No. 19-_____

In the

Supreme Court of the United States

MATTHEW REID HINSON,

Petitioner,

v.

OFFICER R.A. BIAS; OFFICER B.K. KREMLER; OFFICER S.T. WILLIAMS; OFFICER Z.M. ANDERSON; AND LT. ROB SCHOONOVER,

Respondents.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Courts of Appeals have jurisdiction to hear appeals from final decisions issued by district courts. *See* 28 U.S.C. § 1291. A narrow exception exists for "collateral orders" that do not end the litigation but effectively amount to final decisions on issues that can be separated from the central issues that remain to be tried. The denial of summary judgment in a qualified-immunity case is such a collateral order—but *only* with respect to the *legal* issues decided by the district court in its qualified-immunity analysis. As this Court has explained, the limited appellate jurisdiction to review those orders does not extend to the "portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which *facts* a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (emphasis added).

In this case, the Eleventh Circuit vacated a district court order denying summary judgment based only on its disagreement with the district court's review of the factual record—specifically, the district court's conclusion that a surveillance video tape would allow a reasonable juror to conclude that petitioner Matthew Hinson was not resisting arrest. The question presented is:

Did the Eleventh Circuit exceed its limited jurisdiction when, on appeal from a denial of summary judgment in a qualified-immunity case, it vacated the district court's order based on its factual disagreement with the district court's review of a surveillance video?

PARTIES TO THE PROCEEDING

Petitioner Matthew Hinson was appellee below.

Respondents R.A. Bias, B.K. Kremler, S.T. Williams, Z.M. Anderson, and Rob Schoonover (the Officers) were appellants below.

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PETITION FOR A WRIT OF CERTIORARI

Matthew Hinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's June 14, 2019 opinion vacating the Middle District of Florida's order denying summary judgment is published at 927 F.3d 1103 and reproduced at App. 1.

The Middle District of Florida's order denying summary judgment is unpublished but is reproduced at App. 37.

The Eleventh Circuit's order denying rehearing and rehearing en banc is reproduced at App. 72–73.

JURISDICTION

The judgment of the Eleventh Circuit was entered on June 14, 2019. App. 1. On July 5, 2019, Mr. Hinson timely petitioned for rehearing and rehearing en banc. The Eleventh Circuit denied rehearing on August 14, 2019. App. 72.

On October 31, 2019, Justice Thomas extended the time to file a petition for a writ of certiorari until January 11, 2020.

This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1) to consider the Eleventh Circuit's exercise of jurisdiction.

STATUTES INVOLVED

28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals

> from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

In 28 U.S.C. § 1291, Congress limited the jurisdiction of the federal appellate courts to appeals from "final decisions of the district courts." This Court has recognized a narrow exception to that limitation for "collateral orders"—orders that do not end the litigation in the district court but that effectively amount to final decisions with respect to important issues that are collateral to and can be separated from the issues that remain to be tried.

A district court's denial of summary judgment in a qualified-immunity case is an appealable collateral order—but *only* as to the two core *legal* issues in the district court's qualified-immunity analysis: (1) whether the facts alleged amount to a constitutional violation and, if so, (2) whether the law rendering the conduct a constitutional violation was clearly established and so put the officers on notice that their actions would subject them to liability.

In *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier,* 516 U.S. 299 (1996), this Court made clear that the appellate courts' limited

jurisdiction to review a denial of summary judgment does *not* permit review of the district court's conclusion that a genuine issue of material fact exists concerning whether alleged conduct took place. That limitation follows from the reasoning behind the collateral-order exception: the district court's conclusion as to what *facts* the evidence may reasonably show at trial is in no sense collateral to or separate from the central issues to be tried. The whole point of a trial is to figure out what actually occurred. Nothing about a district court's preliminary review of the factual record in denying summary judgment is final, nor can it be separated from the issues that remain to be tried. Full-blown appellate review of the factual record before trial thus exceeds the narrow bounds of the judge-made collateral-order exception to section 1291's finality requirement.

