No. 21-837

# In The Supreme Court of the United States

ROBERT BOHANON; BLAKE WALFORD; AND JAMES LEDOGAR,

*Petitioners,*

vs.

JACQUELINE LAWRENCE, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

TIMOTHY T. COATES
*Counsel of Record*
NADIA A. SARKIS
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

*Counsel for Amicus Curiae International Municipal Lawyers Association*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Pursuant to Supreme Court Rule 37.2(b), the International Municipal Lawyers Association ("IMLA") respectfully moves the Court for leave to file the attached Amicus brief in support of Petitioners.

The Petition presents this Court with the opportunity to resolve a long-standing circuit split: Whether, and in what circumstances, a federal court of appeals has jurisdiction over an immediate appeal from a district court's summary judgment order denying qualified immunity. As the oldest and largest association of attorneys representing United States municipalities, counties, and special districts, IMLA has an interest in ensuring clarity of the law on this issue, which significantly impacts liability of public entities.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Because its members routinely face qualified immunity litigation, IMLA is well-suited to provide this Court with practical insight regarding the adverse impacts of this circuit split on municipalities, which include protracted litigation, increased costs, and difficulty in assessing and planning for potential liability.

IMLA timely notified the parties of its intent to submit its Amicus brief more than 10 days prior to filing and requested consent to the filing. Petitioners consented to the filing of this brief, and Respondents did not. IMLA respectfully moves the Court for leave to file the attached Amicus brief in support of Petitioners.

Respectfully submitted,

TIMOTHY T. COATES
*Counsel of Record*
NADIA A. SARKIS
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

*Counsel for Amicus Curiae International Municipal Lawyers Association*

January 7, 2022

## QUESTION PRESENTED

Whether, and in what circumstances, a federal court of appeals has jurisdiction over an immediate appeal from a district court's summary judgment order denying qualified immunity.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION ..... 1

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iv

STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT ..... 2

WHY REVIEW IS WARRANTED..... 6

I. Review Is Necessary To Ensure Meaningful Interlocutory Review Of Orders Denying Qualified Immunity On Summary Judgment..... 6

A. Robust Qualified Immunity Protection Is Vital To Local Government Entities, Their Employees, And Society As A Whole And Especially Important In Cases Involving The Use Of Force ..... 6

B. The Rule Barring Interlocutory Review Adopted By *Bohanon* And Other Circuit Courts—Relieving The Appellate Court Of Any Obligation To Assess Materiality In Light Of The Relevant Legal Issues—Is Contrary To The Decisions Of This Court And Undermines Qualified Immunity..... 8

TABLE OF CONTENTS—Continued

Page

C. Clear Jurisdictional Rules On Qualified Immunity Appeals Matter To Public Entities ..... 12

II. The Court Should Consider Overruling *Johnson*—A Procedural Decision That Has Only Wreaked Havoc In The Courts Of Appeals ..... 14

CONCLUSION..... 16

TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Liberty Lobby*,
477 U.S. 242 (1986) .....3, 9

