No. 17-1572

In The Supreme Court of the United States

LUCAS PETERSON, et al.,

Petitioners,

vs.

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

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

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

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

Amicus curiae IMLA's members represent all levels of state and local government, including law enforcement agencies such as state police, county sheriff's departments, and city police departments. IMLA and its members have an interest in ensuring that law enforcement officers have appropriate flexibility to make critical decisions to use force to protect the public, without facing the specter of money damages,

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[1] Counsel for petitioners and respondent were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this amicus brief. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution towards preparation of this brief.

attorney's fee awards, staggering defense costs, and the distractions of civil lawsuits.

STATEMENT OF THE CASE

Amicus curiae IMLA joins in and refers to the Statement of the Case in the petition for writ of certiorari ("Pet.") at pages 6-13.

SUMMARY OF ARGUMENT

This Court has repeatedly recognized the importance of qualified immunity in assuring that law enforcement officers may perform their duty to protect public safety, without fear of entanglement in litigation and potential liability, and make decisions in tense, rapidly evolving circumstances. Most recently, in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018), the Court reaffirmed the special importance of qualified immunity in use of force cases which, by their nature, turn on the particular facts in a given case.

The Eighth Circuit's decision here undermines these important principles. As noted in the petition for writ of certiorari, the Eighth Circuit, along with other circuits, is effectively insulating orders denying summary judgment based on qualified immunity in use of force cases from appellate review, based on an erroneous interpretation of *Johnson v. Jones*, 515 U.S. 304 (1995). These courts have concluded that a genuine

issue of material fact precluding appellate jurisdiction may exist, where a particular evidentiary fact may be undisputed but where a jury might draw conflicting inferences from that fact. To be sure, other circuits have properly interpreted *Johnson* as permitting review of such orders—a deep and ongoing circuit split that in and of itself justifies review—but the rule espoused by the Eighth Circuit and other courts eviscerates interlocutory review of qualified immunity in use of force cases and, thus, undermines the very purpose of the immunity.

The two prongs of the qualified immunity inquiry are adversely impacted by the rule adopted by the Eighth Circuit. As this Court noted in *Plumhoff v. Rickard*, 572 U.S. ___, 134 S. Ct. 2012 (2014), when an evidentiary fact is essentially undisputed, the question of whether there is a genuine issue of *material* fact as to the reasonable use of force in evaluating the merits of a Fourth Amendment claim is one for the appellate court, notwithstanding a district court's determination that a jury might ultimately find the force to be excessive. The question in such cases is whether the officer could reasonably perceive a threat necessitating the use of the force at issue. In the context of use of force, there are many circumstances in which an officer may confront a situation where various inferences about a suspect's conduct can be drawn, but an officer does not need ultimately to be correct in his or her assessment of the situation, only reasonable.

The same is true in analyzing the second prong of qualified immunity: whether the law was clearly

established in light of the circumstances confronted by an officer. This Court has emphasized that qualified immunity protects all but those who are plainly incompetent or those who knowingly violate the law, as it affords protection to officers who make a reasonable mistake of fact, i.e., draw an incorrect inference in a particular situation. In short, that different inferences can be drawn from certain evidentiary facts does not bar the application of qualified immunity, let alone foreclose interlocutory appellate review.

The mischief of the Eighth Circuit's approach is illustrated by the court's refusal to consider the qualified immunity claim of petitioner Meath, based on a perceived issue of fact as to whether Franklin was in possession of a firearm at the time Meath shot him. This, in turn, rested upon the conclusion that a jury might infer that Franklin didn't have the weapon because his blood was not found on it. Yet Meath never saw the gun that shot him. His use of force against Franklin was prompted by being shot and hearing officer Durand yell, "He's got a gun!" Thus, for purposes of the qualified immunity inquiry, both on the merits and as to clearly established law, the question is not whether Franklin actually possessed a gun, but whether Meath could reasonably perceive that he did, or whether the law was clearly established with respect to an officer's use of force under such circumstances. Yet the Court of Appeals simply sidestepped both inquiries by declaring the absence of jurisdiction.

