

No. 19–624

In the Supreme Court of the United States

MARK GRAF AND JOHN USTICH,
Petitioners,

v.

HYUNG SEOK KOH,
Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case concerns an interrogation where the parties dispute whether: (1) petitioners provided Hyung Suk Koh with his *Miranda* rights or, instead, impermissibly told him that he did not need an attorney; (2) petitioners denied Koh access to his attorney, who was present at the police station during the interrogation; (3) petitioners improperly conducted Koh's interrogations in English, without a qualified, competent interpreter, despite Koh's clear inability to understand English; and (4) petitioners denied Koh access to his needed medications, despite his repeated requests for them.

In light of these circumstances, the questions presented are:

1. Does the circuit court's dismissal based on a lack of jurisdiction of petitioners' fact-based challenges to the district court's conclusion that evidence in the record was sufficient to require a trial on Koh's Fifth Amendment claims warrant this Court's review?

2. Does this case present the proper vehicle for considering whether the district court correctly denied qualified immunity because petitioners violated Koh's clearly established Fifth Amendment rights by extracting his confession using myriad techniques long held to be impermissibly coercive?

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STATEMENT OF THE CASE

I. PETITIONERS' MISSTATEMENT OF THE RECORD

Petitioners Mark Graf and John Ustich moved for summary judgment, the district judge concluded that genuine disputes of material fact required a trial, and petitioners appealed, asserting that they were entitled to qualified immunity. In proceedings below and before this Court, petitioners continue to ignore long-standing limits on appellate jurisdiction in collateral-order appeals by advancing their own version of disputed facts, while omitting all unfavorable evidence. See *Johnson v. Jones*, 515 U.S. 204 (1995). Pursuant to Rule 15.2, Hyung Seok Koh and Eunsook Koh (the Kohs) therefore object to petitioners' Factual Background sections.

The circuit court reproached petitioners for their “backdoor effort to contest the facts,” a tactic they again employ here. App. 16a.¹ The Kohs respectfully ask this Court to reject petitioners' Factual Background sections, their misstatements of the record, and their requests for review predicated on their self-serving factual accounts.

II. FACTUAL BACKGROUND

A. The Kohs

Hyung Seok Koh (Mr. Koh or Koh) and his wife, Eunsook Koh (Mrs. Koh), are first-generation Korean-Americans. They moved to the United

¹ Citations to “App.” refer to petitioners' appendices. Citations to “D.” refer to the electronic docket entries in the district court.

States, worked hard, established businesses, and settled in Northbrook, Illinois, where they sent their children to school and surrounded themselves with family, friends, and a vibrant church community. D.316 at 2. Unfortunately, their son Paul suffered mental-health problems, including suicidal ideation and symptoms of schizophrenia. App. 87a-88a.

B. Paul Koh's Suicide

On April 16, 2009, around 3:45 a.m., Koh awakened to his wife's screams. App. 2a. Mrs. Koh had just found their son, Paul, lying in a pool of blood, next to a knife, in the entryway of their home. *Id.* Paul had cut his own throat. *Id.* His death was a suicide, and there was no reason to think otherwise. D.315 ¶¶1, 17–18, 53.

The Kohs believed Paul was still alive and called 911. App. 2a. The couple then got dressed in anticipation of going to the hospital. *Id.* Upon arrival to the Kohs' home, non-petitioning defendant officers from the Northbrook Police Department found Mr. Koh hysterical near the front door of the house, and Mrs. Koh hugging Paul's body while sobbing. *Id.*; App. 29a.

The defendant officers initially recognized that Paul had killed himself, a conclusion corroborated by: (a) blood-stain patterns; (b) the lack of evidence of a struggle; (c) the absence of injuries on the Kohs; (d) the fact that any assailant would have been drenched in blood requiring extensive clean up; (e) the lack of blood trails or transfer around Paul's body; and (f) other physical evidence showing Paul had killed himself, as opposed to having been assaulted by his parents or anyone else. App. 2a;

D.315 ¶¶ 18, 53. Further, the defendant officers learned Paul had been hearing voices, battling depression, abusing substances, and saying he wanted to die. App. 34a. Notwithstanding all of this objective evidence of suicide—which petitioners knew—petitioners still chose to investigate Paul’s death as a murder. Pet. 7.

C. Petitioners Arrest the Kohs

When the defendant officers arrived at the scene, the Kohs desperately wanted to drive to the hospital to get Paul help. App. 3a, 29a. Instead, the officers pushed the Kohs to the ground in their front yard, where they proceeded to confine and watch over them. *Id.* The officers denied the Kohs’ requests to: (1) see Paul; (2) retrieve Mr. Koh’s medicine (for diabetes, high blood pressure, and hyperammonemia) from inside the house; and (3) go to the hospital. *Id.* at 3a, 30a. Eventually, the officers forced the Kohs into a squad car and drove them to the Northbrook Police Department without asking the Kohs if they wanted to go there. *Id.* It is undisputed that defendants lacked probable cause to arrest the Kohs at home. App. 57a.

After police arrived at the police department with the Kohs at around 4 a.m., they separated the Kohs. App. 3a. Mrs. Koh was allowed to wash the blood from her hands in a restroom while officers watched her. *Id.* Police made Mr. Koh wait three and a half hours before interrogating him. App. 3a, 32a. During that time, Koh was not allowed to: (1) call his lawyer; (2) see the station chaplain; (3) make a phone call; (4) see his pastor, relatives or friends—all of whom arrived at the police department; or (5) see a

Northbrook social worker who had arrived to assist. *Id.*; D.315 ¶¶ 7, 10–13, 24.

D. Petitioners Interrogate Koh

Starting around 7:30 a.m., petitioners began the first of two interrogations of Koh that lasted a combined total of 2.5 hours. App. 4a. Notwithstanding an Illinois law requiring law enforcement to record the entirety of homicide interrogations, Graf conducted part of Koh's interrogation before the recording started and continued the interrogation after the tape ran out. *Id.* As set forth below, throughout Koh's interrogations, petitioners engaged in numerous coercive tactics to extract a confession from Koh in violation of his constitutional rights.