*Ashcroft v. al-Kidd*,
563 U.S. 731 (2011) .....4

*Behrens v. Pelletier*,
516 U.S. 299 (1996) .....16

*Davis v. City of Las Vegas*,
478 F.3d 1048 (9th Cir. 2007).....9

*Drummond v. City of Anaheim*,
343 F.3d 1052 (9th Cir. 2003).....9

*Estate of Anderson v. Marsh*,
985 F.3d 726 (9th Cir. 2021).....8, 13, 14

*George v. Morris*,
736 F.3d 829 (9th Cir. 2013).....9

*Graham v. Connor*,
490 U.S. 386 (1989) .....7, 9

*Hall v. Flournoy*,
975 F.3d 1269 (11th Cir. 2020).....14

*Harlow v. Fitzgerald*,
457 U.S. 800 (1982) .....6, 7

*Johnson v. Jones*,
515 U.S. 304 (1995) .....*passim*

*Kimble v. Marvel Entertainment, LLC*,
576 U.S. 446 (2015) .....15

*Kisela v. Hughes*,
___ U.S. ___, 138 S. Ct. 1148 (2018).....9

TABLE OF AUTHORITIES—Continued

Page

*Mitchell v. Forsyth*,
472 U.S. 511 (1985) .....2

*Pauluk v. Savage*,
836 F.3d 1117 (9th Cir. 2016).....8

*Pearson v. Callahan*,
555 U.S. 223 (2009) .....9, 15, 16

*Plumhoff v. Rickard*,
572 U.S. 765 (2014) .....3, 14

*Raines v. Counseling Assocs., Inc.*,
883 F.3d 1071 (8th Cir. 2018).....10, 11, 12

*Reichle v. Howards*,
566 U.S. 658 (2012) .....7

*Romo v. Largen*,
723 F.3d 670 (6th Cir. 2013).....5, 13

*Saucier v. Katz*,
533 U.S. 194 (2008) .....15

*Scott v. Harris*,
550 U.S. 372 (2007) .....2, 3, 14

*Smith v. Finkley*,
10 F.4th 725 (7th Cir. 2021) .....10, 11, 12

*Thomas v. Washington Gas Light Co.*,
448 U.S. 261 (1980) .....15

*Tuuamalemalo v. Greene*,
946 F.3d 471 (9th Cir. 2019).....5

## STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, and by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

Amicus Curiae IMLA's members represent all levels of local government, including law enforcement agencies. IMLA and its members have an interest in ensuring clarity of the law regarding qualified immunity, which promotes informed training, allows for more accurate fiscal planning, and avoids prolonged litigation.



[1] This brief was not authored in whole or in part by counsel for any party. No person or entity other than Amicus Curiae made a monetary contribution towards preparation of this brief. The parties were timely notified of IMLA's intention to file this brief. Petitioners consented to the filing of the brief, and Respondents did not.

## STATEMENT OF THE CASE

Amicus Curiae IMLA joins in and refers to the Statement in the petition for writ of certiorari ("Pet.") at pages 5-12.

## SUMMARY OF ARGUMENT

This Court has repeatedly recognized the importance of qualified immunity in ensuring that law enforcement officers may perform their duty to protect public safety and make decisions in tense, rapidly evolving circumstances without fear of entanglement in litigation and potential liability. And it has "'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007). Because qualified immunity is "an *immunity from suit*" that is "effectively lost if a case is erroneously permitted to go to trial," the general rule—established nearly fifty years ago in *Mitchell v. Forsyth*—is that the denial of a claim of qualified immunity is immediately appealable "to the extent it turns on an issue of law." 472 U.S. 511, 526, 530 (1985).

*Johnson v. Jones*, 515 U.S. 304, 313 (1995) threw a cryptic wrench in the works and created a limited exception to the general rule, holding that when an appeal of a district court's summary judgment order denying qualified immunity raises only a question of "'evidence sufficiency,'" the order is not appealable.

The Courts of Appeals are divided on their interpretation of the *Johnson* exception. Some courts, like the Ninth Circuit here, have interpreted *Johnson* to foreclose appellate review whenever conflicting inferences can be drawn from undisputed evidence—regardless of whether the officers' entitlement to qualified immunity turns on that conflict.

Other Courts of Appeals, and even other decisions within the Ninth Circuit, have properly followed this Court's approach in *Plumhoff v. Rickard*, 572 U.S. 765 (2014) and *Scott*, 550 U.S. 372, broadly permitting appellate review even if there are material factual disputes, so long as the appeal presents a question of law resolved by the district court.

*Materiality* of a factual dispute—which is necessarily grounded in the qualified immunity law—numbers among those legal questions. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Entitlement to immunity turns on whether an officer could reasonably perceive a threat necessitating the use of force at issue. Officers are allowed to make reasonable inferences and judgments about the threats presented by a particular situation, even if their assessment is ultimately mistaken and even if a juror might plausibly draw a conflicting inference. That deference—though it is in favor of the officer—does not violate summary judgment principles. And the proper application of that deference is a legal question that Courts of Appeals have interlocutory jurisdiction to review.

