No. _____

In The
Supreme Court of the United States

JAMES DOE,

Petitioner,

v.

GLADYS PISANI, DANIEL MCANASPIE, AND JOSEPH JOUDY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred in concluding that "arguable probable cause" can support a claim for qualified immunity on summary judgment after the District Court denied an interlocutory appeal because there were disputed issues of material fact requiring a jury trial.

Whether a Court of Appeals should be required to evaluate factual findings in interlocutory appeals denying summary judgment based qualified immunity under the abuse of discretion standards, rather than a de novo standard.

PARTIES TO THE PROCEEDING

Petitioner James Doe is an adult resident of the State of Connecticut proceeding pseudonymously with permission of the District Court.

Respondents Gladys Pisani, Daniel McAnaspie, and Joseph Joudy are police officers sued in their individual capacity employed by the Town of Newtown, Connecticut.

RELATED CASES

Mother Doe, John Doe, Jane Doe, and Youngest Child Doe are the spouse and children of James Doe. They joined in the District Court action, but not on the appeal, and are not on this petition for certiorari.

Doe v. Pisani, No. 21-2847, United States Court of Appeals for the Second Circuit, June 29, 2023.

Doe v. Pisani, No. 3:16cv1703(AVC), United States District Court for the District of Connecticut, Oct. 15, 2021.

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PETITION FOR A WRIT OF CERTIORARI

James Doe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, reported at *Doe v. Pisani*, 2023 U.S. App. LEXIS 16444, 2023 WL 4240987 is reprinted in the Appendix (App.) at 1. The District Court ruling from which the appeal was taken to the Second Circuit is reprinted at App. at 15.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision on June 29, 2023. App. 1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. Section 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, . . . " 42 U.S.C. Section 1983.

U.S. Const., Am. 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., Am. 7: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

A Father, his wife and the mother of his two children, and the couple's minor children, all joined in an action arising under 42 U.S.C. Section 1983 against members of the Newtown Police Department for engaging in a series of searches and arresting the father for serious charges of child abuse under the authority of warrants which were not supported by probable cause. How did these parties end up aligned versus the police in a suit of this sort? Police officers used half-truths and deliberate misstatements about facts to

support arrest and search warrant affidavits they knew to be false at the times they were submitted. Officers did so knowing the truth. The family sued and the police department moved for summary judgment on qualified immunity grounds. The District Court then denied the motion for summary judgment on grounds that there were genuine issues of material fact that warranted a trial by jury. The Second Circuit reversed, concluding that even in the absence of probable cause, there was "arguable" probable cause. The result is the transformation of qualified immunity into the functional equivalent of absolute immunity, a practice this Court has never endorsed.

Despite the Seventh Amendment's promise of a right to a jury trial in civil cases, the federal courts have, in recent years, made it increasingly difficult to get cases against public officials to a jury trial. The doctrine of qualified immunity was created by judicial fiat to protect all but the plainly incompetent from the rigors of trial. As if that were not enough, lower courts have extended the qualified immunity doctrine to cover conduct that is only arguably justified, concluding that qualified immunity for an arrest or search is warranted in the absence of actual probable cause. This new and slippery conception of arguable probable cause tends toward a vanishing point arriving at absolute immunity. This Court can, and must, correct this. The Fourth Amendment is clear: no warrant shall issue but for a showing of probable cause supported by a statement under oath or affirmation. In the context of the Fourth Amendment, a warrant is either supported

by probable cause or it is not. There is nothing "arguable" about that.

Late on the night of January 18, 2013, Mother Doe was putting John and Jane, her minor children to bed. One relayed that his father had taught him to masturbate and would do so in his presence. The next day, Mother Doe reported the comment to the Connecticut Department of Children and Families. Instantaneously, James Doe was escorted off his property. Mother Doe gave a statement to the police.

Within 24 hours of the first, shocking disclosure, the child had recanted, and told his mother what he had reported was untrue. Mother Doe called the police to issue a recantation; she asked to amend her statement. The police refused to do so. Several days later, when the children were interviewed by social workers in police presence, the child stood by his recantation. Indeed, there was some confusion on the child's part about the difference between a "penis" and a "butt." The child denied ever having been touched on a private part, except for a spanking. The boy's sister also denied unlawful touching. Such admissions, the children claimed, were made because the children were coerced by overzealous social workers masquerading as forensic investigators.