Almost since the moment this Court decided *Johnson* and *Pelletier*, the Eleventh Circuit has sought to recapture the plenary appellate jurisdiction over non-collateral questions this Court recognized was not available before trial. Notwithstanding this Court's law, the Eleventh Circuit claims it has authority on appeal to conduct a *de novo* review of the record and to find facts in the first instance. And that is precisely the type of extra-jurisdictional pretrial review the appellate court conducted here. Petitioner Matthew Hinson brought this section 1983 excessive-force suit alleging that a group of officers repeatedly struck him even though he was *not* resisting arrest. The officers conceded the use of force but asserted qualified immunity based on affidavits in which they claimed that the blows were necessary because Mr. Hinson *was* resisting arrest. In a thorough, thirty-six-page

order, App. 37–71, a district judge with twenty-five years of experience on the bench carefully reviewed the factual record and denied summary judgment based on his conclusion that a surveillance video would allow a reasonable juror to conclude that Mr. Hinson was *not* resisting arrest.

On appeal, no party disputed that *if* Mr. Hinson was not resisting arrest, the officers' admitted use of force (1) was excessive under the Fourth Amendment and (2) violated clearly established law. In other words, the two core legal issues in the district court's qualified-immunity analysis were not in question at all. Instead, the officers merely asked the Eleventh Circuit to review *de novo* the district court's factual conclusions regarding the surveillance video. Having conducted its own "frame by frame" review, App. 10, the Eleventh Circuit then concluded that the video failed to support Mr. Hinson's allegation that he was not resisting arrest and therefore failed to raise a genuine question of fact when weighed against the officers' affidavits. The appellate court thus vacated the district court's pretrial order based only on its disagreement about which facts Mr. Hinson may be able to prove at trial through the video record.

The Eleventh Circuit's decision cannot be reconciled with this Court's decisions in *Johnson* and *Pelletier*, because it far exceeded the limited scope of pretrial appellate review permitted under the collateral-order exception. In view of this extreme departure and considering the burdens that interlocutory review imposes on the lower federal courts and on civil-rights plaintiffs awaiting trial, this

Court should grant the petition, summarily vacate the decision below, and remand for further proceedings.

If the Court is not inclined to summarily vacate, it should grant certiorari to address the split in authority that the Eleventh Circuit has created with the law of the other regional circuits, which read *Johnson* and *Pelletier* to prohibit the pretrial appellate review the Eleventh Circuit exercised here. Under the Eleventh Circuit's approach, any trial-court finding of fact with a connection to either of the core legal issues is reviewable before trial—effectively allowing the judge-made collateral-order exception to swallow the finality requirement of section 1291 and usurping the pretrial fact-assessing function of the district courts. This important and frequently recurring issue is worthy of this Court's review.

STATEMENT

Legal background. Almost as soon as the ink dried on this Court's *Johnson* and *Pelletier* opinions, the Eleventh Circuit began deviating from their rule. In *Johnson v. Clifton*, 74 F.3d 1087 (11th Cir. 1996), the Eleventh Circuit held that so long as one of the core qualified-immunity legal questions was *also* being appealed, the court of appeals could "conduct its own review of the record in the light most favorable to the nonmoving party." *Id.* at 1091. It offered only a rhetorical nod in the direction of this Court's rulings, adding that "[o]f course, if there is *any evidence* in the record to support the District Court's ruling that there was a genuine issue of material fact as to whether the official actually engaged in the conduct that violated clearly established law, the District Court's factual ruling will not be disturbed." *Id.* (emphasis added)

