No. 19-872

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

REPLY IN SUPPORT OF PETITION

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I. Summary Vacatur Is Appropriate.

A. The Officers' opposition confirms on nearly every page that their appeal did not challenge the district court's legal conclusions related to (1) whether Mr. Hinson's right to be free from unreasonable force during his arrest was clearly established, or (2) whether the facts alleged violated that right. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995). If Mr. Hinson was not resisting arrest—as he alleged and as the district court determined a jury could find from the video record—it was clearly established that his beating at the hands of the Officers constituted excessive force. Pet. 10; *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008); *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002); *Slicker v. Jackson*, 215 F.3d 1225, 1233 (11th Cir. 2000).

And so instead the Officers make clear again and again that their challenge was and is only to the district court's non-final pretrial ruling "that Hinson's version of events in his complaint was supported by the video footage," and that therefore Mr. Hinson had presented a genuine issue of fact concerning whether he was resisting arrest. BIO 8. This becomes even more evident on page 17 of the Officers' brief, where they acknowledge that the district court found that the video creates a jury question: "Here, Petitioner had no evidence other than surveillance video which he, *and the district court*, believed 'could' allow a jury to find in his favor." BIO 17 (emphasis added).

While still claiming that this is not a sufficiency-of-the-evidence case, the Officers cannot even reach

the end of the next sentence before confirming that they *are* challenging the sufficiency of the evidence:

> Unlike the cases cited by Petitioner, this is not a case of "evidence sufficiency" and whether Petitioner had evidence that would create a material fact for a jury. *Petitioner had no evidence in this case to rebut the officers' sworn testimony*, only a surveillance video which does not support his claims and does not contradict any of the officers' statements.

BIO 23 (emphasis added). The Officers' claim that "[p]etitioner had no evidence in this case to rebut the officers' sworn testimony" is the very definition of a challenge to the sufficiency of the evidence, which the Eleventh Circuit lacked jurisdiction to consider under the collateral-order doctrine in this pretrial appeal from the denial of summary judgment. *Johnson*, 515 U.S. at 313; *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

At bottom, the Officers contend that the video footage was no evidence at all, and that their self-serving affidavits were, therefore, the only record evidence of note. *E.g.*, BIO 23–24 ("Petitioner had *no evidence* in this case to rebut the officers' sworn testimony …. This case therefore differs from other cases where evidence was presented on both sides of the qualified immunity issue."). But that contention assumes the conclusion, because it follows *only if* the Eleventh Circuit had jurisdiction to review and reinterpret the video the district court had already assessed—and, moreover, *only if* the Eleventh Circuit's reinterpretation of that record was correct.

B. The Officers' reliance on *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. 765, 771–75 (2014), is misplaced. BIO 11–16. In *Scott*, this Court recognized a narrow exception to the general rule that on summary judgment a court must accept the nonmovant's version of events, holding that it need not do so in the rare circumstance when a video "blatantly contradict[s]" that version. 550 U.S. at 380.

But unlike in *Scott*, the video in this case does not "blatantly contradict[]" Mr. Hinson's allegations. Mr. Hinson has no independent recollection of the events after putting his hands up, which means that his allegations are derived from and based on the video. In other words, Mr. Hinson's version *is* the video. App. 51 ("Therefore, the [District] Court relies on the videos submitted by the parties."); *see also* App. 50 (analyzing *Scott*). Contrary to the Officers' assertion, the district court did not "simply accept[] Hinson's unfounded version of the facts in his complaint." BIO 4. Instead, it reviewed the video, App. 50–52, and found that a jury could find from it that Mr. Hinson was not resisting arrest, App. 47, 50–51.

The Eleventh Circuit disagreed on that factual point—whether the video could allow a jury to conclude that Mr. Hinson was not resisting arrest. App. 24–28. But the Eleventh Circuit *nowhere* concluded that the video "blatantly contradicted" Mr. Hinson's version of events. *See Scott*, 550 U.S. at 380; App. 24–28. Instead—as the Officers concede, BIO 16—it simply performed a *de novo* review and reached a different conclusion about what facts a reasonable juror could find from the video, App. 24–28—an extra-jurisdictional pretrial appellate review of the

sufficiency of the evidence, *see Johnson*, 515 U.S. at 313; *Pelletier*, 516 U.S. at 313.