The Eighth Circuit's unduly crabbed view of interlocutory jurisdiction in qualified immunity appeals

will have a particularly pernicious impact on cases involving video evidence of the use of force. The ubiquitous presence of cell phones, the use of dashboard cameras in both civilian and law enforcement vehicles, and the widespread adoption of body cameras for law enforcement personnel have led to the increasing use of video evidence in use of force cases. The basic evidentiary fact of such video evidence, i.e., whether footage was taken on a particular day at a particular time, is generally undisputed. However, citing its decision in this case, the Eighth Circuit recently dismissed a qualified immunity appeal for lack of jurisdiction based on the district court's determination that a video depicting the use of force was inconclusive, and that a jury might draw varying inferences as to whether the video showed the plaintiff attacking an officer with a knife, as opposed to simply moving towards the officer. *Raines v. Counseling Associates, Inc.*, 883 F.3d 1071, 1074-75 (8th Cir. 2018). In so holding, the court sidestepped the need to address the actual pertinent question for purposes of qualified immunity—whether an officer could have reasonably perceived a threat, notwithstanding the fact that others might draw a different conclusion. And similarly, here, the court refused to even address video evidence that squarely contradicted plaintiff's theory that seventy seconds elapsed between shots, notwithstanding this Court's decisions in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff*, which clearly held that video evidence that flatly contradicts a district court's conclusion *must* be considered in determining qualified immunity. Given the ubiquity of video evidence, it is therefore essential that

this Court grant review to clarify the standards of appellate jurisdiction for interlocutory review in qualified immunity cases.

At bottom, the approach taken by the Eighth Circuit improperly ignores the difference between a district court's determination under Federal Rules of Civil Procedure 56, that a dispute about a fact be genuine, as opposed to material. The former is an inquiry as to whether there is competent evidence to establish a particular fact, and *Johnson* holds that such determinations are not subject to interlocutory review. 515 U.S. at 313, 316. However, as this Court held in *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986), "the materiality determination rests on the substantive law," and as this Court recognized in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Behrens v. Pelletier*, 516 U.S. 299 (1996), and *Plumhoff*, that assessing the legal significance of a particular fact is a proper task for an appellate court in exercising interlocutory review over the denial of a motion for summary judgment based on qualified immunity.

The Eighth Circuit's narrow construction of appellate jurisdiction to review the denial of qualified immunity in use of force cases is squarely contrary to the decisions of this Court and the majority of other circuits. It should not be that officers in Little Rock are denied the opportunity for interlocutory review of the denial of qualified immunity, while officers in Denver, in the exact same circumstances, would be afforded appellate review. Further, the minority, improperly narrow construction of appellate jurisdiction undermines

the application of immunity in precisely those circumstances in which it is most appropriate, i.e., where officers are forced to make a split-second decision to protect themselves or others. Amicus curiae IMLA respectfully urges the court to grant the petition.

WHY REVIEW SHOULD BE GRANTED

REVIEW IS NECESSARY TO ASSURE MEANINGFUL INTERLOCUTORY REVIEW OF ORDERS DENYING SUMMARY JUDGMENT IN USE OF FORCE CASES.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability When Making Split-Second Decisions Under Tense, Rapidly Evolving Circumstances In The Course Of Protecting The Public.

An officer is entitled to qualified immunity when his or her conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. In short, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id*.

This Court has recognized that qualified immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 n.3 (2015); *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017). It assures that officers, when confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' ").

As the Court observed in *Harlow*, failure to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.* at 814. Those concerns are magnified in the context of use of deadly force, where by definition, an officer is confronted by the imminent threat of serious harm to himself, or to others, and where hesitation could have deadly consequences.

Indeed, in the last two terms, this Court has issued per curiam reversals of lower court denials of qualified immunity in deadly force cases. In doing so, the Court emphasized that such cases, which are

necessarily highly fact-dependent and concern tense, hectic circumstances, require courts to closely analyze existing case law to determine whether the law was clearly established within the particular circumstances confronted by the officers in question.