1. Petitioners Exploited Koh's Mental and Physical Vulnerabilities. Throughout Koh's interrogation, he was in an extremely vulnerable mental and physical state as a result of the shock and trauma from his son's gruesome death. D.315 ¶¶ 4, 29, 30-31. Indeed, Koh exhibited clear signs of distress. *Id.* at 67a. He was exhausted and freezing. *Id.* He repeatedly hit himself on the head and chest. *Id.* He hunched over and stared blankly. *Id.* at 67a, 68a. While petitioners denied Koh access to an attorney, see SOC § II(D)(3) *infra*, when they finally allowed an attorney into the room, the attorney found Koh disoriented, disheveled, and exhausted. *Id.* at 67a & n.30. Petitioners compounded Koh's shock and trauma by: (1) holding him in isolation for more than nine hours; (2) interrogating him knowing he had not eaten and only had minimal sleep; and (3) denying him needed medications for

diabetes, high blood pressure, and hyperammonemia until the interrogation was over. App. 4a, 35a & n.8, 66a-67a.

Knowing Koh was in no position to be interrogated, petitioners knowingly exploited his vulnerabilities. Indeed, on the way to court after the interrogation, Graf warned Koh not to mention his physical ailments to the judge, saying, “If you say in the presence of the judge that you are either sick or dizzy, then we will take a week or even two to [] investigate you, so don’t do that.” *Id.* at 78a.

The district court found that petitioners were well aware of Koh’s physical and psychological vulnerabilities and intentionally exploited them with aggressive tactics. *Id.* at 77a-78a. The court concluded that “these facts and circumstances show that Detective Graf was intent on coercing a confession out of Koh.” *Id.* at p.79a.

2. Petitioners Exploited the Language Barrier. In addition to the above-described factors rendering Koh highly susceptible to coercive interrogation, there also existed an obvious language barrier. App. 3a, 16a, 17a, 33a, 66a. As Koh was a native Korean speaker, he had a limited ability to speak, understand, or read English, making an interpreter necessary. *Id.* While Northbrook police department staff recommended Language Line, a service that provided trained interpreters, petitioners demanded a police officer. *Id.* at 3a & n.3. They called non-petitioning defendant Sung Phil Kim to provide Korean-language interpretation. *Id.* at 3a.

Petitioners have acknowledged that Koh could not communicate in English, App. 17a, 67a-68a, 77a, and the district court cited dozens of examples from the interrogation which showed Koh did not understand what was going on. *E.g.*, *id.* at 67a-68a (Koh describing what happened the morning before in response to a question about the type of person Paul was); *id.* (Koh discussing tools he kept for his business in response to questions about whether he saw a weapon); *id.* (Koh answering “yeah” when asked whether God would want him to lie).

Petitioners exploited the barrier to extract incriminating statements from Koh. *Id.* at 67a-70a. For instance, throughout, Graf questioned Koh in English. *Id.* at 36a. He did not leave time between questions for Koh to understand the question or for Kim to translate. *Id.* at 40a. He abruptly switched topics, causing even greater confusion. *Id.* at 68a; 77a-79a & n.37 (at a key moment, Graf asserted that Koh was admitting to killing Paul in self-defense, when in fact Koh was talking about an entirely different interaction with Paul). Based on these facts, the district court held that “[a] reasonable jury could conclude that Graf knew that he was pressuring Koh to agree with statements that he did not fully understand.” *Id.* at 77a-78a.

Further, during the interrogation, Kim mistranslated or did not translate at all. App. 70a. For example, when Koh used the Korean idiom, *gachi jooka*, Kim translated it literally as “let’s die together,” without explaining that the idiom was the equivalent of the English phrase, “you’re killing me” and should not have been taken literally. *Id.* at 9a;

77a-78a. Petitioners considered Koh's use of the phrase an important indication of guilt. D.315 ¶ 117.

Also, Kim improperly interjected his own questions into the interview. *Id.* at 77a-78a. As a result, at times, Kim and Graf asked overlapping questions, making it unclear to which question Koh was responding. *Id.* For instance, at one point, Graf repeatedly asked Koh whether Paul had attacked Koh with a knife in an effort to get Koh to admit he killed Paul in self-defense. D.315 ¶¶ 119–120. At the same time, Kim interjected his own question in Korean, which had nothing to do with Koh killing Paul. When Koh responded with a single affirmative answer, Kim proclaimed suddenly that Koh had admitted to killing Paul in self-defense, even though he had not. D.315 ¶ 119; D.308-73 at 5–6. Again, petitioners considered this an important admission. D.315 ¶ 120.

3. Koh Was Not Allowed to Contact His Attorney. At the start of the first part of the interrogation, Graf asked Koh if he had a lawyer. Koh responded that he did, but he did not know the attorney's phone number. App. 4a-5a. Koh then asked to speak to his pastor, daughter, or church friend. *Id.* Graf denied the request, stating that Koh could only speak to his attorney. *Id.* Not knowing his attorney's phone number and unable to contact anyone else, Koh was denied access to counsel. *Id.*

4. Petitioners Did Not Give Koh *Miranda* Warnings. Petitioners did not give Koh complete or accurate *Miranda* warnings. Graf initially administered *Miranda* warnings in English. *Id.* at 5a. Koh asked Kim to “transfer” the warnings,

indicating that he did not understand what Graf was saying. *Id.* Kim, however, did not translate the warnings or their substance. *Id.* at 5a-6a. In fact, Kim told Koh that he did not need an attorney and failed to tell Koh that his statements could be used against him. D.315 ¶ 105; App. 5a-6a. The Seventh Circuit found that the parties hotly disputed “the accuracy of Kim’s translation and whether Koh understood it.” *Id.* at 6a.