Those familiar with the mechanics of an investigation of child sexual abuse will not be startled by this narrative. Children who complain of sexual abuse, especially by a loved one, are treated as having disclosed a truth too terrifying to be told all at once. Does a child

delay a "disclosure?" Never mind, an expert will explain that "delayed disclosure" is the norm in such cases. Are the "disclosures" inconsistent? Never mind, an expert will explain, "incremental disclosure" will explain away every inconsistency. In the hothouse world inhabited by those who investigate child sex abuse claims, any statement tending to show the guilt of the accused is sacrosanct. Any reason to doubt the accusation is heresy.

The police nonetheless persisted, obtaining three search warrants dated January 29, 2013, February 26, 2013 and January 8, 2015, in the vain effort to corroborate a tale the children told them was untrue. In April 2013, police officers obtained a warrant for James Doe's arrest. The police were unwilling to accept the truth as the answer – there was no sexual misconduct. It took until June 15, 2016, for the Superior Court to dismiss the felony criminal charges. By this time, the family had been shattered, and James Doe's reputation destroyed.

The family sought relief for malicious prosecution against the defendant police officers in the United States District Court for the District of Connecticut. When the defendants moved for summary judgment asserting qualified immunity, the trial court denied the motion, in part, because there were disputed issues of fact about when the officers learned there was no probable cause to support the arrest of James Doe. Because the factual issue resulted in the denial of summary judgment, the defendants availed themselves of an interlocutory appeal. The Second Circuit reversed the

trial court, concluding that even if there was not probable cause to push the matter as far as the police officers had, there was "arguable probable cause" to do so.

This petition asks the Court to review the use of the "arguable probable cause" doctrine to support a grant of qualified immunity to police officers in cases in which there simply is not probable cause on the face of the warrant itself. Qualified immunity ought never be granted to a police officer in such circumstances.

SUMMARY OF THE ARGUMENT

Arguably, this Court's jurisprudence never recovered from the tension created in the law in *Monroe v. Pape*, 367 U.S. 167 (1961). In that case, the Court held that state actors could be sued for tortious conduct in claims arising under 42 U.S.C. Section 1983. But the manner in which the Court resolved the tension between sovereign immunity and individual liability charted a course destined for disaster. Could a state actor be liable when acting on behalf of the sovereign? Not if sovereign immunity was to be honored. So a fiction was created. State actors could be sued only for money damages in their "individual capacities." The result was the opening of a floodgate of claims.

Qualified immunity was the *via media*, a way to salvage individual capacity liability while at the same time respecting sovereign immunity. A state actor acting under color of law was not entitled to absolute immunity. But neither was he left to face the rigors of

each and every claim filed against him. The courts were given the power to grant qualified immunity: an immunity that obtains upon a judicial finding that a state actor defendant's conduct did not violate clearly established law of which a reasonable officer would have known at the time of the alleged tort. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). Qualified immunity was intended to protect state actors from the endless distraction of litigation, and to protect all but the plainly incompetent from liability. *Pearson v. Callahan*, 555 U.S. 223 (2009).

The defense of qualified immunity can be raised at any stage of litigation, although policy considerations favor early assertion of the claim. While the final judgment rule typically requires a litigant to await a final judgment in the trial court to take an appeal, there are circumstances in which a litigant can seek interlocutory relief when qualified immunity is denied by the trial court either at the motion to dismiss or summary judgment stage. When resolving a question of fact drives a decision to grant or deny judgment as a matter of law, a litigant, even in the qualified immunity context, must await a jury's verdict and a final judgment to take an appeal. In cases in which a litigant is denied qualified immunity after a trial court concludes that the party is not entitled to it because the law was clearly established, a party claiming error may take an interlocutory appeal. Somehow, the appellate courts have been permitted to develop a jurisprudence that ignores the basic distinction between matters of law

and matters of fact. Appellate courts now routinely reach factual issues even after district courts have ruled that there is a dispute of fact requiring a jury's work. Appellate courts do this by relying on a doctrine of their own creation, a doctrine never reviewed or evaluated by this Court. That doctrine is called "arguable probable cause."