(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Mere months later, in *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996), the court noted that although "*Johnson* … raised some doubts about the correctness" of the Eleventh Circuit's "*de novo*" approach of deciding itself "what the facts are at this stage," "that doubt has been resolved in [the Eleventh Circuit's own] recent decisions": "evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues" are reviewable. *Id.* at 1486. The *Cottrell* court offered no limiting principle—how a panel would determine if the "evidentiary sufficiency issue[]" was in fact "part and parcel of the core qualified immunity issues." *Id.* The *Cottrell* court also walked back *Clifton*'s statement suggesting that "any evidence" would be sufficient to affirm the district court's order. It held instead that whether to credit a district court's conclusion that a genuine issue existed was a matter not for deference but for circuit-court "discretion" whereby the reviewing court might "accept the district court's findings, if they are adequate" but was "not required to accept them." *Id.*

In *McMillian v. Johnson*, decided a month later, the Eleventh Circuit answered the question left unresolved in *Cottrell*, making the district court's factual analysis *always* reviewable when a legal issue, no matter how insubstantial, is also raised: it held "an appellate court may address the factual issue of what conduct the defendant engaged in"—not *if* the evidentiary sufficiency issues were part of the core analysis, but rather "*because* the issue is a necessary part of the core qualified immunity analysis of

whether the defendant's conduct violated clearly established law." 88 F.3d 1554, 1563 (11th Cir. 1996) (emphasis added), *amended on other grounds by denial of reh'g*, 101 F.3d 1363; *see also Stanley v. City of Dalton*, 219 F.3d 1280, 1287 (11th Cir. 2000).

Factual background. While departing from the scene of an altercation during which he fatally stabbed another man at a Florida restaurant, Navy veteran Matthew Hinson stopped his truck at a parking-garage pay booth. Surveillance video from several cameras in the parking garage shows much of what ensued. *See* Videotape: Matthew Reid Hinson Parking Lot Video (July 12, 2017), https://bit.ly/2FPzFka ("Hinson Video").[1] While he was paying his parking fee, officers of the Jacksonville Sheriff's Office approached his truck with their weapons aimed at Mr. Hinson. Mr. Hinson, with his hands up and palms out, dropped a knife out of the truck window. *Id.* at 0:34:29. Moments later, at the officers' instruction and with Officer Bias's assistance in opening his truck door, Mr. Hinson exited the truck with his hands raised. *Id.* at 0:35:40. Officer Bias guided Mr. Hinson through the narrow path between his truck and the pay booth. *Id.* at 0:35:44. Mr. Hinson did not offer any

[1] On June 21, 2018, Mr. Hinson filed this version of the video—which combines views from several cameras on the scene—as supplemental authority with the Eleventh Circuit. This version differs from the camera recordings the district court considered only in that it combines the various camera angles in a single frame for the viewer's ease of use. The cameras recorded no sound. Because the video recording is triggered by motion, there are several discontinuities in the video record.

resistance during this time—or at any time during the arrest. *See id.* at 0:35:44–0:35:54.

But then Officer Anderson holstered his gun, grabbed Mr. Hinson's left arm, and threw him face-first to the ground. *Id.* at 0:35:55–0:35:57. Officer Bias knelt on Mr. Hinson, and he and Officer Anderson delivered a series of blows to Mr. Hinson's head and back. *Id.* at 0:35:59–0:36:12. Other officers were present but did nothing to stop the beating. *See id.* Mr. Hinson remained on the ground for a minute and a half, during which Officer Anderson celebrated his beating of Mr. Hinson. *Id.* at 0:36:12–0:37:52. Two of the officers can be seen briefly illuminating Mr. Hinson with some kind of handheld light source—perhaps flashlights. *Id.* at 0:36:49, 0:36:52.

The Officers stood the bloodied, dazed, and handcuffed Mr. Hinson up, only to let him fall back to the pavement. *Id.* at 0:37:52–0:37:58. The video then shows another officer subtly kicking the handcuffed and helpless Mr. Hinson in the groin. *Id.* at 0:38:00.

From this series of assaults, Mr. Hinson suffered numerous visible injuries, which continued to bleed for hours while he was interrogated, and which went unseen by any medical professional until nine hours after his arrest. *See* App. 64–65, 66.