Once Graf finished *Mirandizing* Koh in English, he passed Koh a *Miranda* waiver form printed in English and asked Koh to sign and date it. *Id.* Instead, Koh began to write the time that Mrs. Koh had discovered Paul’s body, prompting Graf to stop and correct him. *Id.* at 19a.

Based on these facts, both the circuit and district courts held that Koh did not understand the *Miranda* warnings or the waiver. *Id.* (“As the district court described it in its summary judgment opinion, ‘Koh ultimately executed an English-language *Miranda* waiver form at Graf’s and Kim’s directions.’”).

5. Koh Truthfully Denied Killing His Son.

Throughout the first part of the interrogation, Koh repeatedly and truthfully denied any involvement in Paul’s death. *Id.* at 6a. To the extent that Koh ever confessed, it was only after petitioners overbore his will during the second part of the interrogation.

6. Petitioners’ Scheme to Get Koh to Confess.

After the first interrogation, petitioners held Koh in isolation for three hours. While in isolation, Koh was not allowed to place a phone call or speak to his family members who had gathered at

the station. D.315 ¶¶ 23-25, 114. During that time, petitioners met with their superiors and the team investigating Paul's death. App. 8a, 37a-38a. Petitioners stated that they believed Koh was being evasive. *Id.* at 37a-38a. One of petitioners' superiors then instructed them to press Koh harder. *Id.*; App. 8a.

7. Petitioners Coerced Koh's False Confession. Determined to extract a confession from Koh during the second part of the interrogation, petitioners took a more aggressive and coercive approach. App. 38a-42a, 65a-88a. Before the second part of the interrogation even began, Kim pressured Koh to confess and falsely told him that Mrs. Koh accused him of murdering their son. App. 37a; D.309 ¶ 44. She had not. *Id.*

Koh initially repeated his truthful account of events, but petitioners refused to accept his denials. *Id.* at 39a, 70a-73a. Instead, they employed psychological and physical intimidation and implied threats of violence to coerce his confession. For instance, Graf threatened that his questioning would continue until Koh confessed to murder. App. 9a, D.315 ¶ 27. Further, Graf exploited Koh's devout religious beliefs, saying that God would judge Koh for lying. *Id.* at 68a, 72a.

As Koh's truthful denials continued, Graf raised his voice and yelled at Koh. *Id.* at 39a. Graf got within inches of Koh's face as the questioning intensified, and he repeatedly touched Koh in an unwarranted and unwanted manner. *Id.* at 9a, 39a. At the same time, Kim kept his gun visible. *Id.* at 72a. The district court concluded that a jury could

view this behavior as an implied threat of physical violence. *Id.* at 77a.

In addition, petitioners fed Koh all of the facts of the supposed crime that they wanted him to adopt. *Id.* at 39a-40a. Indeed, the district court found that petitioners provided Koh with every incriminating fact he supposedly adopted. *Id.* at 76a.

Graf also threatened to continue the interview until Koh adopted petitioners' story. Graf told Koh that the interrogation would continue "for days and days and days" if Koh did not tell "the truth." *Id.* at 21a, 76a. As the district court put it, given Graf's refusal to accept Koh's avowals to that point, "Koh would have understood 'the truth' to mean 'what Graf wanted to hear.'" *Id.* at 76a. Thus, petitioners communicated that the only way for Koh to end the interview was to confess. This pressure to confess was heightened by the false choice petitioners presented: Koh could either adopt their false story, which at least minimized guilt by suggesting self-defense, or petitioners would continue to investigate Koh for murdering Paul in a violent rage. *Id.* at 70a; D.311 ¶ 95.

Finally, petitioners falsely told Koh they had other evidence implicating him in the murder. App. 33a-34a, 36a, 70a-72a, 87a-88a. Both Graf and Kim informed Koh that his wife had implicated him, but she had not. *Id.* at 70a-72a. Graf also falsely implied that physical evidence and witness interviews implicated Koh. *Id.* Based on all of these facts, the district court concluded that petitioners crossed the line from being permissibly misleading to improperly coercing an involuntary confession by,

among other means, badgering, pressuring, lying to, and manipulating Koh. *Id.* at 72-73a & n.34.

8. Petitioners Barred Koh’s Attorney from the Interrogation Room. Although petitioners prevented Koh from calling his attorney, *id.* at 3a, Koh’s family and friends were able to contact Koh’s attorney, and he immediately headed to the police department. *Id.* at 41a & n.13; D.315 ¶¶ 25, 40–43. When Koh’s lawyer arrived, the non-petitioning defendant officers made him wait twenty minutes while the interrogation continued. *Id.* at 41a & n.13. About three minutes before the second part of the interrogation concluded, Graf stepped out of the room to talk with another officer, who told him that Koh’s attorney was at the station and they needed to let him in the room. *Id.* at 41a. Graf reported that, in his view, Koh was confessing. *Id.* Graf then returned to the interrogation room where he ramped up the coercive tactics. *Id.* at 72a-73a. Graf asked quick, successive, leading questions, leaving no time for translation, and telling Koh, “Hyung Seok, come on. Right now, let’s be done, hurry up, fast!” *Id.* at 72a-73a. Two minutes later, and more than a half hour after he had arrived, Koh’s attorney was finally allowed access to Koh and immediately terminated the interrogation. *Id.* at 42a.

9. His Will Overborne, Koh Made Incriminating Statements. Before Koh’s attorney terminated the interrogation, Koh purportedly assented to several incriminating statements. *Id.* at 40a-41a & n.14. However, after evaluating the entire record, the district court concluded that Koh’s false incriminating statements—all of which

originated from petitioners—were the product of coercion and an overborne will. *Id.* at 65a-79a.

