Nos. 17-749, 17-788

In The
Supreme Court of the United States

DR. LOWELL T. JOHNSON and
DR. RAYMOND D. RAWSON,

Petitioners,

v.

ROBERT LEE STINSON,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

DR. LOWELL T. JOHNSON & DR. RAYMOND D. RAWSON'S REPLY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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Petitioners do not, as the respondent argues, seek to overturn *Johnson v. Jones*, 515 U.S. 304 (1995), nor do they advocate an "expansion" of appellate court jurisdiction over appeals from a denial of qualified immunity. Petitioners instead ask merely whether *Johnson v. Jones* bars appeal of not only the "who, what, why, where, and how" factual findings reached by the district court, but also strips an appellate court of jurisdiction to weigh in on whether those facts, together with all reasonable inferences drawn from those facts, fall in or out of legal bounds, i.e., whether they are or are not sufficient as a matter of law to permit a reasonable jury to issue a verdict for the plaintiff. The questions presented by petitioners merely recognize that subsequent opinions applying *Johnson v. Jones* have resulted in disparate application of *Johnson*'s jurisdictional bar. These petitions are an appropriate vehicle through which this Court may address the question presented, as the disparate application of *Johnson*'s jurisdictional bar is evident in the tension between the Seventh Circuit's en banc majority opinion and its dissent in this appeal.

ARGUMENT

I. Contrary to respondent's contention, petitioners do not advocate that *Johnson v. Jones* be overturned, nor do they advocate a "radical expansion" of appellate court jurisdiction over qualified immunity appeals.

A. Petitioners do not assert that *Johnson v. Jones* has been "undermined" by subsequent decisions of this Court, nor do they advocate that *Johnson v. Jones* should be "abandoned".

Petitioners do not advocate that *Johnson v. Jones* be abandoned, nor do they contend that *Johnson v. Jones* has been "undermined" by subsequent decisions of this Court. Resp't Br. at 16-17. Petitioners merely recognize that the scope of the jurisdictional bar announced in *Johnson v. Jones* has been addressed in subsequent decisions of this Court, including *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) and *Behrens v. Pelletier*, 516 U.S. 299 (1996), and the result has been confusion in the lower courts and disparate application of *Johnson*'s jurisdictional bar. Some courts have concluded that *Johnson*'s jurisdictional bar has been narrowed by subsequent decisions of this Court. *See Roberson v. Torres*, 770 F.3d 398 (6th Cir. 2014) (" . . . *Plumhoff* appears to cabin the reach of *Johnson* to purely factual issues that the trial court might confront if the case were tried."); *Diaz v. Martinez*, 112 F.3d 1, 8 (1st Cir. 1997) (" . . . *Behrens* places a gloss on *Johnson* and reopens an appellate avenue that some

had thought *Johnson* foreclosed."). Other courts have interpreted *Johnson*'s jurisdictional bar more broadly, applying it not just in circumstances where a defendant refuses to accept the plaintiff's evidence-supported version of what happened, but also where a defendant challenges on appeal not the district court's findings of fact, but its conclusions based on inferences drawn from those facts. This broad application of *Johnson*'s jurisdictional bar has led some courts to conclude that whenever a district court determines that there is a genuine issue of material fact for trial by drawing an inference in favor of the plaintiff, the appellate court has no jurisdiction to second-guess the district court's assessment of the facts or conclusions drawn therefrom. *See Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013).

This tension between a "narrow" application of *Johnson*'s jurisdictional bar, supported by *Behrens*, and a "broad" application, as well as the disparate conclusions to which these opposing interpretations can lead, were pointedly recognized by the chief judge of the Fourth Circuit in his concurrence to the denial of rehearing en banc in *Elliott v. Leavitt*, 105 F.3d 174 (4th Cir. 1997):

> I do not understand *Johnson* to suddenly disavow a decision, *Mitchell v. Forsyth*, 472 U.S. 511 . . . (1985), that has been a staple of that Court's jurisprudence for many years. . . . *Behrens*' warning that appellate jurisdiction is not abolished simply because the case involves asserted factual disputes was an apparently vain attempt to preempt precisely

> the type of overreading of *Johnson* proposed by my dissenting colleagues. Under *Behrens*, we are to respect the role reserved for the trial court by *Johnson*, but we are not to slam the door to interlocutory appeals on the district court's mere recitation of the mantra that "a genuine issue of fact exists."