In *White v. Pauly*, the Court held that an officer who arrived belatedly to the scene of an evolving firefight could reasonably rely on the actions of other officers in determining it was necessary to shoot a suspect who fired at the officers. 137 S. Ct. at 550-51. The Court observed that the highly unusual circumstances of the case should have alerted the lower court to the fact that the law governing such situations was not clearly established, and the officer was, indeed, entitled to qualified immunity. *Id*. at 552.

Earlier this term, in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018), the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who received a 911 call reporting a woman hacking a tree with a kitchen knife and acting erratically. *Id.* at 1151. Shortly after arriving at the scene, the officer saw a woman standing in a driveway. The woman, separated from the street and the officer by a chain-link fence, was soon approached by another woman, who was carrying a kitchen knife *and* matched the description that had been related to the officer via the 911 caller. *Id.* With the knife-wielding woman only six feet away from what appeared to be her potential victim, and separated by the chain-link fence, which impaired the potential victim's ability to flee and the officer's ability to physically intervene, when

the woman refused commands to drop the knife, the officer fired and wounded her. *Id.*

In reversing the Ninth Circuit, the Court underscored the importance of applying qualified immunity to use of force cases, again emphasizing the highly fact-specific nature of such claims, and the relevance of the exceedingly narrow window of time in which officers usually have to make such life or death decisions. *Id.* at 1153 (observing that "Kisela had mere seconds to assess the potential danger to Chadwick"). As the Court noted:

> Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. [Citation.]

Id. at 1153 (citing *Mullinex*, 136 S. Ct. at 309, 312).

This Court has repeatedly recognized the importance of qualified immunity, particularly in the context of use of force cases, as the Court observed in *White*. Nonetheless, the lower federal courts have been somewhat recalcitrant in following this Court's dictates concerning the need to apply the doctrine with rigor, particularly at the pre-trial stage, thus repeatedly

requiring this Court's intervention. 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases).

The same concerns for vindicating the important purposes of qualified immunity, which have led the Court to repeatedly grant review to reaffirm its jurisprudence concerning the need to define clearly established law with a high degree of specificity, similarly justify this Court's intervention in this case. When an interlocutory review of the denial of qualified immunity is not available, the "social costs" outlined in *Harlow* fall disproportionately on officers especially in specific regions, as a result of the circuit split. It is necessary for the Court to grant review, to repudiate a limitation on interlocutory jurisdiction that undermines the principles of qualified immunity and allows an appellate court to avoid the substantive inquiry entirely.

B. The Rule Adopted By The Eighth Circuit And Other Circuit Courts Which Bars Interlocutory Review Of The Denial Of Summary Judgment On Qualified Immunity, Where The District Court Has Found A Factual Dispute Concerning A Material Issue, Thus Relieving The Appellate Court Of Any Obligation To Assess The Materiality In Light Of The Relevant Legal Issues, Is Contrary To The Decisions Of This Court And Undermines Qualified Immunity.

The district court denied petitioners' motion for summary judgment on the grounds that the absence of blood on the MP5 could support an inference that the

suspect was not holding the weapon at the time petitioner fired at him. This, in turn, created an issue of fact as to the accuracy of petitioners' account of the incident, which ultimately created a material issue of fact as to whether the force was justified. The court further concluded that there was an issue of fact as to when the shots were fired, with plaintiff contending that rounds were discharged over a period of twenty to seventy seconds. (Pet. App. 5-6.)

In dismissing the officers' appeal for lack of jurisdiction, the Eighth Circuit concluded that the district court's finding, that there was a material issue of fact, necessarily foreclosed appellate review under this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995). (Pet. App. 15.) In so holding, the court sidestepped any need to assess whether the factual dispute was indeed material to the qualified immunity defense, i.e., whether it undermined petitioners' claim to qualified immunity. Indeed, the court went so far as to hold that the district court's simple declaration of an issue of fact foreclosed the appellate court from even reviewing and assessing video evidence that flatly refuted the plaintiff's account of the incident and supported petitioners' version of the shooting. (Pet. App. 9, 15.)