The Officers' discussion of this Court's decision in *Plumhoff* also does not help them. In that case, the Court concluded that the appellants' challenge fell within the collateral-order doctrine because—unlike here—it raised questions of law based on the facts found by the district court: whether respondents' "conduct [did or] did not violate the Fourth Amendment and [whether it did or] did not violate clearly established law." 572 U.S. at 773. The Court emphasized that in qualified-immunity cases the collateral-order doctrine is limited to those situations in which the qualified-immunity issue is "completely separate from the merits of the action," *id.* at 772, and reaffirmed that such legal "issues are quite different from any purely factual issues that the trial court might confront if the case were tried," *id.* at 773.

Indeed, this Court's recitation of the facts viewed in light most favorable to the plaintiff in *Plumhoff* came directly from the *district court's* order in that case. *See id.* at 768–69 (citing *Estate of Allen v. W. Memphis*, Nos. 05-2489, 05-2585, 2011 WL 197426 (W.D. Tenn. Jan. 20, 2011)). Though the Sixth Circuit felt compelled to examine the video record to determine whether it blatantly contradicted the plaintiff's version, there is no indication that either that court or this one did anything but rely on and apply the law to the district court's recitation of the material facts as reflected in the record.

Here, by contrast, the Eleventh Circuit conducted a *de novo* reassessment of the facts the district court reasoned the jury could find—precisely the type of

factual issue that cannot be separated from the issues that remain to be tried and is thus unreviewable in a pretrial appeal under the collateral-order doctrine.

C. In the end, the Officers and the Eleventh Circuit simply believe that *de novo* review of the factual record is proper whenever the appellate court disagrees with the district court's pretrial assessment of the facts. Pet. 14–17. But that stretches the collateral-order doctrine far beyond its narrow confines and would swallow up the finality rule in 28 U.S.C. § 1291. The collateral-order doctrine is limited to district court "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995).

The Eleventh Circuit's approach fails every element of that test: the factual ruling it reversed was *not* conclusive, was *not* separable from the merits, and would *absolutely* have been reviewable on appeal from the final judgment. The district court merely made a preliminary assessment that the video creates a jury question as to the purely factual issue of whether Mr. Hinson was resisting arrest; it did not make a final finding that he was or was not resisting arrest. What is more, this pretrial ruling was in no way "separable from, and collateral to" the question to be tried to the jury; it *was* the question to be tried to the jury, and it was a plain question of fact. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *see also Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (denial of summary judgment in qualified-immunity case is collateral order only "to the extent that it turns on an

issue of law"). And once the jury rendered its verdict, either Mr. Hinson or the Officers could have appealed the jury's resolution of that question for the Eleventh Circuit's review. *E.g.*, *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 644 (11th Cir. 1990) (articulating sufficiency-of-evidence standard for post-trial review of jury verdict on appeal).

The jurisdictional rule the Eleventh Circuit has adopted has no limiting principle. Under its rule, it may exercise jurisdiction and reverse—as it did here—whenever it merely disagrees with the district court's conclusion that a genuine issue of fact exists. This would convert the collateral-order doctrine into something that might more aptly be called the "wrong order" doctrine, where the court of appeals has the alchemical ability to transmute a nonfinal and central order into a final and collateral one whenever it disagrees with the district court's view of the factual record, thus arrogating to itself jurisdiction to reverse. That is not the rule announced in *Johnson*—and endorsing it would authorize the judge-made derogation of the jurisdictional statute Congress passed in Section 1291.

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

The Officers do not dispute that the Eleventh Circuit believes it has jurisdiction to conduct a plenary pretrial review of the factual record in any qualified immunity case. They emphasize that some of the Eleventh Circuit cases in conflict with *Johnson* and *Pelletier* were "decided decades ago," BIO 24, as

though the passage of time could somehow make the Eleventh Circuit's approach correct.