E. Criminal Proceedings Against Koh

Solely based on Koh’s “confession,” he was charged with murder in state court. App. 11a. Koh was subsequently detained for nearly four years on \$5 million bond. At trial, Jenner & Block represented him *pro bono*. A jury acquitted Koh after deliberating for just two hours, including lunch. *Id.*

III. PROCEEDINGS BELOW

A. The Kohs’ Claims

The Kohs brought claims pursuant to 42 U.S.C. § 1983 against eight Northbrook police officers—two of whom are petitioners here—the Village of Northbrook, Officer Kim, and the Village of Wheeling (Kim’s employer). They asserted a variety of federal constitutional claims, including: (a) a Fourth Amendment claim for false arrest; and (b) Fifth and Fourteenth Amendment claims arising out of Koh’s illegally coerced confession. They also brought claims for failure to intervene and conspiracy, as well as a *Monell* claim against the Village of Northbrook. Finally, the Kohs asserted state law claims for malicious prosecution, intentional infliction of emotional distress, and loss of consortium.

B. The District Court’s Decision

The defendants moved for summary judgment, claiming qualified immunity. The district court denied the motions in part and granted them in part. As relevant here, the district court found that numerous genuine disputes of material fact

precluded summary judgment on Koh's Fifth and Fourteenth Amendment coerced confession claims.

After discussing in detail all of the evidence of Koh's vulnerabilities and petitioners' illegal tactics, and examining those factors in light of long-established law, the court wrote in summation:

A reasonable officer would have known that verbally and physically intimidating a suspect, as well as manipulating him, lying to him, and coaching him on the details of the confession, all while knowing he was not fluent in English and was operating without food, medications, or sleep, violates the Fifth Amendment. And a reasonable officer assigned to interpret for that suspect would have recognized that manipulating his deficient understanding of English, mistranslating the *Miranda* warnings, and altogether refusing to provide translation assistance, likewise violates the Constitution.

App. 75a-76a. The district court also determined that a trial was required on the Kohs' Fourth Amendment false arrest claims (with some limitations), conspiracy and failure to intervene claims (with some limitations), municipal liability claim against Northbrook, and Mrs. Koh's loss of consortium claims.

Invoking the collateral-order doctrine, petitioners and defendant Kim appealed the summary-judgment order, but only as it concerned Koh's Fifth and Fourteenth Amendment claim. All of the other claims against these and all other defendants remained pending for trial in the district

court. On appeal, petitioners and Kim disputed or ignored numerous facts found by the district court, including:

- Petitioners disputed that Paul's death was a suicide. Compare Pet. C.A. Br. 4–6, 12 with App. 87a.
- Petitioners disputed that the Kohs were immediately arrested without probable cause. Compare Pet. C.A. Br. 4–6, with D.279 at 5–16.
- Petitioners disputed that they separated the Kohs at the police department. Compare Pet. C.A. Br. 5, with App. 31a.
- Petitioners ignored that they held the Kohs *incommunicado* for hours, without a phone call or contact with family or friends. See 32a.
- Petitioners ignored virtually all discussion of Koh's known physical and mental vulnerabilities, such as the fact that he was in shock and traumatized, had not eaten, had barely slept, and had been denied needed medications. See 66a-67a; Compare Pet. C.A. Br. 7 & n.8, with App. 35a, 66a-67a.
- Petitioners largely ignored Koh's language barrier. See 68a; Pet. C.A. Br. 7, 8-11, 13-20; Kim C.A. Br. 9–11.
- Petitioners ignored that they initially denied Koh access to his counsel and, later, made his attorney wait while they continued interrogating Koh. See 32a; Pet. C.A. Br. 18–19; see 42a.

- Petitioners omitted that they threatened to interrogate Koh until he confessed. See 37a; 87a.
- Petitioners disputed that: (1) they failed to properly *Mirandize* Koh; (2) Koh did not understand the warnings; and (3) Koh did not voluntarily waive his *Miranda* rights. Pet. C.A. Br. 7–8; Kim C.A. Br. 9.
- Petitioners disputed that they had no basis to suspect Koh of murder and that his truthful explanations were credible and corroborated. See 36a, 37a, 72a; Pet. C.A. Br. 8–11.
- Petitioners disputed their use of psychological and physical intimidation during the interrogation, and their exploitation of Koh’s mental and physical vulnerabilities. See Pet. C.A. Br. 15–16 & nn.12&13, 19; 75a-76a.
- Petitioners disputed that their lies crossed the line from misleading to outright coercion. Pet. C.A. Br. 16; see 72a & n.34.
- Petitioners ignored that they improperly applied the Reid technique on a suspect not known to be guilty. Pet. C.A. Br. 6, 14, 16 & n.14, 19–20; see 37a; 39a, 87a.
- Petitioners ignored that they fed Koh the facts of the crime, falsely making it appear as though Koh spontaneously confessed. Pet. C.A. Br. 17–18; see 39a, 40a, 72a, 73a.
- Petitioners reiterated the findings of a Cook County judge as if they were uncontested issues in the appeal, Pet. C.A. Br. 20–21; Kim C.A. Br. 11, when in fact they were all

contested, and the district court found them to be, see 79a & n.38.

C. The Seventh Circuit's Decision

A unanimous panel of the Seventh Circuit ruled that under *Johnson v. Jones*, 515 U.S. 304 (1995), it lacked jurisdiction to consider petitioners' and Kim's factual challenges to the district court's conclusion that the record presented material disputes of fact for trial. App. 25a. The circuit court found that petitioners and Kim were not asking the court to decide the appeal based on Koh's version of the facts, but instead were disputing and ignoring key facts that the district court had relied upon to deny summary judgment on Koh's Fifth and Fourteenth Amendment claim. App. 15a-21a. Indeed, the Seventh Circuit identified at least ten disputes of fact on central issues necessary to resolve Koh's Fifth and Fourteenth Amendment claims, including:

- Whether petitioners allowed Koh to call his lawyer. App. 4a.
- The extent and effect of the language barrier. *Id.* at 18a. (holding that Petitioners' "characterization of Mr. Koh's language problem as a 'limited English language proficiency' overcome by the presence of an interpreter, rather than accepting the district court's conclusions concerning Koh's lack of understanding, precludes our jurisdiction.").
- Whether Kim accurately translated the *Miranda* warnings Graf administered to Koh in English, and whether Mr. Koh understood the warnings. *Id.* at 5a-6a; 18a-20a.