Elliott v. Leavitt, supra, at 177.

Petitioners do not advocate "overturning" *Johnson v. Jones* any more than the Seventh Circuit's en banc dissent did in its analysis below. Petitioners contend merely that, consistent with the Seventh Circuit's en banc dissent, *Johnson v. Jones* is a limited exception to the general rule of *Mitchell v. Forsyth*, given the subsequent teachings of *Scott, Plumhoff*, and *Behrens*, and that a properly narrow application of *Johnson* required the Seventh Circuit to accept jurisdiction over petitioners' appeals because the appeals raised legal issues, the resolution of which did not depend on the outcome of any fact question.

B. Petitioners' position does not ordain an expansion of appellate jurisdiction contrary to *Johnson v. Jones*.

Respondent contends that petitioners seek to "create" some sort of new, expansive, and unworkable test to "replace" *Johnson v. Jones*. Resp't Br. 8, 10. Not so. Judge Sutton's incisive concurrence in *Romo*, supra, concisely characterizes the dichotomy that has arisen amongst the lower courts concerning the application of

the jurisdictional bar of *Johnson v. Jones* – i.e., a "narrow" interpretation of *Johnson* that bars jurisdiction only in protypical "he said, she said" fact disputes, and a "broad" interpretation of *Johnson*, which applies the jurisdictional bar not just to the question of whether the defendant accepts the plaintiff's evidence-supported version of what happened, but also applies the bar where a defendant challenges on appeal a district court's conclusion that a reasonable jury could find a constitutional violation based upon the district court's reading of the inferences and assessment of those facts. *Romo*, supra, at 678. These competing approaches to *Johnson v. Jones* are not a fiction concocted by petitioners, and they are already at work in the circuit courts. *See DiLuzio v. Village of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015) ("[We] have also held that a defendant may not challenge the inferences the district court draws from those facts, as that too is a prohibited fact-based appeal."); *but see Walton v. Powell*, 821 F.3d 1204, 1208 (10th Cir. 2016) ("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.").

The instant petitions do no violence to *Johnson v. Jones* – they merely recognize that *Johnson* is being inconsistently applied; broadly by some courts, and narrowly by others. This has resulted in situations where jurisdiction over an interlocutory appeal from a denial of qualified immunity has been either granted

or denied based in large part upon whether *Johnson*'s jurisdictional bar is applied broadly or narrowly by the reviewing appellate court. The protracted battle over jurisdiction of these very appeals in the Seventh Circuit, below, bears witness to this reality. These petitions present an opportunity for this Court to provide guidance.

II. Confusion amongst the circuits over the scope of *Johnson v. Jones* in light of subsequent decisions like *Scott*, *Plumhoff*, and *Behrens*, is no fiction.

Respondent flatly denies that there is any discord in the lower courts with respect to the application of *Johnson*'s jurisdictional bar, yet he does not explain how to square that position with unmistakable language emanating from lower courts, stating point-blank that *Johnson* has been problematic in the application. *See Roberson v. Torres*, supra ("applying *Johnson* has not been easy"); *Woolfolk v. Smith*, 81 F.3d 741, 743 (8th Cir. 1996) ("[As] the Supreme Court predicted in *Johnson v. Jones*, its new standard of appealability can be difficult to apply"); *Walton v. Powell*, supra, at 1209 ("indeed we have struggled ourselves to fix the exact parameters of the *Johnson* innovation"). Respondent likewise offers no explanation for the proliferation of scholarly articles that have also highlighted difficulties in the application of *Johnson*. *See* Johnson Pet. at 17-18.

Respondent suggests that any discord amongst the lower courts over the scope of *Johnson*'s jurisdictional bar is "an invention of the petitioners' making." Resp't Br. 20. How, then, to explain why appellate courts endeavoring to apply *Johnson* so often birth dissenting or concurring (and sometimes both) opinions debating the proper scope of *Johnson*? *See Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013); *Thomson v. City of Lebanon*, 831 F.3d 366 (6th Cir. 2016); *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999); *Elliott v. Leavitt*, 105 F.3d 174 (4th Cir. 1997); and *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997). If there is no confusion amongst the lower courts over the proper application of *Johnson v. Jones*, as respondent contends, why does so much judicial ink continue to be spilled on the topic?