The same is true in analyzing the second prong of qualified immunity: Whether the law was clearly established considering the particularized circumstances confronted by an officer. On summary judgment, officers remain entitled to every arguable inference about dangerousness of the historical facts most favorable to plaintiff, as well as great latitude in their perception of those facts. Officers lose immunity only if their force was so obviously egregious in light of clearly established law that only a plainly incompetent officer would have concluded the force was lawful. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

In short, the potential for different inferences to be drawn from undisputed evidentiary facts does not bar the application of qualified immunity, let alone foreclose interlocutory appellate review. Yet *Johnson* has led court after court to do just that. The Ninth Circuit decision here underscores the problem. The court refused to consider Petitioners' qualified immunity appeal based on its conclusions that Petitioners' appellate brief "implicitly" departed from the district court's factual recitation and that undisputed video evidence could be interpreted by a jury in multiple ways. In so holding, the court refused to consider the most important legal inquiries for purposes of the qualified immunity inquiry—(1) whether the officers' perception of the events could be reasonable, and (2) whether the law was clearly established with respect to their use of force under such circumstances.

Sidestepping those inquiries by declaring an absence of jurisdiction eviscerates interlocutory review of

qualified immunity in use of force cases and undermines the very purpose of the doctrine. The proliferation of video evidence—from cell phones, dashboard cameras, and body cameras—all but guarantees that such evidence will remain front and center in motions for summary judgment concerning qualified immunity and has made that abdication particularly insidious. The basic fact of such evidence, i.e., whether the footage was taken on a particular day at a particular time, is generally undisputed, while the interpretation of such evidence may give rise to conflicting inferences. But that is not a proper basis to defeat appellate jurisdiction. This Court needs to clarify that the validity of officers' judgment, based on the inferences they draw from a given set of historical facts, is a *legal* question that is properly subject to appellate review.

More than twenty years after *Johnson*, there is not just a circuit split on a fundamental question of appellate jurisdiction: All but two circuits in the country have an intra-circuit split as well. *Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring). This profound incoherence in the law requires clarification. As a practical matter, the confusion that has resulted benefits neither plaintiffs nor defendants. Litigants are forced to navigate a jurisdictional morass in case after case, many of which would otherwise be easily resolved on appeal. Courts are left to struggle with "analytic chaos" in the case law, burdened by an exception that was intended to conserve appellate resources but has the opposite effect. *Tuuamalemalo v. Greene*, 946 F.3d 471, 480 (9th Cir. 2019) (W. Fletcher, J.,

concurring). And municipalities are left ultimately responsible for bearing the unnecessary costs caused by protracted litigation, which has a cascading effect that broadly impacts the operation of local government services, to the detriment of their constituents.

Rarely is this Court presented with an important legal issue that has so many appellate courts acknowledging that they are effectively stumbling in the dark, to discern and apply a coherent rule of law. It is essential that this Court clarify the standards of appellate jurisdiction for interlocutory review in qualified immunity cases. Amicus Curiae IMLA respectfully urges the Court to grant the petition.

## WHY REVIEW IS WARRANTED

### I. Review Is Necessary To Ensure Meaningful Interlocutory Review Of Orders Denying Qualified Immunity On Summary Judgment.

#### A. Robust Qualified Immunity Protection Is Vital To Local Government Entities, Their Employees, And Society As A Whole And Especially Important In Cases Involving The Use Of Force.

The most powerful justification for qualified immunity, as articulated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), is that it allows government employees to "unflinching[ly] discharge . . . their duties." In no situation is qualified immunity

more important than when a police officer must decide whether to use force. Officers often must make "singularly swift, on the spot, decisions," *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring), with their own lives and/or the lives of others on the line, and limited information about the context and people they are dealing with. Even the information that an officer *does* have, based on personal observation, or otherwise, often presents as equivocal or unclear, including on critical subject matters, such as whether a suspect is armed.