- Whether Koh agreed at the beginning of the second part of the interrogation that he was advised of his rights and understood. *Id.* at 20a (noting that petitioners were disputing the district court’s conclusion regarding Koh’s lack of understanding due to the language barrier and recognizing that petitioners’ characterization of the facts “presuppose[d] that Mr. Koh understood his rights in the first instance.”).
- Whether Koh lacked sleep and was denied access to his needed medications. *Id.* at 20a-21a.
- Whether petitioners threatened Mr. Koh during the interrogation. *Id.* at 21a.

Given the numerous factual disputes, the court of appeals dismissed the appeals for lack of jurisdiction. *Id.* at 25a.

Kim has not petitioned for certiorari. Pet. ii. None of the claims against him are currently before this Court. *Id.* Nor are any of the other constitutional claims against any of the defendants. *Id.*; App. 2a. Moreover, petitioners Ustich and Graf have informed the district court that they do not intend to seek a stay of the Seventh Circuit’s decision dismissing their claims. D.426. Accordingly, regardless of the outcome of this petition, all claims against all parties in this litigation will go to trial in the district court on April 6, 2020.

SUMMARY OF ARGUMENT

The Court should deny the petition for numerous reasons. First, this case presents an exceptionally poor vehicle for adjudicating any of the several issues raised by the petition for certiorari. The numerous questions presented in the petition have nothing to do with each other, meaning this Court would have to resolve each and every issue on behalf of petitioners. Notably, even if the Court resolved all issues in petitioners' favor, this case will still proceed to trial in April.

Additionally, the petition asks this Court to resolve messy factual disputes and wade into a voluminous summary judgment record to assess which evidence is entitled to credit. Factual disputes like the ones presented here are the primary reason this Court has limited qualified immunity appeals to questions of law.

Second, the petitioners allege that certiorari is necessary to remedy purported "circuit disarray" over competing interpretations of *Johnson v. Jones*, 515 U.S. 304 (1995). But no such disarray exists. *Johnson* limited appellate jurisdiction in qualified-immunity appeals to purely legal questions, and it made clear that appellate courts lack jurisdiction to second guess a district court's finding that there is sufficient evidence in the summary judgment record for a trial. *Id.* at 313. Accordingly, the Seventh Circuit correctly held that it lacked jurisdiction to decide petitioners' interlocutory appeal.

Third, the Court should deny the petition because the court of appeals has not addressed the merits of petitioners' qualified-immunity defense. At

best, this Court should remand. To the extent that the Court is inclined to consider the merits of the underlying appeal and resolve the thirty or more factual disputes, it should conclude that the district court's decision was correct.

At bottom, petitioners' attempts to conjure questions of law out of run-of-the-mill factual disputes are not a basis for certiorari. This Court has recently rejected five petitions for certiorari in which the petitioners, as here, attempted to disguise an interlocutory appeal of a fact-based qualified-immunity defense by framing it as a legal dispute. See *Burningham v. Raines*, 139 S. Ct. 787 (2019); *Wise v. Hurt*; 139 S. Ct. 412 (2018); *Peterson v. Franklin*, 139 S. Ct. 411 (2018); *Gauger v. Stinson*, 138 S. Ct. 1325 (2018); *Herriman v. Kindle*, 136 S. Ct. 1657 (2016). This petition should meet the same fate.

ARGUMENT

I. THIS CASE PRESENTS AN EXCEPTIONALLY POOR VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED IN THE PETITION

This case is a poor vehicle for examining any of the issues raised in the petition. The number of issues in the questions presented, the assorted areas of the law implicated by those questions, and the reality that this Court would have to resolve every one of those issues in order to fully resolve this appeal, weigh strongly against granting certiorari in this case. The fact that this case is headed to trial

regardless of any decision by this Court underscores this conclusion.

A. The Petition Presents Numerous, Distinct Issues

The petition presents questions about a dozen distinct issues spanning the scope of appellate jurisdiction; the proper interpretation of Federal Rule of Civil Procedure 56; and the types of evidence a court can consider at summary judgment. The questions presented also span the contours of a variety of distinct areas of federal constitutional law including interlocutory appeals, qualified immunity, Fifth Amendment law, direct and circumstantial evidence, factual inferences, causation, issue preclusion, and the relationship between causation and issue preclusion and the qualified immunity inquiry. Given the number and complexity of issues raised, this case is a poor vehicle for examining any of the issues raised in the petition.

B. Because the Issues Are Independent of Each Other, the Court Would Have to Resolve Each Distinct Issue

What's more, the questions presented are entirely independent of one another, meaning that resolution of one does not bear in any way on the others. Take, for example, petitioners' third question presented, which is actually two questions: (1) whether a state judge's decision not to suppress the coerced confession supersedes to break the chain of causation between their wrongful acts and the harm suffered; and (2) if the state judge's decision was a superseding event, would the petitioners be entitled to qualified immunity. Pet. i. Even if the Court were

to determine the former in favor of petitioners, it would still have to determine whether that fact entitled petitioners to qualified immunity. Finally, even if the Court were to find for the petitioners with respect to the above-described issues, those issues have nothing to do with the myriad other unrelated issues raised by petitioners, such as the scope of appellate jurisdiction under *Johnson*; whether the district court may rely on factual inferences in deciding summary judgment; and whether petitioners plainly violated long-established Fifth Amendment law.

Because many of the issues are not outcome determinative, resolution of each and every one of the dozen issues would be necessary to fully resolve the appeal. This Court's resources are not well deployed in adjudicating unrelated issues that are merely academic and will not make any difference in this case.