Mr. Hinson also told interrogating officers that he had lost consciousness during the officers' assault—no surprise, given that he had been thrown head-first to the ground and then struck in the head—with the result that he has no independent recollection of the Officers' attacks on him after putting his hands up in response to the officers' commands. *See* App. 67.

District court proceedings. Mr. Hinson filed a verified complaint asserting claims under 42 U.S.C. § 1983 against five officers. He alleged that some of them used excessive force during the arrest and that others failed to protect him from the needless beating, violating his Fourth Amendment right against unreasonable seizure. He further alleged that he was not resisting arrest. *See* App. 49 (noting that "the question remains as to … whether Plaintiff was actively resisting arrest").

The Officers moved for summary judgment on qualified-immunity grounds based on affidavits in which they conceded the use of force but claimed it was justified because Mr. Hinson was resisting arrest. App. 52. In response, Mr. Hinson said that all he could personally recall about the incident was that he put his hands up when the officers instructed him to do so. *See* App. 67. Given that he lost consciousness when his head hit the pavement, Mr. Hinson had no memory of the arrest after putting his hands up. *Id.* He therefore had to rely on the video as his evidence for the remainder of the events. App. 50.

The district court issued a detailed thirty-six-page opinion denying summary judgment. App. 37–71. In assessing the Officers' assault on Mr. Hinson, the court relied exclusively on the Officers' statements and the video. *See* App. 52–58 (recounting Officers' statements), 59–60 (describing what "the video shows"). Based on those pieces of record evidence, the district court concluded that genuine issues of material fact existed regarding (1) whether Mr. Hinson "disobeyed the officers' orders or resisted arrest, including being handcuffed"; (2) whether Mr.

Hinson "fully submitted to the officers' commands and threw the knife out [of] the truck window or dropped the knife as he exited the vehicle," (3) whether Officer Anderson threw Mr. Hinson "to the ground after [he] raised his hands and complied with the officers' commands"; and (4) whether Officers Anderson and Bias repeatedly struck Mr. Hinson "after he was taken to the ground." App. 47.

Those jury questions—whether Mr. Hinson was resisting arrest—precluded qualified immunity at the summary judgment stage. *If* Mr. Hinson had not been resisting arrest, the force the Officers used was excessive and violated clearly established law. *See* App. 48 (citing *Reese v. Herbert*, 527 F.3d 1253, 1274 (11th Cir. 2008)). In light of its factual conclusion that a reasonable juror could find that Mr. Hinson was not resisting his arrest, the district court denied the Officers summary judgment. App. 70. The Officers timely appealed.

Proceedings in the Eleventh Circuit. On appeal, the Officers did not raise and the Eleventh Circuit did not purport to identify, much less correct, any error in the district court's legal analysis on either core qualified-immunity issue of law. *See generally* App. 1–36. There was no dispute that *if* Mr. Hinson had not been resisting arrest—a fact question—Eleventh Circuit law clearly established that the use of such force to effect his arrest would have been excessive and thus an unreasonable seizure under the Fourth Amendment. *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008); *see also Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002); *Slicker v. Jackson*, 215 F.3d 1225, 1233 (11th Cir. 2000).

Instead, the officers asked the appellate court to review the district court's conclusion that a question of fact exists as to whether Mr. Hinson was resisting arrest. And that is what the Eleventh Circuit did. It dived directly into a painstaking re-review of the record the district court had already assessed. *See* App. 4–11. The court traversed the officers' affidavit assertions and then the video record of the arrest, drawing different conclusions on its *de novo* view of the record evidence from those the district court had drawn. *Id*. The appellate panel rejected the district court's conclusion that a reasonable juror viewing the video record of Mr. Hinson's arrest could conclude that it showed he had offered no resistance. App. 27 (noting that the court would "credit the Officers' statements" contending that Mr. Hinson resisted). It substituted its own finding that the video is "not inconsistent with the officers' description of what occurred during the arrest," at least "for the most part." App. 8.