Qualified immunity allows officers to make reasonable decisions in these high-pressure, uncertain situations—even if an officer may have made a different decision in hindsight or his or her assessment of a situation ultimately proves to be incorrect. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Such protections are important to "society as a whole." *Harlow*, 457 U.S. at 814. Without qualified immunity, the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" would hinder, if not cripple, the operations of local government. *Id.*

### B. The Rule Barring Interlocutory Review Adopted By *Bohanon* And Other Circuit Courts—Relieving The Appellate Court Of Any Obligation To Assess Materiality In Light Of The Relevant Legal Issues—Is Contrary To The Decisions Of This Court And Undermines Qualified Immunity.

The district court denied Petitioners' motion for summary judgment—even though it found the officers' initial use of lethal force was reasonable—based on its determination that a reasonable juror could potentially conclude that a second volley of shots was excessive force after the suspect had already been shot. (Pet. 25a) (whether Childress "was moving in a threatening way after having been shot" was a "disputed material fact").

The Ninth Circuit dismissed the case, concluding that appellate review was foreclosed under *Johnson* because the undisputed video testimony did not wholly discredit Plaintiffs' version of events and conflicting inferences could be drawn from that evidence.[2] (Pet. 3a-4a.) In so holding, the court side-stepped any need to assess whether the factual dispute was *material* to the qualified immunity defense, i.e., whether it

[2] The Opinion cites to *Pauluk v. Savage*, 836 F.3d 1117, 1120-21 (9th Cir. 2016) to articulate the *Johnson* exception, despite the authoring judge's subsequent admission that *Pauluk*'s interpretation of *Johnson* is wrong. *Estate of Anderson v. Marsh*, 985 F.3d 726, 738 (9th Cir. 2021) (W. Fletcher, J., dissenting) ("I wrote the opinion in *Pauluk* and now confess error.").

undermined Petitioners' claim to qualified immunity. And it entirely skipped over the second prong of qualified immunity, which would have resulted in a straightforward reversal.[3]

The court's error appears to conflate genuineness—namely "the question whether there is enough evidence in the record for a jury to conclude that certain facts are true," *George v. Morris*, 736 F.3d 829, 835 (9th Cir. 2013)—with materiality. It is a bedrock principle that on summary judgment, only *material* factual disputes matter, and materiality is a legal question that can only be decided vis-à-vis the relevant law. *Anderson*, 477 U.S. at 248. Here, the relevant law requires substantial deference to officers' judgments, including mistaken judgments about the facts, *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), and requires the reasonableness of a particular use of force to be judged from the perspective of a reasonable officer on the scene, *Graham v. O'Connor*, 490 U.S. 386, 396 (1989). The relevant law also dictates that in the absence of clearly established law rendering a constitutional question "beyond debate," *Kisela*, 138 S. Ct. at 1152,

---

[3] The cases relied upon by the district court—involving the punching of a handcuffed suspect and officers' use of a neck restraint, resulting in the asphyxiation of a mentally ill individual with no criminal background—did not place it "beyond debate," *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1152 (2018) (per curiam), that the officers' use of different force under distinct circumstances was excessive. (Pet. 26a-27a) (citing *Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007) & *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003)).

many factual disputes are irrelevant for purposes of qualified immunity.

Somewhat counterintuitively, the ubiquity of video evidence is only making the confusion in the law worse. *Bohanon* is exemplary, and regrettably, not unique. *Smith v. Finkley*, 10 F.4th 725 (7th Cir. 2021) and *Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071 (8th Cir. 2018) are similarly illustrative:

In *Smith*, a citizen complaint about a man with a gun led to a standoff on a rooftop with the plaintiff, captured by the officers' body cameras. 10 F.4th at 729. Video footage captured the officers shooting the plaintiff after he ignored verbal commands and reached down behind an air conditioning unit—which the officers interpreted as reaching for a weapon, but plaintiff asserted was his belated response to an earlier attempt to surrender. *Id.* The Seventh Circuit dismissed the appeal, even though the district court had blatantly erred in its qualified immunity analysis by concluding the officers' entitlement to immunity was a jury question rather than a question of law for the court. *Id*. at 729, 734.