**C. Resolving Each and Every Issue in the
Petition Will Not Resolve This Case,
Which Is Set for Trial in April 2020**

None of the questions presented in the petition will fully resolve this already decade-old case. This is an interlocutory appeal of only one claim at summary judgment—Koh's Fifth Amendment coerced-confession claim—against only two defendants—petitioners Graf and Ustich. None of the claims against Defendant Kim, who also appealed the district court's summary-judgment decision, will be resolved by this petition. Similarly, none of the Kohs' claims against the other defendants will be resolved by the petition—*e.g.*, the

Kohs' Fourth Amendment false-arrest claims (except against Kim); the Kohs' conspiracy and failure-to-intervene claims; their *Monell* claims; Mrs. Koh's loss-of-consortium claim; and the *respondeat superior* and indemnification theories. Thus, this case will go forward to trial regardless of the outcome of this petition.

Based on the above, if this Court were to grant the petition, it would find itself confronted with the same problems it sought to avoid when it decided *Johnson*—i.e., regardless of the result, the Court will be “faced with approximately the same factual issue again, after trial, with just enough change brought about by the trial testimony [] to require it, once again, to canvass the record.” *Johnson*, 515 U.S. at 316-17. There is no reason why petitioners cannot raise these issues after judgment in order to avoid two cumbersome reviews of the record by appellate courts with overloaded dockets. See *Behrens v. Pelletier*, 516 U.S. 299, 322, (1996) (Breyer and Stevens, JJ. dissenting) (recognizing interlocutory appeals “threaten[] busy appellate courts with added numbers of essentially similar, if not repetitive, appeals, at a time when overloaded dockets threaten the federal appellate system.”).

**D. The Petition's Fact-Bound Challenges
Make This a Poor Case to Consider the
Numerous, Distinct Issues**

Compounding the number and complexity of issues raised; the need to resolve each and every issue; and the fact that resolving all the issues would be merely academic, are the intense factual disputes underlying the inherently fact-bound questions

presented. As mentioned above, the district court performed an exhaustive review of the record and issued an extraordinarily detailed opinion, granting summary judgment on some claims and denying it on others. The court devoted 30 pages to explaining the material disputes of fact that precluded qualified immunity on Koh's Fifth Amendment claim at the summary-judgment stage. App. 65-95a.

For its part, the Seventh Circuit also reviewed the record evidence and identified numerous disputes of fact on central issues necessary to resolve Koh's claims. All told, the district and circuit courts identified at least thirty factual disputes, see SOC §§ III(B)-(C), *supra*.

Ultimately, consideration by the Court of these numerous factual issues would lead to the conclusion that there are, at best, many factual disputes for trial. See *Hurt v. Wise*, 880 F.3d 831, 847 (7th Cir. 2018) (“[W]hen an interrogation is infected with numerous problems, a full trial may be necessary before a final characterization of the process is possible.”). It is not a wise use of the Court's resources to conduct an extensive fact-bound inquiry in a case going to trial. For this reason as well, the petition should be denied.

**II. THE SEVENTH CIRCUIT'S
DISMISSAL OF THE APPEAL FOR
LACK OF JURISDICTION IS A
STRAIGHT-FORWARD
APPLICATION OF THIS COURT'S
PRECEDENT**

**A. This Court's Cases Establish that
Qualified-Immunity Appeals Falling
Within the Collateral Order Doctrine
Are Limited to Purely Legal Questions**

The collateral-order doctrine is a limited exception to the final judgment rule that permits appeals of non-final orders that: (1) conclusively determine a disputed question; (2) resolve an issue separate from the merits; and (3) are effectively unreviewable at final judgment. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 542, 546 (1949); *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863, 867–68 (1994). In *Mitchell v. Forsyth*, this Court extended this doctrine to denials of immunity at summary judgment. 472 U.S. 511, 525–30 (1985). Such denials can sometimes be appealed, but “the *Cohen* framework breaks down if there is no separation between the merits of the underlying lawsuit and the subject matter of the collateral order being appealed.” *Jones v. Clark*, 630 F.3d 677, 679 (2011). “The problem, as the [Supreme] Court has recognized, is that a great number of orders denying qualified immunity at the pretrial stage are linked closely to the merits of the plaintiff’s claim.” *Id.*

In response to this “problem,” the Court in *Johnson* drew a strict line: jurisdiction in qualified-immunity appeals is limited to “abstract issues of

law,” 515 U.S. at 317, i.e.—no jurisdiction exists for qualified immunity appeals that seek review of a district court’s sufficiency of the evidence determination. *Id.* at 319-20.

In reaching this holding, the Court in *Johnson* carefully considered the competing underlying principles of the final order doctrine and immunity for public officials. *Id.* The Court provided three reasons for its ruling. First, the Court’s holding in *Mitchell* extended the collateral order doctrine to cover qualified immunity only in those limited circumstances where an appeal presents a purely legal question. *Id.* at 313.

Second, the immediate appealability requirement set forth in *Cohen* necessitated that the issue on appeal be separate from the merits, and the holding in *Mitchell* “rested upon the view that ‘a claim of immunity is conceptually distinct from the merits of the plaintiff’s claim.’” *Id.* at 514 (quoting in part, *Mitchell*, 472 U.S. at 527). By contrast, where:

a defendant simply wants to appeal a district court’s determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such “separate” question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff’s claim on the merits.

515 U.S. at 314. The Court in *Johnson* correctly observed that to take what the petitioners there described as a “small step” to expand jurisdiction to include sufficiency of the evidence appeals, would not be so small. Instead, such an expansion would

“do more than relax the separability requirement—it would in many cases simply abandon it.” 515 U.S. 315. Finally, the Court in *Johnson* balanced the competing considerations of “avoiding the cost and expense of piecemeal review on the one hand and the danger of denying justice by delay on the other,” and concluded that “immunity appeals interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law.” 515 U.S. at 318.