Respondent contends that no court has "adopted" the "taxonomy" advocated by petitioners, and that all appellate courts since *Johnson v. Jones* was decided have "applied its law-fact jurisdictional divide without deviation." Resp't Br. 21. The issue, however, lies not in the application of a simple "law-fact divide." The problem lies in those "mixed" appeals involving both factual and legal issues – like the case underlying petitioners' appeal, below. The recognition by the Seventh Circuit panel (and, later, by the en banc dissent) that *Johnson* is a limited exception to *Mitchell*'s general rule, and the panel's consequent narrow application of *Johnson*'s jurisdictional bar, led the panel to take jurisdiction and to rule upon the merits of the legal issues presented even though those legal issues coexisted in the appeal with factual issues identified by the district court. In

contrast, the en banc majority's failure or refusal to recognize the limited nature of *Johnson*'s exception to the general rule of *Mitchell* resulted in a reversal of the panel decision and a denial of jurisdiction.

Respondent attempts to minimize Judge Sutton's incisive analysis of the competing "narrow" versus "broad" applications of *Johnson v. Jones*, arguing that the position taken by Judge Sutton's *Romo* concurrence was rejected by the *Romo* majority, and that no other circuit has adopted it. Resp't Br. 23. The fact that the Sixth Circuit's broad application of *Johnson*'s jurisdictional bar in *Romo* is at odds with other circuits (for example, the Tenth Circuit[1]), is a point in favor of granting these petitions.

The *Romo* majority, moreover, did not have the luxury of this Court's *Plumhoff* decision, as *Plumhoff* was decided the year after *Romo*. In fact, the Sixth Circuit subsequently recognized, in a footnote to *DiLuzio v. Village of Yorkville*, 796 F.3d 604, n.1 (6th Cir. 2015), that an argument now exists that this Court rejected the *Romo* majority's position (thus implicitly overruling *Romo*) in *Plumhoff*. *See DiLuzio*, supra, at n.1. The

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[1] The Tenth Circuit noted as follows in *Walton v. Powell*, 821 F.3d 1204, 1209-1210 (10th Cir. 2016):

> Under *Johnson*, it is for the district court to tell us what facts a reasonable jury might accept as true. But under *Plumhoff*, it is for this court to say whether those facts, together with all reasonable inferences they permit, fall in or out of legal bounds – whether they are or are not enough as a matter of law to permit a reasonable jury to issue a verdict for the plaintiff.

fact that the Sixth Circuit, according to its footnote in *DiLuzio*, considers it an open question as to whether *Plumhoff* implicitly overruled the *Romo* majority's "broad" interpretation of *Johnson*, is yet another point in favor of granting the instant petitions in order to allow this Court to clarify the issue of *Johnson*'s reach in light of the subsequent teachings of *Harris*, *Plumhoff*, and *Behrens*.

Contrary to respondent's contention, *Johnson v. Jones* is not being uniformly and effortlessly applied by lower courts. The turbulent and protracted history of the appeal out of which these petitions arise provides but one example.

III. This case presents an appropriate vehicle through which to resolve the question presented by petitioners.

The Seventh Circuit's handling of the instant appeals provides an example of the disparate results achieved, depending upon whether the reviewing Court recognizes *Johnson* as a limited exception to *Mitchell*'s general rule and thus applies *Johnson*'s jurisdictional bar narrowly, or not. The original Seventh Circuit panel decision, below, recognized that *Johnson v. Jones*, read in light of subsequent pronouncements of this Court, is actually a limited exception to *Mitchell*'s general rule allowing interlocutory appeal from a denial of qualified immunity. Johnson App. 48-51. As the en banc dissent noted, petitioners' appeals present a "mixed case" with separable factual and legal issues.

Johnson App. 29. The original panel decision properly identified the existence of a legal issue separate from any factual issue, and therefore appropriately took jurisdiction and ruled on the merits. Johnson App. 55-64.