In this case, a District Court denied summary judgment to defendants accused of procuring arrest warrants under false pretenses. In particular, the court found there was a material issue of fact as to whether one officer mischaracterized statements made by one of the alleged minor-victims to make them sound more inculpatory than they were; the court also found there was a material issue of fact as to whether officers persisted in their prosecution of the petitioner long after they learned that the minor-victims in this case were coerced into making false statements by forensic interviewers. The trial court denied the defendants' summary judgment motion, holding that there was a dispute of material fact as to these issues sufficient to require a jury's evaluation before judgment could be entered in favor of one side or another.

Ordinarily, the presence of a factual dispute would resolve whether summary judgment should be granted and whether a litigant could seek interlocutory review. Enter the strange doctrine of "arguable probable cause." Absent a genuine issue of material fact, the doctrine permits the courts to decide, as a matter of law, that there is "arguable" probable cause. In other words, even when a trial court concludes that there are facts for a

jury to decide, an appellate court can say "never mind, we'll give the public official the benefit of the doubt." This is not a matter of declaring the trial court committed clear error in its factual determinations. Rather, the appellate courts are engaging in de novo review. This Court can and should rein in this specious form of judicial activism.

This Court has never ruled on whether a grant of qualified immunity in a Fourth Amendment context challenging a search warrant and/or an arrest warrant can be supported by "arguable probable cause." Yet every Circuit does recognize and use the doctrine. The nation is worse off for it. At a time when the legitimacy of so many public institutions is in doubt, the use of a dubious legal doctrine to shield state actors from accountability is dangerous. This is especially so in the area of policing, wherein officers have the ability to make decisions with profound impacts on the lives and liberties of members of the public.

REASONS FOR GRANTING THE PETITION

I. The Doctrine Of "Arguable Probable Cause" Eviscerates The Distinction Between Questions Of Law And Matters Of Fact In Such A Way That Qualified Immunity Is Capable Of Transformation Into A Form Of Absolute Immunity, A Practice That Protects Officers Engaging In Unlawful Conduct

Although qualified immunity has been used by the federal courts for forty years to decide federal civil rights cases, this Court has not yet ruled on whether one application of the doctrine – arguable probable cause in Fourth Amendment cases challenging a search or arrest warrant – passes muster. The petitioner contends it does not. You can no more have "arguable" probable cause than you can be arguably pregnant. Probable cause is ether present or it is not.

Qualified immunity limits the legal liability of police offers, shielding them when they perform discretionary acts unless their conduct violates clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). But in so doing, qualified immunity creates a gap between rights and remedies. As one commentator notes: "The Constitution contains many . . . rights. None enforces itself. Without a remedy, a right has no practical value." Aziz Z. Huq, *The Collapse of Constitutional Remedies* 4 (2021).

In cases arising under 42 U.S.C. Section 1983, a person may bring an action for money damages: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, . . . " 42 U.S.C. Section 1983. The statute itself is silent about qualified immunity.

It wasn't until 1961 that Section 1983 claims took their current shape and form. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court held that an individual police officer could be sued for money damages when he violated a person's rights, in that case the right to be free from unreasonable searches and seizures arising under the Fourth and Fourteenth Amendments. The case rejected the claim that the officers could not be sued as state actors because their acts were *ultra vires* and they were otherwise shielded by municipal immunity. It held that individual officers sued for violating a person's rights could be sued, but only in their "individual capacities." In the years that followed, there was an explosion of litigation in the federal courts involving claims of police misconduct. Neither the statute, passed in 1871 as part of § 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, nor any subsequent legislation, limited its reach of effectiveness by offering defendants immunity, whether absolute or qualified, from the statute's reach.

A complex body of law has developed in response to the courts' creation of qualified immunity in the 1980s. This body of law is even further removed from the remedial purpose of Section 1983. In the instant case, the law has traveled so far from its moorings as to be adrift.