The crabbed view of appellate jurisdiction, espoused by the Eighth Circuit here and, as the petition noted, adopted by other circuit courts, is contrary to the decisions of this Court and undermines the important protections of qualified immunity.

In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), the Court held that where a district court denies a motion for summary judgment on qualified immunity, based upon its determination of what constituted clearly established law, the order is immediately appealable. The Court reasoned that such an order fell within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949). 472 U.S. at 527. This is because determination of the legal question, as to whether the law was clearly established, was independent of the merits of the underlying claim. *Id*. at 527-28. More significantly, interlocutory appellate review is required because qualified immunity is an immunity not simply from liability, but from participation in litigation at all. Hence, the benefits of that protection would be lost if an officer was required to undergo a full trial, before being able to obtain review of a district court's failure to grant immunity. *Id*. at 525-27.

In *Johnson v. Jones*, the plaintiff asserted that various defendants had either unlawfully beat him, or failed to stop other officers from doing so. 515 U.S. at 307. The officers moved for summary judgment based on qualified immunity, arguing that there was no evidence they had participated in the beating. *Id*. at 307-08. The district court denied summary judgment, finding that there was evidence that defendants were, contrary to their statements, in or near the room where the beating occurred, and that this created a genuine issue of material fact barring summary judgment. *Id*.

at 308. The defendants appealed and the appellate court dismissed for lack of jurisdiction. *Id*.

This Court affirmed, noting that *Mitchell* held that an order denying summary judgment that was based upon the district court's application of law, i.e., assessing whether or not it was clearly established for purposes of qualified immunity, was subject to immediate review. *Johnson v. Jones*, 515 U.S. 304. In *Johnson* however, the defendants were not contesting whether the district court properly applied the law, but rather, whether the district court was correct in assessing that there was sufficient evidence to support plaintiff's account of what transpired. As the Court observed, the question whether a factual dispute is "genuine" is the sort of task that is performed by trial courts, not appellate courts. *Id.* at 313, 316.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court reaffirmed the broad scope of appellate review afforded by *Mitchell*. There, the district court had denied defendants' summary judgment motion on qualified immunity, based on its determination that there was a genuine issue of material fact, but without specifying the particular conduct that was subject to the factual dispute. *Id.* at 312-13. The plaintiff argued that the order was not appealable under *Johnson*, but this Court rejected the contention, noting that "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, *see* Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable." *Id.* The Court emphasized that

"*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." Instead, "summary judgment determinations *are* appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity" such as whether the law was clearly established with respect to the conduct at issue. *Id.* at 313.

Thus, the Court held that the order was appealable, and that in light of the district court's failure to specify precisely what conduct was disputed, the task for the appellate court was "'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'" and then apply the law to those facts. *Id.* (citing *Johnson*, 515 U.S. at 319).

In *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), this Court reaffirmed the principle that an appellate court is free to review a district court's determination of the legal significance of evidentiary facts, i.e., whether there is a *material* dispute, that precludes summary judgment based on qualified immunity. In *Scott*, the plaintiff, who was fleeing police in a vehicle, was severely injured when an officer terminated the high-speed pursuit by striking plaintiff's vehicle with his car. *Id.* at 374-75. The plaintiff filed suit, alleging excessive force, and the district court denied the officer's motion for summary judgment, finding that there was a material issue of fact as to whether the force was excessive, and

that the law governing use of force to terminate pursuits was clearly established. *Id.* at 375-76. The Eleventh Circuit affirmed. *Id.* at 376.

This Court reversed, finding that the force employed was reasonable as a matter of law. *Id.* at 376, 381-86. In so holding, the Court emphasized that there was no dispute concerning the evidentiary facts of the case, most significantly, because there was a video tape of the incident. *Id.* at 378 ("There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened."). As a result, the Court held that despite the district court's conclusion that there was a material issue of fact based on plaintiff's characterization of the evidence, as a matter of law, no reasonable jury could find the force excessive in light of the undisputed evidence in the form of the video:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life.