The Eleventh Circuit reasoned that no genuine issue of material fact existed—that "what looked at first like a tale of two stories turns out to be but a single one," App. 2, and that the "video recordings simply do not, in any material way, contradict the Officers' version of what occurred," App. 36. It concluded that Mr. Hinson's "proof … is not in the video recordings here," and vacated the district court's order. *Id*. This ruling effectively saddled Mr. Hinson with an unspecified burden of persuasion before an appellate panel that did not explain why it believed the video (1) *conclusively* failed to show plaintiff's nonresistance or (2) was insufficiently probative to

raise a genuine question of fact as against written assertions never subjected to cross-examination.

Given the binding, unfavorable Eleventh Circuit law on jurisdiction discussed above, Mr. Hinson did not raise the issue of jurisdiction in his answer brief to the panel. *See United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."). But, of course, questions of subject matter jurisdiction cannot be forfeited or waived, *see Union Pac. R.R. v. B'hood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009), and Mr. Hinson raised the lack of appellate jurisdiction when seeking rehearing from the en banc court—the first entity that could effect any change in the Eleventh Circuit's unfavorable (and incorrect) panel precedent, *see Steele*, 147 F.3d at 1317–18; *Smith v. GTE Corp.*, 236 F.3d 1292, 1301–02 (11th Cir. 2001). The Eleventh Circuit denied rehearing en banc. App. 72–73.

REASONS FOR GRANTING THE PETITION

I. This Court Should Summarily Vacate the Eleventh Circuit's Decision.

Because the Officers appealed and the Eleventh Circuit decided only the question whether the record presented genuine issues of material fact concerning Mr. Hinson's conduct at the scene of the arrest, the Eleventh Circuit lacked jurisdiction to consider the Officers' appeal or to vacate the district court's order.

A. As a general matter, the Courts of Appeals have jurisdiction to hear appeals only from district courts' "final decisions." 28 U.S.C. § 1291. This Court has recognized a narrow exception to this general rule,

permitting interlocutory appeals of "collateral orders" that effectively amount to final decisions. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Collateral orders "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*

The denial of summary judgment in a qualified-immunity case is such a collateral order, but *only* "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). It has been settled for more than two decades that when considering a pretrial appeal from a denial of summary judgment in a qualified-immunity case, "collateral order" jurisdiction of federal appellate courts permits consideration of only those interlocutory appeals raising at least one of two legal issues: *first*, whether the right at issue was clearly established, and, *second*, whether "the facts alleged (by the plaintiff or, in some cases, the defendant) support a claim of violation" of such a clearly established right. *Johnson*, 515 U.S. at 313. As this Court made clear in *Johnson*, this limited jurisdiction does not permit pretrial appellate review of the "portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id.* That is so because "the District Court's determination that the summary judgment record … raised a genuine issue of fact concerning [appellants'] involvement in the alleged beating … [is]

not a 'final decision' within the meaning of the relevant statute." *Id.*

This limitation follows directly from the rationale behind the collateral-order doctrine. When "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 … 'separate' question … from the fact-related legal issues that likely underlie the plaintiff's claim on the merits." *Id.* at 314. In other words, the interlocutory challenge to the factual premise of the order is not collateral, but only an iteration of the central merits question. *See Cohen*, 337 U.S. at 546.

This Court further clarified the "'conceptual distinct[ion]'" between the legal questions of qualified immunity—which can be decided without an examination of whether the evidence shows a dispute of material fact—and the merits of the plaintiff's claim. *Johnson*, 515 U.S. at 312 (quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). It later expanded its reasoning in *Behrens v. Pelletier,* 516 U.S. 299 (1996), holding that appellate review is permissible when the question is whether conduct about which the district court found *no dispute* is objectively reasonable, but that review is barred when "the sufficiency determination" at issue is "whether the evidence could support a finding that *particular conduct occurred.*" *Id.* at 313 (emphasis added).