Because qualified immunity is intended to protect state actors from the rigors, aggravation and risks of a trial for money damages in cases where officials were merely doing their job, *Ziglas v. Abbasi*, 582 U.S. 120, 151 (2017) (recognizing the need to give officers "breathing room to make reasonable but mistaken judgments about open legal questions," citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)), much of that law is focused on pre-trial proceedings and motions. To create effective appellate rights for those denied qualified immunity, the courts permit a litigant denied qualified immunity to avoid having to wait for a final judgment in some instances. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). A litigant denied qualified immunity may bring an interlocutory appeal when challenging a court's legal conclusions in denying application of the immunity. *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (interlocutory appellate jurisdiction is "limited to circumstances where the qualified immunity defense may be established as a matter of law").This right is limited to challenges to the court's legal conclusions; when a court denies qualified immunity because there are questions of fact that must be resolved by the finder of fact, most often a jury, an appellant cannot take an interlocutory appeal. (*Bolmer v. Oliveira*, 594 F.3d 134,

141 (2d Cir. 2010) ("we may not review the district court's ruling that the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense").

The conceptual framework is clear, and policy rationale supporting it unambiguous. A defendant is entitled to judgment as a matter of law when a claim against him alleges a violation of clearly established law. Appellate jurisdiction is proper on an interlocutory basis to review claims that the district court erred as to the law. Disputes of material fact are, at least in theory, left to a jury to determine.

"Arguable probable cause" blurs the conceptual clarity and invests in the judiciary an unbridled power to impose a policy preference in favor of granting immunity to state officials. It does so in derogation of the proper role and function of juries, a role enshrined in the 7th Amendment to the United States Constitution: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amend. 7. Arguable probable cause is a substitution of judicial judgment for the fact-finding work of a jury when probable cause does not exist. As the Second Circuit so candidly puts it: "Even when actual probable cause does not exist, an officer may be entitled to qualified immunity . . . if his actions were objectively reasonable or if 'arguable probable cause' existed at the time of [the event in question]." *Triolo v.*

Nassau Cnty., 24 F.4th 98, 107 (2d Cir. 2022). Every Circuit relies upon this doctrine. *Rivera v. Murphy*, 979 F.2d 259, 263 (1st Cir. 1992); *Triolo*, infra.; *Blaylock v. City of Philadelphia*, 504 F.3d 405, 412 (3d Cir. 2007); *Orem v. Gillmore*, 813 Fed. Appx. 90, 92, 2020 U.S. App. LEXIS 14943, *4 (4th Cir. 2020); *Peterson v. Johnson*, 57 F.4th 225, 234 (5th Cir. 2023); *Haywood v. Hough*, 811 Fed. Appx. 952, 959 (6th Cir. 2020); *Pierner-Lytge v. Hobbs*, 60 F.4th 1039, 1046 (7th Cir. 2023); *Branch v. Gorman*, 742 F.3d 1069, 1072 (8th Cir. 2014); *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1076 (9th Cir. 2011); *Jordan v. Adams Cnty. Sherriff's Office*, 73 F.4th 1162, 1170 (10th Cir. 2023); *Garcia v. Casey*, 75 F.4th 1176, 1186 (11th Cir. 2023); and *Wesby v. District of Columbia*, 816 F.3d 96, 106 (D.C. Cir. 2016).

The arguable probable cause doctrine dilutes the protection of the Fourth Amendment's probable cause requirement. This is especially so in cases involving disputes about whether an arrest warrant or a search warrant is supported by probable cause. The amendment does not speak of an arguable justification for a warrant. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. 4. (emphasis added). The plain meaning of the amendment is obvious: but for a probable cause "no Warrant shall issue." How is it even possible that the appellate courts of this

nation have been permitted to dilute the categorical character of the warrant requirement?

As a matter of constitutional interpretation, the reasonableness requirement does not modify the probable cause requirement. The petitioner is not contending that there can never be a search or seizure without a warrant. Reasonableness undergirds both warrantless searches and arrests and those arrests and searches supported by a warrant. But in this case, the police sought, and obtained, four warrants: three search warrants and an arrest warrant. There was nothing exigent about the searches and arrest. No exception to the warrant requirement was applicable. The warrants were either supported by probable cause or they were not. A district court judge found that there was a dispute of fact about the contents of the warrants sufficient to warrant a jury trial and to deprive the defendants of the defense of qualified immunity. The officers appealed. They did not contend that the trial court engaged in clear error, the legal standard for challenging a trial court's factual findings. They simply didn't like the trial court's result. So they went to the appellate court to argue that even without probable cause, the arrests and searches were nonetheless reasonable. They pleaded no exception to the warrant requirement.