Id. at 380.

The Court reaffirmed this principle in *Plumhoff*. There too, officers terminated a high-speed pursuit of

fleeing suspects through the use of force—eventually firing several rounds after the suspect's vehicle had collided with several police vehicles. 134 S. Ct. at 2017-18. The district court denied the officers' motion for summary judgment on qualified immunity. The court found a triable issue of fact as to whether the force was excessive and stated that the law was clearly established with respect to the use of such force. 134 S. Ct. at 2018. A Sixth Circuit motions panel initially dismissed the appeal under *Johnson* but subsequently deferred decision on the issue to a merits panel. *Id.* The panel determined that jurisdiction was proper under *Scott*, but affirmed the district court's order. *Id.*

This Court reversed. *Id.* at 2016-17. The Court held that *Johnson* did not foreclose appellate review because there was no dispute about what happened, i.e., what the officers did or the circumstances prompting the use of force:

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate

> courts to decide such issues is not an undue burden.

Id. at 2019.

The Court observed: "The District Court order here is not materially distinguishable from the District Court order in *Scott v. Harris*, and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under § 1291." *Id.* at 2020. As a result, the Court addressed the merits of the qualified immunity claim and concluded that the use of force was reasonable, that in any event the law was not clearly established, and hence, the officers were entitled to qualified immunity. *Id*. at 2021-23.

This Court's decisions in *Mitchell*, *Johnson*, *Behrens*, *Scott* and *Plumhoff* recognize that the question of whether a factual dispute is *material* is necessarily a question of law, and, therefore, an order denying summary judgment on qualified immunity is appropriate for appellate review. This is consistent with the Court's observation in *Anderson v. Liberty Lobby, Inc.*, that under Federal Rules of Civil Procedure 56, "the materiality determination rests on *the substantive law*," and "it is the *substantive law's* identification of which facts are critical and which facts are irrelevant that governs." 477 U.S. at 248 (emphasis added).

Indeed, in *Anderson*, the Court emphasized the distinction between the materiality inquiry, which is necessarily tied to the relevant law, and the inquiry as to whether there is a *genuine* issue of fact, with the latter merely focusing on the evidentiary basis of any

factual dispute. *Id.* at 248 ("[M]ateriality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.").

The rule espoused by the Eighth Circuit here, and adopted by other circuits, which allows appellate courts to side step their obligation to assess the materiality of any factual dispute in the context of a motion for summary judgment upon simple declaration by the district court that differing inferences may be drawn from otherwise undisputed facts, cannot be reconciled with the decisions of this Court. Moreover, the adverse impact on the important purposes served by interlocutory review of qualified immunity determinations is underscored by the panel majority's failure to address both prongs of immunity—merits of the constitutional claim, or clearly established law—even assuming a dispute as to the inferences that could be drawn from evidentiary facts that are themselves undisputed.

The district court concluded that there was an issue of fact as to whether the suspect was holding the MP5 at the time he was shot, yet petitioner Meath's assertion of qualified immunity does not depend on the suspect actually possessing the MP5 at the time he fired. Meath fired based on hearing his fellow officer call out, "He's got a gun!" and then being shot. Meath did not claim he actually saw a weapon, only that it was reasonable for him to believe he was being fired upon. (Pet. 7 & n.1.) The merits of the Fourth Amendment claim do not depend on Meath being correct in

his assessment, only "reasonable." *Graham v. Connor*, 490 U.S. 386, 394-96 (1989). And whether Meath acted reasonably under the Fourth Amendment is appropriately within the jurisdiction of the appellate court to review on interlocutory appeal.