B. Here, the Eleventh Circuit exceeded its limited jurisdiction to review the denial of qualified immunity at the summary-judgment stage. Its opinion did not decide any core legal question related to the qualified-

immunity analysis, because the appeal did not present one. The "facts alleged" here were that Mr. Hinson was brutally beaten while not resisting arrest. All parties agreed that the "gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force," and thus violates the Fourth Amendment. *Hadley*, 526 F.3d at 1330. And all parties agreed that this law was clearly established in the Eleventh Circuit. *See id.* at 1329; *see also Lee*, 284 F.3d at 1198; *Slicker*, 215 F.3d at 1233. There was no dispute that "the facts alleged … support a claim of violation of clearly established law." *Johnson*, 515 U.S. at 313.

With no legal question in dispute, the appellate court vacated the denial of summary judgment based *only* on its disagreement with the district court's view of the factual record. *See* App. 28. Mr. Hinson alleged that he was not resisting arrest when he was beaten, *see* App. 49, and the district court denied summary judgment because it concluded that a jury could reasonably find that the surveillance video supported Mr. Hinson's version of the events, App. 47, 51. But the Eleventh Circuit completed its own "frame by frame" appellate "review[]" of portions of the video recording of the assaults, which it then compared with the Officers' statements. App. 10. Having reviewed the video and those statements *de novo*, the appellate court stated: "[T]he proof of Mr. Hinson's case is not in the video recordings here. Those video recordings simply do not, in any material way, contradict the Officers' version of what occurred during and after Hinson's arrest." App. 36. It vacated the district court's pretrial ruling based on its appellate fact-finding that Mr. Hinson's "proof … is not in the video

recordings here." *Id.* This was a plain violation of this Court's decisions in *Johnson* and *Pelletier*.

To be sure, the Eleventh Circuit then applied qualified-immunity legal analysis to the new set of facts *it* had found. App. 28–32. But those are not the "facts alleged," and an appellate court cannot bootstrap itself into subject-matter jurisdiction simply by applying after-the-fact legal analysis to a new set of facts it was precluded from finding. Permitting this end-run around *Johnson* would in essence allow the appellate court to convert a district court's nonfinal decision into a final one, subverting section 1291's finality requirement.

The issue the Eleventh Circuit decided can in no way be divorced from the underlying merits of Mr. Hinson's claims to be assessed at trial. *See Johnson*, 515 U.S. at 312; *Pelletier*, 516 U.S. at 313 ("whether the evidence could support a finding that particular conduct occurred … is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision'"). The collateral-order exception does not permit three appellate judges to substitute their pretrial view of the evidence for that of a district judge. The district judge merely concluded that the video creates a question of fact (whether Mr. Hinson was resisting arrest) that a *jury* should resolve—instead of a judge deciding that the officers' self-serving affidavits (which have not even been tested in discovery, much less on cross-examination) entitle them to judgment as a matter of law. The district court's assessment was reasonable—this is not a case

where the plaintiff is relying on sham evidence or where his story is contradicted by the video.[2]

Summary vacatur of the Eleventh Circuit's decision is appropriate in light of this Court's clear precedent in *Johnson* and *Pelletier*. The appellate court blatantly exceeded the limited jurisdiction available under the collateral order exception.

II. If This Court Does Not Summarily Vacate the Eleventh Circuit's Decision, It Should Grant Certiorari to Address the Split in Authority.