It would be difficult to find a more straightforward basis to reverse a summary judgment order denying qualified immunity. But instead, the Seventh Circuit insulated the district court's error from review because the appeal did not raise a "pure question[ ] of law" and the officers did not "adopt the plaintiff's facts." *Id.* at 735-36.

The dissent recognized the majority's approach was at odds with this Court's precedent, and correctly concluded that where "[t]he historical facts about what occurred before and during the shooting are preserved on video and are not disputed," "[a]ll that remains is to apply the qualified-immunity standard to the video-recorded evidence and make a legal determination about the officers' entitlement to immunity." *Id.* at 753 (D. Sykes, C.J., dissenting).

*Raines* similarly ruled there was no appellate jurisdiction, even though qualified immunity could have been determined as a matter of law. The case involved a confrontation between several officers and a plaintiff who was acting erratically and brandishing a knife, waving it back and forth, and moving from one foot to another. 883 F.3d 1071, 1073. The officers commanded plaintiff to drop the knife, but he refused to do so. *Id.* Trying to avoid the use of deadly force, an officer, at her peril, moved closer to the plaintiff to fire a Taser and disable him. *Id.* As she approached, plaintiff moved towards her in a manner officers perceived as aggressive and threatening, causing them to fire at the plaintiff, gravely wounding him. *Id.*

Plaintiff sued for excessive force, and defendants moved for summary judgment based on qualified immunity, contending that video captured by the Taser camera demonstrated that plaintiff posed a threat to the officer, or that defendants could reasonably perceive such a threat. *Id.* The district court denied the motion, finding a genuine issue of material fact as to whether the force was excessive. *Id.* at 1073-74.

The Eighth Circuit dismissed the officers' appeal for lack of jurisdiction—not because the officers' perception was unreasonable, but because the video did not *conclusively* establish that plaintiff had advanced on the officer in a threatening manner. *Id.* at 1075. It shouldn't have mattered. Any conflicting inferences that could be drawn from the video were immaterial for purposes of qualified immunity, which (1) entitles officers to make reasonable inferences about the events, even if there might have been other plausible inferences to the contrary, and (2) gives the *officers* the benefit of every reasonable inference that can be drawn from those facts concerning the danger posed by a suspect.

*Smith, Raines*, and *Bohanon* are not unique. Appellate courts are regularly failing to allow an interlocutory appeal of a district court's denial of qualified immunity, contrary to this Court's jurisprudence and to the very purposes of qualified immunity. Because of the disarray created by *Johnson*, only this Court's intervention can solve that problem.

### C. Clear Jurisdictional Rules On Qualified Immunity Appeals Matter To Public Entities.

Section 1983 liability is a fact of life for every local public entity in the country: It directly impacts municipal decision-making across a broad spectrum of public services and embroils local governments in costly litigation. When the state of the law is uncertain, those

burdens are both unnecessarily high and difficult to anticipate.

Under *Johnson*, a qualified immunity appeal can be a complete waste of time and resources. Or the same appeal in the same circuit could be essential to protect an officer's right to immunity from suit. The question currently appears to depend more on the particular panel a litigant draws, rather than any coherent view of the law. *Estate of Anderson*, 985 F.3d at 737-38 (W. Fletcher, J., dissenting) (collecting Ninth Circuit cases exercising jurisdiction despite genuine issues of material fact, cases denying appellate jurisdiction because a district court relied on disputed facts, and cases that try "to have it both ways"); *Romo v. Largen*, 723 F.3d at 686 (Sutton, J., concurring) (identifying intra-circuit conflicts regarding the scope of *Johnson* in every circuit save the D.C. and Federal Circuits).

Fiscal planning for litigation is difficult in the best of circumstances. It is nigh impossible when the law is in a state of chaos. It is essential that the Court provide guidance to the Courts of Appeals—which have acknowledged they are essentially flummoxed by *Johnson*—regarding the scope of interlocutory review of summary judgment denials of qualified immunity. Until it does so, local public entities will face uncertainty that adversely affects their ability to plan for potential liability and unnecessarily increases litigation costs, all to the detriment of the constituents they serve.