The same is also true with respect to the second prong of qualified immunity. As this Court has emphasized, qualified immunity embraces not just mistakes of law, but also mistakes of fact. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"). Hence, even if petitioner Meath were mistaken about the suspect having a weapon, it would not foreclose immunity. Moreover, as the dissent noted, even assuming the suspect had no weapon, the question would be whether, under the existing case law, it was clearly established that an officer would face liability under such tense, rapidly evolving and uncertain circumstances. (Pet. App. 16-19.) As the dissent observed, the absence of such case law mandates qualified immunity. (*Id*.) Yet the majority simply avoided the inquiry by declaring a factual dispute, foreclosing review under *Johnson*.

Petitioners also contended that video evidence utterly defeated the theory that the shots were fired as far as 70 seconds apart. As in *Scott*, the lower court did not find that there was an issue of fact as to the foundation of the video, i.e., when it was taken or whether it was accurate. However, the panel majority refused to

even consider it, based on the district court's finding that there was a factual dispute. (Pet. App. 9, 15.) It is impossible to square the panel majority's refusal to even consider the video evidence with this Court's decisions in *Scott* and *Plumhoff*.

In fact, the Eighth Circuit's narrow view of appellate jurisdiction has a particularly pernicious impact on the growing number of qualified immunity motions that turn on video evidence. In *Raines v. Counseling Associates, Inc.*, 883 F.3d 1071 (8th Cir. 2018), several officers confronted a plaintiff who was acting erratically and brandishing a knife, waving it back and forth, and moving from one foot to another. *Id*. at 1073. The officers commanded plaintiff to drop the knife, but he refused to do so. *Id.* In an effort to avoid the use of deadly force, an officer, at her peril, moved closer to the plaintiff in an attempt to fire a Taser and disable him. *Id.* As she approached, plaintiff moved towards her in a manner officers perceived as aggressive and threatening, causing them to fire at the plaintiff, gravely wounding him. *Id.*

Plaintiff sued for excessive force, and defendants moved for summary judgment based on qualified immunity, contending that video captured by the Taser camera demonstrated that plaintiff posed a threat to the officer, or that defendants could reasonably perceive such a threat, and that no clearly established law would have suggested that their actions were improper. *Id*. The district court denied the motion, finding a genuine issue of material fact as to whether the force was excessive. *Id.* at 1073-74.

Citing its decision in this case, the Eighth Circuit dismissed the officers' appeal for lack of jurisdiction. *Id*. at 1074-75. The court found that the video was "inconclusive as to whether or not Raines advanced on the officers in a manner that posed a threat of serious physical harm to an officer." *Id.* at 1075. In so holding, the court therefore did not determine whether, even assuming the video was equivocal about whether plaintiff was *actually* attacking the officer, the officers might reasonably have perceived such a threat, even if they were ultimately incorrect. Similarly, the court did not address whether, under clearly established law, the officers would be on notice that their actions under such tense, rapidly evolving circumstances might give rise to liability. In sum, on the pretext of a factual dispute concerning inferences that could be drawn from otherwise undisputed evidence—after all, the video shows what it shows—the Eighth Circuit side-stepped its core obligation, as established by this Court's decisions, to undertake meaningful inquiry with respect to defendants' entitlement to qualified immunity.

The ubiquity of cell phone, civilian, and law enforcement dashboard cameras, and the increasing use of body cameras on police personnel,[2] has made video

[2] Nearly every large police department in a recent nationwide survey stated it planned to move forward with body-worn cameras, with 95 percent either committed to body cameras or having already completed their implementation. Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, Governing (Jan. 26, 2016), http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html (last visited June 17, 2018).

evidence a prime component in motions for summary judgment concerning qualified immunity. The Eighth Circuit's decision here underscores the need for this Court to intervene at this time and provide clear guidelines for future cases. In addition, it is vital that the Court assure adherence to its precedents concerning the importance of qualified immunity and the obligation of appellate courts to conduct a rigorous inquiry as to the clearly established law, thus foreclosing the sort of end run around the Court's decisions that underlie the Eighth Circuit's opinion here. The petition should be granted.

CONCLUSION

For the foregoing reasons, amicus curiae International Municipal Lawyers Association respectfully submits that the petition should be granted.

Respectfully submitted,

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