The Fourth Amendment asserts a general right to be free from unreasonable search and seizures. This right shall not be violated, and "no Warrant shall issue, but upon" probable cause supported by indicia of reliability in the form of an oath or affirmation and a

particular description of the person or thing to be seized and the place to be arrested. The amendment was crafted in this manner to distinguish it from general warrants issued prior to independence. The petitioner here contends that arguable probable cause transforms the concrete guarantee of the warrant requirement into something resembling a general warrant. In this case, the King's men aren't free to rummage at will in search of material and persons of interest to the King. It's a little more insidious. A rule based in administrative convenience, the need to keep state actors from being distracted from the performance of their duties, is used, in effect, to justify the use of infirm warrants to search and seize persons, their homes and their effects. At the very least, it grants impunity to state actors who violate the law.

Lea v. Kirby, 171 F. Supp. 2d 579 (4th Cir. 2001), illustrates the incoherence of the arguable probable cause standard. In *Kirby*, a district court granted qualified immunity in a Fourth Amendment case noting that "the reasonableness of the defendants' actions is not contingent upon whether probable cause actually existed." *Id.* at 583. In other words, there the Fourth Amendment's requirement that an arrest or warrant could issue, does not depend on whether there was probable cause, but merely on whether an argument could be made that an officer's conduct was "reasonable." That reduces the Fourth Amendment's probable cause requirement to something resembling a tired tautology.

These are far from abstract, academic or quibbling concerns. In the petitioner's case, his and his family's right to familial association was abridged in the most terrifying way possible. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing the fundamental rights of parents "in the companionship, care, custody, and management of their children"); *Wisconsin v. Yoder*, 406 U.S. 206 (1972). He was separated by court order from his family during the pendency of criminal proceedings that could well have resulted in decades behind bars. All of this because of warrants unsupported by probable cause. After the criminal case against him was dismissed, he sought to hold the officers accountable for his ordeal. The district court ruled there was evidence sufficient for a jury to conclude in his favor. The appellate court took away the right to have a jury decide whether the officers erred because it held the officers' conduct was "arguably" justified. The appellate court did so without finding that the warrants at issue were supported by probable cause. The result is difficult to fathom.

Arguable probable cause and qualified immunity are also of great concern to the public at large as jurisdictions nationwide struggle over how to make police accountable to their communities. Castro, Bryan, *What States Are Doing About Qualified Immunity: A Report And Recommendation*, 41 Quinnipiac L. Rev. 237 (2023). See also Schwartz, Joanna, *Shielded: How the Police Became Untouchable* (2023). Policing is controversial. It is where the state demonstrates its monopoly on the

legitimate use of deadly force.[1] Claims of excessive force, unlawful searches and seizures, and false arrest and malicious prosecution are common in the federal courts. These cases are evaluated under the Fourth Amendment, which guarantees the right to be free from unreasonable searches and seizures. The law of arrest, whether arrest by warrant or warrantless arrest, is evaluated under the probable cause standard. Both are flexible standards, subject to changing perceptions of what is reasonable and submitting to an endless complex evaluation of all the variables that reasonableness may entail. Current calls to "defund" police departments sound in a sense of despair over whether officers share the same sense of what is reasonable as the communities they police. Vitale, Alex, *The End of Policing* (2017). If ever there were an area in which the federal courts should demonstrate a modest sense of the law's reach and a deference to the judgment of juries, it is in the evaluation of conflicts between citizens and police officers. Empowering courts to make findings that there is "arguable" probable cause in the absence of "*actual*" probable cause undermines respect for the law and supports the claim that courts are more interested in preservation of the status quo, and all that entails, than they are in responding to the felt necessities of communities throughout the nation. As Chief Justice John Marshall observed long ago: " "We must never forget that it is a constitution we are expounding . . . intended to endure for ages

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[1] The German historical sociologist Max Weber developed this definition of the state in his 1919 essay, *Politics as a Vocation.*

to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316 (1819). "Reasonableness," like "due process" and other open-ended terms in the Constitution are terms of no fixed meaning; they change shape and assume form and content depending on the context and times in which they are used. If ever there were a time to trim the sails of the judiciary in favor of broader public participation in the national discussion about what is, and what is not, reasonable police powers, that time is now. "Arguable probable cause" has no place in that discussion.