The Eleventh Circuit's view of its jurisdiction is irreconcilable with the decisions of its sister circuits. While the Eleventh Circuit claims discretion to undertake a *de novo* review to "decide for [itself] what the facts are at this stage," *Cottrell*, 85 F.3d at 1486, the other regional circuits have declined to review the evidence on a pretrial appeal from a denial of summary-judgment in qualified-immunity cases when those appeals challenge evidence-sufficiency determinations. Those courts have properly recognized the limited scope of jurisdiction under the collateral-order exception. *E.g.*, *McGrew v. Duncan*, 937 F.3d 664, 669–70 (6th Cir. 2019) ("[W]e may examine only purely legal questions.… Yet the officers ask us to reweigh the facts.… We therefore lack jurisdiction to consider this argument."); *Gant v.*

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[2] For that reason, this case does not implicate *Scott v. Harris*, 550 U.S. 372 (2007), which did not address jurisdiction and merely instructed lower courts not to take the plaintiff at his word when his story is "blatantly contradicted" or "utterly discredited" by a video record. *Id.* at 380.

Hartman, 924 F.3d 445, 448 (7th Cir. 2019) (dismissing appeal because "[a]n appellate court may not … reconsider the district court's determination that certain genuine issues of fact exist.") (quotation marks omitted); *Thompson v. Dill*, 930 F.3d 1008, 1012 (8th Cir. 2019) ("Our jurisdiction does not extend to the issue of whether or not the pretrial record sets forth a genuine issue of fact for trial.") (quotation marks omitted); *Ralston v. Cannon*, 884 F.3d 1060, 1066–67 (10th Cir. 2018) ("[I]f a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law."); *Garver v. Brandt*, 584 F. App'x 393, 394–95 (9th Cir. 2014) (appeal dismissed when "contours of the rights at issue … are clearly established" and the court "therefore lack[ed] jurisdiction to review the district court's order" finding "triable issue of fact"); *Cady v. Walsh*, 753 F.3d 348, 359, 361 (1st Cir. 2014) (the "district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on … an issue perceived by the trial court to be an issue of fact" and therefore the court did "not have jurisdiction to review" the case) (quotations and alterations omitted); *Culosi v. Bullock*, 596 F.3d 195, 201 (4th Cir. 2010) ("Whether we agree or disagree with the district court's assessment of the record evidence on that issue … is of no moment in the context of this interlocutory appeal.… [because] 'we possess no jurisdiction over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the

facts actually occurred.'") (quoting *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (en banc)); *Barham v. Salazar*, 556 F.3d 844, 848–49 (D.C. Cir. 2009); *Blaylock v. City of Phila.*, 504 F.3d 405, 411–14 (3d Cir. 2007) ("To accept either of [the Officers'] propositions would require us to review the District Court's determination of which facts are subject to genuine dispute which, as we have already emphasized, *Johnson v. Jones* precludes us from doing in an interlocutory appeal."); *Martinez v. Simonetti*, 202 F.3d 625, 633, 636 (2d Cir. 2000) (concluding that officer's appeal contested only "'evidence sufficiency'" and dismissing appeal); *Fuentes v. Riggle*, 611 F. App'x 183, 189 (5th Cir. 2015) (court may "'review the *materiality* of any factual disputes, but not their *genuineness*'") (quoting *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000)).

Other circuits have also explicitly rejected the Eleventh Circuit's notion that a court of appeals may undertake a *de novo* re-review of the facts so long as a party happens to raise a legal issue alongside the factual one. The First Circuit, for example, declined to use the intermingling of legal and factual issues on a denial of summary judgment as an excuse to exercise jurisdiction, instead properly treating it as a reason to *reject* jurisdiction under *Johnson*. In *Cady*, the First Circuit noted that even though "defendants urge us to view this appeal as presenting a pure issue of law," the factual issues were "inextricably intertwined with whatever 'purely legal' contentions are contained in the … briefs." 753 F.3d at 360. The First Circuit dismissed the appeal, concluding it could not exercise jurisdiction because "were we to attempt to separate the legal from the factual in order to address only

those arguments over which we might permissibly exercise jurisdiction, we simply would not know where to begin." *Id.* That rationale—the idea that the legal and factual issues are not separable and so exercising jurisdiction is *in*appropriate because the question is central, not collateral—is precisely the opposite of the reasoning underlying the Eleventh Circuit's contrary rule. *See McMillian*, 88 F.3d at 1563 (reasoning that the Eleventh Circuit "may address the factual issue of what conduct the defendant engaged in *because the issue is a necessary part* of the core qualified immunity analysis") (emphasis added).