## II. The Court Should Consider Overruling *Johnson*—A Procedural Decision That Has Only Wreaked Havoc In The Courts Of Appeals.

The Courts of Appeals require guidance from this Court. Over twenty years of widely divergent precedent makes it clear that no clear application of *Johnson* has emerged.

At a minimum, this Court needs to clarify what *Johnson* means considering its subsequent decisions in *Scott* and *Plumhoff*. Those later cases confirm the materiality of disputed facts presents a legal question for review and that courts maintain appellate jurisdiction, despite the existence of disputed purported material facts, whenever the denial of qualified immunity turns on an issue of law. *Scott*, 550 U.S. at 378, 381 n.8; *Plumhoff*, 572 U.S. at 768, 773. Neither decision appears fully consistent with *Johnson*'s holding that there is no appellate jurisdiction when the denial of summary judgment involves "'evidence sufficiency.'" 515 U.S. at 308.

To the extent that *Johnson* remains viable at all, its reach is exceedingly narrow. The Eleventh Circuit has determined that *Johnson* precludes appellate jurisdiction only when "there is no legal question to review" and the "only question before the appellate court is a factual one." *Hall v. Flournoy*, 975 F.3d 1269, 1276-77 (11th Cir. 2020). The dissent in *Estate of Anderson*, 985 F.3d at 741, takes an even narrower view, concluding *Johnson* bars appellate review "[o]nly when officers

provide disputed evidence showing that they were not present, and were in no way involved in the challenged conduct."

But this Court should also consider overruling *Johnson*. *Stare decisis* is intended to promote the "evenhanded, consistent, and predictable application of legal rules." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). *Johnson*, to put it mildly, does not serve that goal. It has sown only chaos, not consistency, in the law. Where a decision has "defied consistent application by the lower courts," it should be reconsidered. *Pearson*, 555 U.S. at 235 (overruling mandatory, two-step rule for resolving qualified immunity claims set forth eight years earlier in *Saucier v. Katz*, 533 U.S. 194 (2008)).

Another primary justification for *stare decisis* is judicial economy. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015) (*stare decisis* "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation"). Judicial economy is certainly not served by *Johnson* either. Courts have been locked in constant conflict as to its meaning for decades, and worse yet, disputes concerning *Johnson*'s application are often played out not on summary disposition of a motion to dismiss, but only after full briefing of merit issues that are never reached, resulting in needless consumption of public, private and judicial resources.

Because *Johnson* espouses a procedural rule, not a substantive one, abandoning its unworkable exception

to appellate jurisdiction also would not upset settled expectations or established rights. *Pearson*, 555 U.S. at 233 ("'Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules' that do not produce such reliance.") (original ellipsis).

The overruling of any precedent should of course be approached with caution. But overruling *Johnson* would stabilize and streamline qualified immunity appeals. And it would not lead to a proliferation of frivolous appeals. As this Court recognized in *Behrens v. Pelletier*, 516 U.S. 299, 310 (1996), even though "the availability of a second appeal affords an opportunity for abuse," in practice successive pretrial assertions of immunity are a "rare occurrence." Moreover, when and if abuse *does* occur, courts have effective tools to handle that problem. District courts can certify an immunity appeal as frivolous, which enables the court "to retain jurisdiction pending summary disposition of the appeal," and Courts of Appeals can establish "summary procedures and calendars to weed out frivolous claims." *Id.* at 310-11.

## CONCLUSION

Clear and uniform rules governing appellate jurisdiction are always important, and particularly so where, as here, the dismissal of a qualified immunity

appeal effectively deprives officers of immunity from suit to which they would otherwise be entitled as a matter of law, regardless of any factual dispute.

Moreover, while the Courts of Appeals may disagree as to the meaning of *Johnson*, there is broad consensus that all parties involved would benefit from clarification of the decision by this Court. Amicus Curiae IMLA respectfully joins in Petitioners' request that the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY T. COATES
*Counsel of Record*
NADIA A. SARKIS
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

*Counsel for Amicus Curiae International Municipal Lawyers Association*

January 7, 2022