The Court reaffirmed *Johnson* during its next term. See *Behrens*, 516 U.S. at 313. *Johnson* has not been undermined or abrogated in any of the Court’s subsequent decisions.²

B. No Circuit Split Exists About the Jurisdictional Limits Set Out in *Johnson*

Contrary to petitioners’ contention, there is no split among the circuits about the clear limits that *Johnson* places on appellate jurisdiction.³ Nor is

² *Johnson* has not been undermined by this Court’s subsequent decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), as petitioners argue, see Pet. 17-18. To the contrary, *Plumhoff* re-affirmed that reviewing the sufficiency of the evidence is not a legal issue; that doing so is often intertwined with determinations a trial court makes later in a case; and that appellate courts have “no comparative expertise” to review the sufficiency of the evidence. 134 S. Ct. at 2019 (citing *Johnson*, 515 U.S. at 309-10 & 314).

³ Petitioners fail to address the Seventh Circuit’s en banc opinion in *Stinson v. Gauger*, 868 F.3d 516 (2015), which noted that “[n]o Supreme Court decision has criticized *Johnson*; to

there circuit “disarray” over the application of *Johnson*—that notion is an invention of the petitioners’ making. Indeed, no court has adopted the petitioners’ proposed extension of appellate jurisdiction to review a district court’s inferential finding of facts.

Rather, all appellate courts reviewing qualified immunity appeals in *Johnson*’s wake have applied its law-fact jurisdictional divide without deviation. See, e.g., *Walton v. Powell*, 821 F.3d 1204, 1208-1210 (10th Cir. 2016) (Gorsuch, J.) (holding that circuit court had jurisdiction under *Johnson* to reach the legal argument that plaintiff’s version of the facts was insufficient to state a claim under the First Amendment, reasoning that, although it could not resolve a factual dispute, it did have jurisdiction to assess whether the facts assumed by the district court—viewed in favor of the plaintiff—“fall in or out of legal bounds.”); *Mallak v. City of Baxter*, 823 F.3d 441, 446 (8th Cir. 2016) (*Scott* and *Plumhoff* did not alter jurisdictional holding that no appellate

the contrary, the Court continues to rely on it post-*Harris*.” *Id.* at 524 (citing *Plumhoff*, 134 S. Ct. at 2018–19; *Ashcroft v. Iqbal*, 556 U.S. at 671, 673–74; *Ortiz v. Jordan*, 562 U.S. 180, 188–91 (2011)); see also *Ortiz*, 562 U.S. at 190 (describing qualified immunity appeals that raise legal issues as those that “typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law” (citing *Behrens*, 516 U.S. at 313 and *Johnson*, 515 U.S. at 317)). “Nor has the Court disavowed its pre-*Harris* reliance on *Johnson* in multiple cases.” *Stinson*, 868 F.3d at 524 (citing *Behrens*, 516 U.S. at 312-13; *Johnson v. Fankell*, 520 U.S. 911, 922 (1997); *Crawford-El v. Britton*, 523 U.S. 574, 595, 597 n.18 (1998); *Richardson v. McKnight*, 521 U.S. 399, 402 (1997)).

jurisdiction exists to review the sufficiency of the evidence in case where defendants argued record lacked evidence of improper motive); *Penn v. Escorsio*, 764 F.3d 102, 106 & n.2 (1st Cir. 2014); *George v. Morris*, 736 F.3d 829, 835 (9th Cir. 2013) (rejecting the argument that *Scott* altered *Johnson* and its progeny on scope of appellate jurisdiction); *Via v. LaGrand*, 469 F.3d 618, 624 (7th Cir. 2006); *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (*en banc*); *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 62 (3d Cir. 2002) (rejecting the argument that *Johnson* did not apply to disputes about intent as opposed to conduct and holding that *Johnson*'s jurisdictional boundary "clearly appl[ies] to factual disputes about intent, as well as conduct."); *Koch v. Rugg*, 221 F.3d 1283, 1297 (11th Cir. 2000) (interpreting *Johnson* and *Behrens* to find no jurisdiction over appeal in racial discrimination case where defendants' appeal was sufficiency of the evidence in the record to infer discriminatory intent "which is prototypically a factual determination derived from circumstantial evidence by the trier of fact").⁴

⁴ Petitioners point to a purported "narrow" interpretation of *Johnson*. Pet. 14. None of the authorities petitioners cite has adopted such an interpretation. In fact, the cases applied the straightforward application of *Johnson* in which appellate courts review only legal issues, and in doing so, rely on the facts the district court credited and reasonable inferences derived therefrom. *Id.* at 21-22. While the court in *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997), reviewed the underlying factual

In sum, the appellate courts are not confused on this issue. For this reason, the Court should deny the petition.

C. The Seventh Circuit Correctly Held that It Lacked Jurisdiction to Decide Petitioners’ Interlocutory Appeal

In dismissing the appeal, the circuit court properly relied on this Court’s rulings and uncontroverted constitutional principles to determine that it lacked jurisdiction. App. 25a. The court correctly held that the numerous factual disputes precluded jurisdiction under a straightforward application of *Johnson. Id.*

Moreover, the court correctly determined that before it could answer the “abstract issue[] of law” allowed on interlocutory appeal—i.e., “whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged

record, that case is inapplicable here. In *Winfield*, unlike here, the district court failed to identify the facts on which its qualified immunity decision was based. *Id.* at 533. Finally, the single concurrence in *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013), relied on by petitioners, has been rejected repeatedly by the Sixth Circuit, including the *Romo* majority, see *id.* at 675; *DiLuzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604, 609 (2015), *Kindl v. City of Berkley*, 793 F.3d 391 (2015), *Hopper v. Plummer*, 887 F.3d 744, 757 (2018), and the Seventh Circuit, see *Hurt v. Wise*, 880 F.3d 831, 839, cert. denied, 139 S. Ct. 412, and cert. denied sub nom. *Vantlin v. Hurt*, 139 S. Ct. 412 (2018) (rejecting the defendants’ argument to “revisit the inferences that the district court found could reasonably be drawn from [the plaintiffs’] recorded interrogation” because to do would go “beyond our jurisdiction on this interlocutory appeal.”).

