–53.

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[4] The Eighth Circuit therefore interpreted *Johnson* to prohibit the fact-particular qualified immunity analysis repeatedly guaranteed by this Court in summary reversals such as *White* and *Kisela*. In line with those cases, this Court could accept review here, resolve the jurisdiction issue, and summarily order that the officers be awarded qualified immunity, as Judge Loken reasoned in his efficient dissent below.

Moreover, the court of appeals also used its broad interpretation of *Johnson* to avoid the exception in *Scott*, which allows jurisdiction to reject the district court's determination of fact disputes that are blatantly contradicted by the record. 550 U.S. at 380. Below, Petitioners argued that the seventy-second gap between shots was blatantly contradicted by the video evidence because no gunshots are audible in the video. By holding that there was no jurisdiction to consider the district court's determination that there was a triable issue as to an essential legal element, the court of appeals never reached the more specific issue of whether the seventy-second timing was blatantly contradicted by the video. App. 10, 13. As such, the court of appeals was wrong because its holding also allows an end-run around *Scott*.

The rule applied by the court of appeals should also be rejected because it prohibits an appellate court from reviewing the purely legal issue of whether a fact is material. Petitioners argued that the identified fact disputes were not material to Respondent's claims because they were insufficient to create a triable issue as to the threat Franklin posed when he was shot. The broad interpretation of *Johnson* applied by the court of appeals here foreclosed this argument. *See* App. 13, 15. This result is in conflict with numerous cases holding that materiality is a legal issue subject to review under *Johnson*. *Fuentes*, 611 F. App'x at 189; *Thompson v. Murray*, 800 F.3d 979 (8th Cir. 2015) ("[W]e do have jurisdiction to review the purely legal issue of whether a dispute identified by the district court is material.").

For example, in this case, Petitioner Meath never saw the gun that shot him. Instead, the reasonableness of Petitioner Meath's actions was based on other knowledge, such as, e.g., being shot and hearing Durand yell "He's got a gun!" Petitioners therefore argued that, regarding Petitioner Meath, whether Franklin was in possession of a firearm when Franklin was shot is not material. The court of appeals' determination that it had no jurisdiction over this purely legal issue of materiality, and the other materiality issues raised by Petitioners, was wrong.

2. Likewise, the broader question as to whether there is jurisdiction to review all inferences made by the district court from record-supported fact disputes should also be answered in the affirmative. Here, the dissent agreed, and assessed the district court's inference that Franklin was not holding the submachine gun, which was drawn from an absence of blood on the gun. Such reasoning is consistent with the narrow interpretation of *Johnson* pressed by Judge Sutton and has the advantage of consistency with this Court's decision in *Scott*, a decision the courts of appeals have struggled to apply. In *Scott*, the details of Harris's driving were indisputable because of the video. The remaining issue concerned the inferences to be drawn by those details: was Harris driving safely. Those inferences were subject to interlocutory review under *Scott* and "[a] contrary reading of *Johnson*—that in no event does an appellate court have jurisdiction to say a district court drew the wrong inferences—cannot co-exist with *Scott*." *Romo*, 723 F.3d at 679 (Sutton, C.J.,

concurring). Judge Sutton continues: "[t]his reading of *Scott* also respects *Behrens*, which cautions that '[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable.'" *Id.* (internal citations omitted).

The following hypothetical illustrates the purely legal nature of reviewing inferences made by the district court. Suppose the district court reasons that there is a record-supported, prototypical fact dispute over whether it was cloudy outside when Franklin was shot. And the district court infers from this dispute, a dispute over whether Franklin was in possession of the submachine gun when he was shot; and from that inference, infers a triable issue of fact as to the threat posed by Franklin when he was shot. The second inference would be reviewable under the rule in *Walton*, and the first would be reviewable under the interpretation suggested by Judge Sutton. The propriety of the first inference is a legal question of relevance: does the weather make it more or less likely that Franklin was holding the submachine gun? The answer may depend on other, record-supported prototypical facts, as assumed or likely assumed by the district court, but the validity of this type of assessment is a purely legal issue. Therefore, the courts of appeals should have jurisdiction to review such questions under *Johnson*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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