No. 19-624

IN THE

Supreme Court of the United States

MARK GRAF AND JOHN USTICH,

Petitioners,

v.

HYUNG SEOK KOH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The circuit courts have inconsistently applied two diametrically opposed interpretations on the scope of *Johnson v. Jones*, 515 U.S. 304 (1995), one which prohibits and one which requires interlocutory review of inferences drawn from undisputed facts. Contrary to Koh's insistence, the presence of an uncontested videotaped interrogation and the district court's entirely uncontested findings regarding a few matters not contained on the videotape, make this case the perfect vehicle to clarify the scope of interlocutory review of the denial of a claim to qualified immunity.

Koh's further failure to identify a single case that would have placed Petitioners on notice that their interrogation tactics were unconstitutional, in conjunction with this Court's repeated warnings that "clearly established law should not be defined at a high level of generality," necessitates reversal of the district court's denial of Petitioners' qualified immunity defense. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotations omitted). The videotaped interrogation irrefutably demonstrates Petitioners did not use a single prohibited tactic.

Lastly, this Court is uniquely positioned to resolve the inter-circuit conflict created by the Seventh Circuit's refusal to review the district court's rejection of Petitioners' alternative qualified immunity defense based upon the state court judge's fully informed decision to admit Koh's videotaped statements at trial. Prior to the Seventh Circuit's declination of jurisdiction, several circuit courts had held, pursuant to qualified immunity,

that a state trial judge's admission of evidence breaks the chain of causation between a police officer's actions and a trial-based injury provided the officers did not corrupt that judicial decision by misleading prosecutors or misrepresenting the state of the evidence. By refusing to address Petitioners' causation-based qualified immunity argument, the Seventh Circuit placed itself in direct conflict with the Second, Fourth, Fifth, and Eleventh Circuits. Because the district court specifically found that Petitioners did not mislead prosecutors or the criminal trial court concerning the evidence against Koh, this case presents a clean legal question and excellent vehicle for determining a police officer's entitlement to qualified immunity on civil rights claims grounded in the decisions of prosecutors and judges.

I. There Is Undoubtedly Disarray Among The Circuit Courts On The Scope Of *Johnson* Review And This Case Presents An Excellent Vehicle To Resolve The Confusion.

Koh claims "there is no split among the circuits about the clear limits *Johnson* places on appellate jurisdiction" and unabashedly dismisses the inter-circuit disarray as "an invention of the petitioners' making." Resp. at 26-27.[1] But Koh's pronouncement flies in the face of *Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016) (Gorsuch, J.) and Judge Sutton's thorough concurrence in *Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013), where he explained that "nearly twenty years after *Johnson*, every circuit in the country has some decisions that adopt" either the narrow or broad reading of *Johnson*, and then goes

1. "Resp." references Koh's brief in opposition to the petition.

on to painstakingly identify cases from every circuit to support both sides of the argument. Likewise, academics have debated the proper scope of *Johnson* for decades. *See* Arielle Herzberg, *"The Right of Trial by Jury Shall Be Preserved": Limiting the Appealability of Summary Judgment Orders Denying Qualified Immunity*, 18 U. Pa. J. Const. L. 305, 313 (2015) ("Appellate courts have thus had difficulty defining the appealability standard for qualified immunity summary judgment denials"); Tobias Barrington Wolff, *Scott v. Harris and the Future of Summary Judgment*, 15 Nev. L.J. 1351, 1380 n.111 (2015) ("Judge Sutton is correct" to identify "a challenge to the stability of the *Johnson* doctrine"); Mark R. Brown, *Qualified Immunity and Interlocutory Fact Finding in the Courts of Appeals*, 114 Penn. St. L. Rev. 1317, 1318 (2010) ("*Johnson's* distinction between fact and law" is "blurred"); Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539, 594 (1998) (highlighting the "unworkability of the *Mitchell-Johnson* rule").

As then Circuit Judge Gorsuch explained in *Walton,* the "procedural puzzles" associated with appellate review under the *Johnson* framework are arduous and the Tenth Circuit itself has "struggled…to fix the exact parameters of the *Johnson* innovation". 821 F.3d at 1207-1209. Favoring the narrow approach advocated by Petitioners, the *Walton* court explained that appellate courts are duty-bound to determine whether the lower court's findings of fact, "together with all reasonable inferences they permit, fall in or out of legal bounds." *Id.* at 1210. By stark contrast, the Seventh Circuit mandated here that Petitioners must take "all facts *and inferences* in plaintiff's favor" in order to secure jurisdiction and resolve the question of qualified

immunity. App. 13a (emphasis added). And just last year, in *Barry v. O'Grady*, 895 F.3d 440 (6th Cir. 2018), Judge Sutton further expounded, this time in dissent, on the ramifications of the overbroad approach to *Johnson* and the pressing need for the Court's intervention:

> The key gloss used today (and not for the first time) is to transform *Johnson* into a rule about what the district court did, as opposed to what the defendant officer did. No longer is the subject-matter-jurisdiction question about what *the officer does*, namely raise a legal question about whether the plaintiff's record evidence creates a material issue of fact for trial. It is a subject-matter-jurisdiction question about what the *district court did*, namely drew 'inferences' that have become a forbidden source of appeal because in our circuit 'that too is a prohibited fact-based appeal.'