Similarly, the Tenth Circuit has repeatedly held that it "has jurisdiction over appeals challenging the denial of a qualified-immunity-based motion for summary judgment only if a defendant-appellant does not dispute the facts a district court determines a reasonable juror could find but, instead, 'raises only legal challenges to the denial of qualified immunity based on those facts.'" *Ralston*, 884 F.3d at 1067 (quoting *Henderson v. Glanz*, 813 F.3d 938, 947–48 (10th Cir. 2015)). That, again, is the opposite of the Eleventh Circuit's expansive view of its own jurisdiction on qualified-immunity summary-judgment review.

The Eleventh Circuit's law not only runs afoul of the standard this Court announced in *Johnson*, it also opens a significant circuit split on the interpretation of *Johnson*, raising the prospect that it, alone among the appellate courts, possesses interlocutory jurisdiction to consider every appeal from a district court's denial of summary judgment based on qualified immunity.

III. This Issue Is Recurring and Exceptionally Important.

Federal courts are, of course, courts of limited jurisdiction. U.S. Const. art. III. They are tasked with policing their own jurisdiction, "even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). The *Johnson* and *Pelletier* decisions recognize a fundamental limit on that jurisdiction.

The collateral-order doctrine is a gloss on the subject-matter jurisdiction Congress has granted. 28 U.S.C. § 1291; *see Cohen*, 337 U.S. at 546 (noting that collateral-review doctrine is a "practical rather than a technical construction" of § 1291). A collateral order is construed as final because it is collateral to the issues to be tried. *Cohen*, 337 U.S. at 546. But the issues of material fact a district court discovers that prevent the grant of summary judgment to a government officer accused of abuse are not collateral to the questions to be tried; they *are* the questions to be tried. Especially where, as here, the existence of jurisdiction is judicially inferred instead of stated by the law Congress has passed, courts should hew closely to the boundaries of the jurisdiction this Court has announced. The Eleventh Circuit's approach expands its interlocutory subject-matter jurisdiction well beyond the narrow, legal-question-centered circumstances this Court has condoned as a permissible reading of section 1291.

In addition to leaving parties uncertain about the scope of federal jurisdiction, the Eleventh Circuit's *Johnson*-defying rule also has significant practical effects. Plaintiffs in cases where defendants assert

qualified-immunity defenses already face long odds. That doctrine bars before trial the majority of claims of federal law violations by government officials. It requires the plaintiff to persuade the district court that the conduct complained of violates a previously and clearly established constitutional right. Novel methods of abuse or violation therefore ordinarily go unpunished.

And now, in the Eleventh Circuit, even if a violation is clearly established as a matter of law, a plaintiff facing a qualified-immunity summary-judgment motion must convince not only a district judge but also at least two out of three circuit judges that a genuine issue of material fact remains for trial.

In other circuits, a civil-rights plaintiff can meet that test by persuading a district judge, and only that judge, that a jury could reasonably find the facts required by clearly established law to constitute a federal law violation. This barrier alone is formidable, and few plaintiffs surmount it. The Eleventh Circuit approach reduces the plaintiff's odds still further, with another level of review that adds months or years before a trial—or, as here, may deny a trial altogether based on a standardless "discretionary" review. This Court's rule is designed to prevent this kind of chancellor's-foot judgment in which appellate judges substitute their views for those of the jury about issues that remain for trial.

Most fundamentally, the Eleventh Circuit's approach erodes Congress's final-decision principle forbidding most interlocutory appeals under Section 1291. In doing so, it burdens appellate courts with second-bite pretrial appeals on issues of fact, while

disrespecting the district judges who initially resolved those issues and disrupting their trial calendars.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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