

No. 17-1572

In The
Supreme Court of the United States

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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**

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REPLY BRIEF
—◆—

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INTRODUCTION

Each of Respondent's three arguments against granting the Petition should be rejected. First, Respondent's argument that Petitioners misinterpreted the district court's opinion fails for the multiple reasons discussed below. In particular, Respondent's interpretation of the district court's opinion is not materially different than that asserted in the Petition. Moreover, even if there was a difference between interpretations of the district court's opinion, that difference would be immaterial because the questions raised in the Petition were explicitly before, and decided by, the court of appeals. Thus, this case is an excellent vehicle for resolving the questions raised in the Petition. Second, Respondent's assertion that the court of appeals' decision is consistent with this Court's precedent is incomplete because it ignores the multiple opinions issued by the Court interpreting and applying *Johnson v. Jones*, 515 U.S. 304 (1995), and it ignores the deep and mature circuit split outlined in the Petition. (Petitioners rest on the arguments laid out in the Petition regarding these points. Pet. 18-38.) Third, Respondent's assertion that applying the narrow interpretation of *Johnson* to this case would result in a lack of jurisdiction is incorrect because the reasoning applied by the Eighth Circuit below is the very reasoning rejected by the court of appeals cases adopting a narrow interpretation of *Johnson*. See, e.g., *Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016).

Petitioners further detail three points below: (1) both issues raised in the petition were before, and

decided by, the court of appeals; (2) Respondent's arguments implicitly acknowledge how the Court of Appeals' reading of *Johnson* frustrates jurisdiction to review whether facts identified as being in dispute are blatantly contradicted by the record; and (3) application of the narrow interpretation of *Johnson*, as exemplified in *Walton*, results in jurisdiction here.

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ARGUMENT

I. Both Issues Raised in the Petition Were Before and Decided by the Court of Appeals Below.

Respondent appears to argue that the issues raised in the Petition are not present in this case because, according to Respondent, Petitioners misinterpret the *district court's* order. Resp. 4. He argues, “[t]he questions presented by the Petitioners are inappropriate for review by the United States Supreme Court because they are based on the false premise that the district court assumed certain facts to be true when instead the district court could not find a clear set of facts to be true.” Resp. 4. This argument fails for multiple reasons. First, Respondent ignores the reasoning and specific text in the court of appeals' decision. The court of appeals below declined to exercise jurisdiction because, it reasoned, *Johnson* prohibited review of the district court's determination concerning “whether the evidence presented supported a finding that the officers faced a threat of serious physical harm when they used deadly force.” App. 10. In this officer-involved

shooting case, the threat posed by the suspect is a legal element essential to liability. Thus, the first issue in the Petition—whether there is jurisdiction under *Johnson* to review the district court’s assessment that there is a triable issue as to a legal element essential to liability—was before the court of appeals and decided by it. This case therefore presents an excellent vehicle for the Court to review the first issue in the Petition.

Likewise, the second, more general issue raised in the Petition was also before and decided by the court of appeals below. In fact, Respondent admits as much. Respondent states that the district court inferred, from the lack of blood on the submachine gun, an alleged dispute over whether Terrance Franklin possessed the gun when he was shot. Resp. 7. On interlocutory appeal below, Petitioners asserted that this inference was error. Pet. 10-11. But the court of appeals determined that it did not have jurisdiction to review such an inference. App. 14, 17. The scope of interlocutory appeals over such inferences from recorded-support fact disputes was therefore before and decided by the court of appeals. This case therefore presents an excellent vehicle for the Court to review the second issue in the Petition.

Second, although Respondent claims that the Petition is based on a misinterpretation of the district court’s opinion, the interpretation Respondent puts forward is essentially the same as that presented in the Petition. Respondent asserts that the district court did not explicitly state which facts were in genuine

dispute and which were not. Resp. 4. Instead, the district court identified only two facts as being in genuine dispute: the seventy-second timing and the lack of blood on the submachine gun. Resp. 5. From these two allegedly disputed facts, the district court held that unspecified aspects of the “version” of events advanced by Petitioners was in dispute. Resp. 4. This is precisely the interpretation of the district court’s ruling set forth in the Petition. *See, e.g.*, Pet. 14-18. For example, the Petition highlights how this type of reasoning is prevalent in force cases resulting in the death of a suspect, and, therefore, resolving the issues in the Petition are particularly important to society. Pet. 17-18.