The Seventh Circuit, en banc, reversed the panel decision, ostensibly seizing upon two "facts" identified by the district court: (1) that Dr. Johnson had met with petitioner Gauger prior to Gauger's interview of Stinson, and (2) that Dr. Johnson had contacted petitioner Rawson for a second opinion. Johnson App. 18-20. Petitioner Johnson did not challenge these "facts" in his briefing before the Seventh Circuit; nowhere did Dr. Johnson argue that he did not, in fact, meet with Gauger prior to Gauger's interview with Stinson, nor did he argue before the Seventh Circuit that he was not the one who contacted Rawson for a second opinion.

The en banc majority's reversal of the panel decision precluded not simply a challenge to the facts found by the district court (a challenge which would clearly be prohibited by Johnson's jurisdictional bar), but also appellate review of petitioners' challenge to the district court's conclusion, based upon inferences drawn by the district court from the facts that it found, that those facts were sufficient to allow a reasonable jury to find that petitioners had violated respondent's right to due process.

In contrast, the en banc dissent, echoing the original panel, recognized that *Johnson v. Jones* represented a limited exception to *Mitchell*'s general rule, and thus applied it narrowly in light of this Court's

subsequent teachings in *Harris* and *Plumhoff*. The en banc dissent properly recognized that *Johnson*'s jurisdictional bar "applies if the issues raised on appeal are limited to the 'who, what, where, when, and how' of the case," but does not apply "if the appeal asks whether the evidence in the summary judgment record–construed in the plaintiff's favor–would permit a reasonable jury to find that the defendant committed the claimed constitutional violation and the constitutional right in question was clearly established at the time the defendant acted." Johnson App. 33. As a result, the en banc dissent recognized that the district judge really had made two separate rulings in denying qualified immunity to petitioners, the first of which was not appealable under *Johnson v. Jones*, but the second of which was:

> The judge held that (1) the evidentiary record reveals genuine factual issues about whether certain key events occurred; and (2) the defendants are not entitled to qualified immunity because the evidence in the record, when construed in Robert Stinson's favor, would permit a reasonable jury to find that they violated his right to due process.

Johnson App. 26.

The en banc dissent, owing to its well-supported, narrow application of *Johnson*, recognized that petitioners' appeals raised a legal question, separable from any factual issues, that was sufficient to invoke jurisdiction. This allowed the en banc dissent to identify and lay out in its opinion the key facts found by the

district court (which included the "fact" that Dr. Johnson met with Gauger before he spoke to Stinson, and the "fact" that Dr. Johnson called Dr. Rawson), and ultimately to conclude that these facts, even accepted as true, were not sufficient to allow a reasonable jury to conclude that a due process violation had occurred. Johnson App. 35-37.

The en banc dissent's application of *Johnson* was the correct one. The dissent did not blithely disclaim jurisdiction over the appeals simply because it deemed the appellants' recitation of the facts in their briefing materials to be insufficiently comprehensive, as the en banc majority did. The dissent accepted jurisdiction, properly considered the facts identified by the district court, and found that those facts, even accepted as true, simply did not support a conclusion that petitioners had violated an established constitutional right of the respondent.

In contrast to the narrow interpretation of *Johnson* accorded by the Seventh Circuit's panel (and subsequently, by the en banc dissent), the en banc majority applied *Johnson* too broadly. In doing so, the majority simply deferred to the district court's determination that a genuine issue of fact existed for trial, thus failing to differentiate the legal issue raised by the appeals from any fact issues. The en banc majority thereby stripped petitioners of their right to an interlocutory appeal of the strictly legal question posed by the district court's "mixed" decision denying qualified immunity.

The appeal out of which these petitions arise highlights the dichotomy that has developed between outcomes reached by way of a "narrow" application of *Johnson*'s jurisdictional bar, versus those reached through a "broad" application. These petitions provide an appropriate vehicle for this Court to clarify the application of *Johnson v. Jones* in light of subsequent decisions of this Court. Review by this Court is necessary to protect a government official's right to invoke the protections of qualified immunity prior to trial and to have a denial of that protection timely adjudicated. Review is equally necessary to prevent subsequent appeals from a denial of qualified immunity in future cases from being subjected to the same tortured and protracted jurisdictional muddle to which petitioners' appeals were subjected in the Seventh Circuit, below.

CONCLUSION

For the reasons set forth above, this Court should accept petitioners' Petitions for Certiorari.

Respectfully submitted,

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