But of course, the Eleventh Circuit's view is not the law in any other regional circuit, it is not the law this Court announced in *Johnson*, and it is certainly not the law Congress passed in Section 1291. Pet. 17–19 (citing cases from each circuit). Other circuits have plainly rejected the Eleventh Circuit's notion that pretrial appellate re-assessment of the factual record is proper whenever those facts could bear on the qualified immunity analysis. Pet. 19–20 (citing *Cady v. Walsh*, 753 F.3d 348, 360–61 (1st Cir. 2014) & *Ralston v. Cannon*, 884 F.3d 1060, 1067 (10th Cir 2018)). Those other courts have correctly read *Johnson* to limit the collateral-order doctrine's applicability in qualified-immunity summary-judgment pretrial appeals to *legal questions* that must be determined based on the facts as found *by the district court* in the light most favorable to the plaintiff. *See id.*; Pet. 17–18.

The Officers seek to distinguish the other circuits' cases on the ground that in their view Mr. Hinson presented "no evidence" to support his story. BIO 28. But this exercise in question-begging gets no more convincing with repetition. The district court—the only court with jurisdiction to review the factual record—found sufficient evidence in it to raise a genuine issue of material fact as to whether Mr. Hinson was resisting arrest when the Officers subjected him to repeated blows that left him dazed and bloodied. Only by accepting the results of an extra-jurisdictional record review on appeal can that record evidence—including a video that convinced a

commissioned U.S. district judge that a jury of Mr. Hinson's peers could see it as showing that he was not resisting arrest—be converted to "no evidence."

And in any event, even if the Officers were correct that the Eleventh Circuit's expansive, outlier view is the better reading of this Court's *Johnson* and *Pelletier* decisions, that is no reason to deny certiorari. The Eleventh Circuit's view cannot be squared with the reasoning the other circuits employ when applying the *Johnson* rule. *E.g.*, *Cady*, 753 F.3d at 359–60 (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"); *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."). Either way, there is a split in authority, and this Court's guidance is needed to knit it shut.

III. This Issue Is Recurring and Exceptionally Important, and This Case Is a Proper Vehicle to Decide It.

This case is exceptionally important because it involves the question of federal-court jurisdiction. *See* Pet. 21–23. The question presented here is also recurring, as defendants in qualified immunity cases frequently seek appellate re-assessment of the factual record in pretrial appeals under the collateral-order doctrine. *See, e.g.*, Pet. 17–20 (identifying at least sixteen cases raising substantially identical issue).

The Officers cannot make a straight-faced contention that the question presented is not

important and recurring. Instead, they resort to the argument that this case is a poor vehicle. Their primary point is that Mr. Hinson is a bad guy who did a bad thing, while they are good guys for beating him unconscious, and so the Eleventh Circuit "got it right." BIO 32–33. This attempt to distract by means of emphasizing Mr. Hinson's alleged crime betrays the weakness of their jurisdictional argument, such as it is. The Officers' belief that the Eleventh Circuit "got it right" in its re-assessment of the video has nothing to do with the question presented, which is whether the appellate court even had jurisdiction to go to the replay booth and re-assess the video in this pretrial appeal under the collateral-order doctrine.

Further, in making that contention, the Officers contend that if Mr. Hinson is correct, "any plaintiff" could "simply present video footage and ask the court to speculate on what it might show." BIO 33. But that, of course, is precisely what they have done here—only the court they asked to "speculate" happened to be the one without jurisdiction to do so.

The Eleventh Circuit assumed jurisdiction that it did not possess. It followed circuit precedent that invented a jurisdictional rule contrary to *Johnson* and decisions of all other regional circuits. If this case is allowed to stand, the Eleventh Circuit will keep ignoring *Johnson*. This Court can and should say that twenty-four years of such deviation is enough.

CONCLUSION

For the foregoing reasons and those in the Petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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