II. Appellate Courts Should Not Be Permitted To Conduct De Novo Review Of A Denial Of Summary Judgment By Application Of The "Arguable Probable Cause" Standard; The Proper Standard Should Be Abuse Of Discretion

Even if this Court is unpersuaded to tackle the more difficult issue of whether arguable probable cause is a tenable legal doctrine, a small adjustment in the manner in which qualified immunity cases are handled could pay large dividends. Appellate review of interlocutory appeals involving denial of summary judgment should be limited to an abuse of discretion standard. In that case, matters of fact would be reviewable upon an clearly erroneous standard; this standard would promote respect or the factual findings of the district court, and would eliminate the ability of the appellate court to reach factual issues on an

interlocutory basis. The current regime permits courts to reach factual issues while claiming they are doing no such thing. It is confusing, lacking in standards and creates an impression of a judiciary untethered to anything other than latent policy preferences. "Traditionally, decisions on questions of law are reviewable *de novo*, decisions on questions of fact are reviewable for clear error, and decisions on matters of discretion are reviewable for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)." (quotation marks omitted) *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563 (2014).

The Second Circuit has created a legal regime which pays mere lip service to the traditional understanding of the difference between matters of law and fact. It recognizes, of course, the final judgment rule. *Marshall v. Sullivan*, 105 F.3d 47, 53 (2d Cir. 1996) ("denial of summary judgment is ordinarily an interlocutory decision, not a 'final decision' appealable under 2b U.S.C. Section 1291"). But in cases of a denial of summary judgment on grounds of qualified immunity, an appeal may be taken. *Kinzer v. Jackson*, 316 F.3d 139, 139 (2d Cir. 2003). In those cases, "jurisdiction is limited to circumstances where the qualified immunity defense may be established as a matter of law." *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). All of this is clear enough.

Where the Second Circuit muddies the waters is in stating that a "district court's mere assertion that disputed factual issues exist . . . [is not] enough jurisdiction is to preclude an immediate appeal." *Salim v.*

Proulx, 93 F.3d 86, 89 (2d Cir. 1996). If there is a sufficient factual record before the court, the Circuit concludes, it can consider the facts anew; in the case of claims asserting a defense of qualified immunity the Circuit courts conduct de novo review, granting qualified immunity if in its judgment it is warranted. *Bolmer v. Oliverira*, 594 F.3d 134, 131 (2d Cir. 2010). No justification is offered as to why the court should apply de novo review of a district court's factual findings in a qualified immunity case, but not in others. The only justification might be that de novo review permits the Circuit to engage in something like fact-finding without calling it fact-finding. It engages in this conceit so that it can then conclude that something like probable cause exists when there is not, in fact, probable cause. The petitioner claims that this Alice in Wonderland style of jurisprudence demeans the significance of claims raising serious Fourth Amendment violations.

The current regime, permitting appellate courts to conduct de novo review of complete records fosters a free-for-all environment in which "arguable" conduct, is decided on an ad hoc basis by reviewing courts. The petitioner here contends that the evaluation of official misconduct claims is better left to juries, or, in the alternative, to trial courts situated in the communities in which they serve. Appellate review should be limited to an abuse of discretion standard under which the factual findings of the district court would be disturbed only if they were clearly erroneous.

The standard of review was outcome determinative in the instant case. The district court found that there were material issues of fact requiring a jury's determination. The appellate court did not take issue with that. Instead, the appellate court accepted the district court's factual findings, conducted its own review of the record, and, apparently, concluded that despite the existence of material facts in dispute, the police officers were nonetheless entitled to judgment as a matter of law because there was arguable probable cause. This is a direct assault on the role of juries in our national lives and runs afoul of both the Seventh Amendment's guarantee of a right to a jury trial and of the intentions of Congress in enacting 42 U.S.C. Section 1983. This Court can and should restrike the balance in favor of jurors as fact-finders. What's more, altering the standard of review would show respect for litigants who must calculate whether the risk of litigation is worth the expense: a settled body of law permits folks to bargain in the law's shadow rather than guess about what an appellate court panel might find to be arguably the case.

III. A writ is appropriate under 10(c)

Rule 10 of this Court's Rules cautions that a writ of certiorari is a matter of judicial discretion and will be granted for only the most compelling reasons. Rule 10(c) reads, in pertinent part, that the Court shall consider whether a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, . . . " The

petitioner submits that the matter of "arguable probable cause" is such a question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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