Third, Respondent’s acknowledgement of the reasoning applied by the district court and held to be unreviewable by the court of appeals illustrates the importance of the issues in the Petition and the error in the lower court’s decision. As highlighted in the Petition, this Court has repeatedly admonished the lower courts that the clearly established prong of the qualified immunity analysis must be conducted with the facts particular to the case. Pet. 14-16. Allowing the lower court’s interpretation of *Johnson* to stand insulates the district court’s analysis from this requisite fact-particular review. Respondent is correct: the district court never specified which particular facts were in dispute, beyond stating that the seventy-second timing and the absence of blood on the submachine gun caused unspecified disputes in Petitioners’ version of events. But what facts in the record—a record which included, not just testimony from the officers, but

abundant physical evidence—were in dispute? Respondent argues that nearly every fact in the case is disputed, Resp. 2, but he provides no support for these assertions. As the Petition and the record below illustrate, none of these facts were genuinely disputed. Certainly, some aspects of the “version” of events told by the officers, such as the date and location of the shooting and the fact that two officers were shot, were not in genuine dispute. In spite of stating that “we recite the facts as stated by the district court” just before repeating facts identical to those asserted by Petitioners, 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. But neither the district court nor the court of appeals specified which facts were in dispute, and Petitioners never received the fact-particularized qualified immunity analysis to which they are entitled.

Finally, Respondent’s point about the district court’s reasoning also illustrates how the court of appeals’ overly-constrictive reading of *Johnson* runs afoul of *Behrens v. Pelletier*, 516 U.S. 299 (1996). Under *Behrens*, because the district court did not specify which particular facts were in dispute, the court of

appeals should have conducted a review of the record to determine which facts the district court likely assumed. *Behrens*, 516 U.S. at 313. It did not. By holding that the district court’s determination that there was a triable issue on an element essential to liability—i.e., whether “the officers faced a threat of serious physical harm when they used deadly force”—was unreviewable under *Johnson*, the court of appeals never conducted the “cumbersome” review of the record mandated by *Behrens*, and it short-circuited the required fact-particularized qualified immunity analysis.

II. Respondent Implicitly Acknowledges How the Court of Appeals’ Reading of *Johnson* Frustrates Jurisdiction to Review Whether Facts Identified as Being in Dispute are Blatantly Contradicted by the Record under *Scott v. Harris*.

The court of appeals’ interpretation of *Johnson* also short-circuited the reviewing court’s obligation to consider whether factual disputes identified by the district court are blatantly contradicted by the record. Respondent admits that one fact dispute identified by the district court was whether a video showed that up to seventy-seconds transpired between shots. Resp. 6. On appeal, Petitioners argued, *inter alia*, that the seventy-second timing is blatantly contradicted by the record because the video contains no sound of any gunshots. Pet. 10. By holding that the district court’s determination that there was a triable issue on whether “the officers faced a threat of serious physical harm when

they used deadly force” was unreviewable under *Johnson*, the court of appeals never considered, under *Scott v. Harris*, 550 U.S. 372 (2007), whether the seventy-second timing was blatantly contradicted by the video evidence.

Moreover, as amicus curiae International Municipal Lawyers Association points out, the ruling below severely impacts cases involving video evidence by allowing courts to avoid a fact-particularized analysis based on facts incontrovertibly established in a video. Amicus Br. 4-6. This effect is only going to become increasingly important with the proliferation of body-worn camera (“BWC”) technology in policing. For example, BWC footage of officer-involved shootings will play an increasingly important role in federal litigation. A search of the internet reveals how common BWC footage of officer-involved shootings is becoming. In such videos, facts are established upon which claims of qualified immunity might be based. True enough, aspects of an incident may not be caught on camera or may have occurred before the camera was activated, and if such facts are subject to conflicting testimony or other evidence, then they might create a genuine dispute. But a defendant asserting qualified immunity has a right to a fact-particularized analysis of the clearly-established prong of the defense—and that analysis should be based on facts shown to be incontrovertible by any BWC video. By holding that there is no jurisdiction to consider a district court’s inference that there is a triable issue as to a legal element essential to liability—in this case, the threat posed by

Franklin—the court of appeals completely frustrates any review based on those facts rendered undisputed by video footage. As the Petition demonstrates, this issue is subject to a deep and mature circuit conflict.¹ With the proliferation of BWC technology, the resolution of this conflict is critical, and will only intensify.

III. The Narrower Interpretation of *Johnson*, Exemplified in *Walton*, Results in Interlocutory Jurisdiction Here.

Contrary to Respondent’s assertions, the rule set forth in *Walton*, and the other cases adopting a narrow interpretation of *Johnson*, compel the conclusion that the court of appeals had jurisdiction. As noted above, the court of appeals declined to exercise jurisdiction because, it reasoned, *Johnson* prohibited review of the district court’s determination concerning “whether the evidence presented supported a finding that the officers faced a threat of serious physical harm when they used deadly force.” App. 10. This issue amounts to an element essential to liability in this deadly force case, Pet. 30, and is precisely the type of “evidence sufficiency” question *Walton* held was reviewable. If the court of appeals would have applied the rule in *Walton*, it would have exercised jurisdiction over the interlocutory appeal.



¹ Respondent offers no argument or citations to law calling into question the circuit split detailed in the Petition. Resp. 12.

CONCLUSION

For the reasons stated above, and in the Petition, Petitioners respectfully request that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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