actions,” *Johnson*, 515 U.S. at 312, 317—it first would have had to resolve multiple factual disputes. *Id.* at 16a-21a. The court correctly held that it lacked jurisdiction to engage in that exercise, which would have required it to delve into the record, weigh competing evidence, and decide in the first instance heavily disputed facts. *Id.*

III. PETITIONERS’ SECOND AND THIRD QUESTIONS PRESENTED ARE NOT PROPERLY BEFORE THIS COURT

The petition’s second and third questions presented concern whether, on the merits, petitioners are entitled to qualified immunity. Pet. i, 26-33. The Seventh Circuit never considered these issues because of its dismissal of the appeal on jurisdictional grounds. Because this Court is “a court of final review and not first view,” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)), the question of whether petitioners are entitled to qualified immunity is not properly before this Court. This Court should not consider the merits of the officers’ qualified-immunity defense, if at all, unless the circuit court rules on the merits in the first instance. Accordingly, if this Court determines there is a basis for the circuit court to exercise jurisdiction, it should remand this matter for further consideration.

To the extent that the Court were inclined to resolve messy factual disputes and wade into the voluminous summary-judgment record, it should easily conclude that the district court correctly determined that petitioners: (1) violated long-

established Fifth Amendment law; (2) were plainly aware that Koh suffered pronounced mental and physical deficits, including an inability to speak the language of the interrogation and a denial of essential medications; and (3) through the use of myriad specific tactics, long held to be impermissibly coercive, petitioners overbore Koh's will and coerced his false confession.

A. The District Court Correctly Determined that Petitioners Used Impermissible Tactics to Coerce a Confession from Koh

The district court correctly found petitioners' tactics—including exploiting Koh's mental and physical impairments caused by his inability to comprehend English and his lack of sleep, needed medications, and food; failing to advise him of his *Miranda* rights, giving him false information about those rights, and questioning him after he invoked his right to counsel; keeping him in extended isolation; feeding him facts of the crime they made up; and categorically rejecting any answer unless it was incriminating—were impermissible. App. 65-95a. In addition, the district court correctly found that petitioners' multiple coercive threats to Koh—including Kim's display of his gun, Graf yelling at Koh, Graf impermissibly touching Koh and intimidating him by sitting just inches away, and Graf's explicit threat to keep interrogating Koh for "days and days and days"—were tactics that plainly violated clearly established constitutional rights, as held in *Howell v. United States*, 442 F.2d 265, 272

(7th Cir. 1971) (citing *Malloy v. Hogan*, 378 U.S. 1, 7 (1964)). *Id.* at 76a-77a.

The petition does not point to any law that suggests that these types of threats and coercion were constitutionally permissible tactics to induce a confession. Instead, such threats—considered alone or in totality—can render a confession involuntary under this Court’s precedents, as interpreted by the circuits. See, e.g., *Malloy v. Hogan*, 378 U.S. at 7; *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (credible threat of violence is coercion); *Weidner v. Thieret*, 866 F.2d 958 (7th Cir. 1989) (implication of future physical force is improper); *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987) (“police threats to an accused or his family render a resulting confession involuntary”).

Regardless, this case is not a good vehicle for examining each and every tactic discussed by the district court.⁵ As described above, the district court’s ruling rests on solid law, universally followed by all circuits, establishing that officers must not overbear the will of the suspect. The petition does

⁵ As the Seventh Circuit held, appellate courts lack jurisdiction to consider arguments challenging a district court’s conclusion that attacks one among many vulnerabilities or tactics. See *Jackson v. Curry*, 888 F.3d 259, 265–66 (7th Cir. 2018) (“In sum, the district court did not conclude [appellants’] comments regarding race, in a vacuum, violated a clearly established right, but rather considered the totality of the alleged circumstances. So even if in a vacuum the race comments do not violate such a right, the district court committed no error because it did not hold they did. As the district court made no conclusion here raising a pure legal issue regarding qualified immunity, we lack jurisdiction.”).

not present an opportunity to resolve a circuit split. Instead, the petition is merely an invitation for the Court to conduct a survey of fact-bound cases across many circuits, without actually resolving the issues presented in this case.

B. The District Court Correctly Determined that Petitioners' Impermissible Tactics Violated Clearly Established Law

The district court properly applied the law from this Court and the Seventh Circuit in adjudicating qualified immunity on Koh's coerced-confession claim. Petitioners cite a number of cases that they argue the district court failed to strictly follow, but none are outcome determinative of this appeal. Thus, even if petitioners were correct about the district court misapplying the law—a nonstarter, as described above—their concerns would be merely academic and, thus, do not warrant this Court's review.

C. The Courts Below Correctly Determined that Petitioners' Causation Argument is a Factual Question Unrelated to Qualified Immunity

Petitioners concede that proximate cause is generally a fact issue, and can only be a legal issue where the facts are not in dispute. Pet. 30. But as stated above, while petitioners pay lip service to stipulating to facts, their petition, like their arguments in the district and circuit courts, turns on heavily disputed facts.

The Seventh Circuit was thus correct in determining that it lacked jurisdiction to consider superseding causation. The question of whether

third-party actors intervened to cause a violation of Koh's rights that was an unforeseeable result of petitioners' own misconduct is a question that: (a) necessarily involves fact disputes; and (b) is unrelated to the qualified-immunity question of whether petitioners violated Koh's clearly established rights. *Armstrong v. Daily*, 786 F.3d 529, 537–38 (7th Cir. 2015); see also *Ortiz*, 562 U.S. at 188.

Neither court's ruling that causation is a factual question unrelated to qualified immunity warrants a grant of certiorari, as both involved the proper and consistent application of long-standing law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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