Id. at 446 (emphasis in original). Judge Sutton further explained that such an "approach gives *Johnson v. Jones* a bad name, cannot be reconciled with Supreme Court precedent, and makes little sense. If appellate courts have no jurisdiction to review the inferences drawn by a district court judge in resolving a claim of qualified immunity at summary judgment, how are they supposed to apply de novo review to the district court's decision, as Supreme Court decisions since *Johnson* do?" *Id*. at 445.

Undeniably, the difference between the two approaches is dispositive of the jurisdictional issue presented by Petitioners. Both *Walton,* and Judge Sutton's opinions in *Romo* and *Barry,* aptly illustrate the pitfalls inherent in

the Seventh Circuit's broad view of *Johnson*. What the Seventh Circuit described as Petitioners' "back-door effort to contest the facts" was in reality a front-door effort to obtain review of the district court's conclusion that the inferences it drew from uncontested facts defeated qualified immunity. App. 15a. Petitioners asked only that the Seventh Circuit view the videotaped interrogation, accept all of the district court's factual findings, and determine whether clearly established law prohibited Petitioners' Reid-based interrogation tactics. Contrary to Koh's concerted efforts to create the impression of an unmanageable morass, that simple and limited undertaking makes this case a perfect vehicle for finally resolving the long-simmering inter-circuit split on the appropriate scope of interlocutory review of the denial of a claim to qualified immunity under *Johnson*.

II. The Seventh Circuit's Declination Of Interlocutory Review Effectively Defeated Petitioners' Qualified Immunity-Based Right To Avoid Trial Absent A Clearly Established Constitutional Violation.

Koh argues that Petitioners' qualified immunity defense should not be reviewed until after trial because deciding the Fifth Amendment claim will not resolve the entire case. Resp. at 21-22. This Court squarely rejected this exact position in *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996), holding that the "right to immunity is a right to immunity *from certain claims,* not from litigation in general; when immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit." (emphasis in original).

Moreover, the elimination of the coerced confession claim in this case will dramatically alter the trial given that Petitioners were granted summary judgment on the malicious prosecution and fabrication of evidence claims. App. 80a-88a. Without the coerced confession claim, the trial will focus on claims related to the Kohs' alleged false arrests at their home (which Petitioners were not involved in) rather than any matters arising from the criminal prosecution.

Additionally, Koh attempts to avoid this Court's review by misleadingly stating that Petitioners "have informed the district court that they do not intend to seek a stay of the Seventh Circuit's decision dismissing their claims." Resp. at 17. But Petitioners merely represented that they would not seek a stay of the trial based on the *filing* of the petition. Petitioners never suggested nor did the district court ever state that the trial should somehow go forward (which would not make any sense) in the event the petition is granted. Certainly the district court will take whatever action is required, including a stay of the trial, in the event this Court grants the petition.

III. The District Court's Factual Findings And The Videotaped Interrogation Are The Only Evidence Required To Determine Whether The Seventh Circuit Should Have Exercised Jurisdiction To Review Petitioners' Entitlement To Qualified Immunity.

Insisting this case is a poor vehicle for review, Koh asks this Court "to reject petitioners' Factual Background sections, their misstatements of the record, and their request for review predicated on their self-serving

factual accounts." Resp. at 1. Initially, Koh's attempt to create factual challenges where none exist is the same strategy Koh utilized in the Seventh Circuit. While Koh now devotes three quarters of his response brief to that same effort, the truth is this Court need only review the interrogation video and the district court's factual findings to determine whether the Seventh Circuit should have exercised jurisdiction over the denial of Petitioners' qualified immunity defense. In no way does this Court need to "delve into the record, weigh competing evidence," and decide "heavily disputed facts." Resp. at 30.

This exact approach, where a plaintiff employs a massive effort to create a non-existent factual dispute, was specifically identified and rejected in *Walton*, where the Tenth Circuit explained:

> [I]n our recitation above and analysis below we do just that, treating as true all the facts the district court held a reasonable jury could find *even as we are quite confident [Plaintiff] would dispute nearly all of them.* But *Johnson* does not *also* require this court to accept the district court's assessment that those facts suffice to create a triable question on any legal element essential to liability. That latter sort of question is precisely the sort of question *Johnson* preserves for our review.

821 F.3d at 1208 (emphasis added).[2]

2. Koh's description of Petitioners' claim as a denial of "access to counsel" claim because the parties dispute whether "petitioners provided [Koh] with his *Miranda* rights or, instead impermissibly

Even more so than in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), the uncontested videotape fully and accurately portrays the tactics utilized by Petitioners during Koh's interrogation, and Petitioners fully accepted before the Seventh Circuit the district court's factual findings concerning relevant interactions that allegedly occurred off-camera. Review of that videotape and due consideration of those factual findings was all that was needed to permit a full evaluation of Petitioners' claim to qualified immunity on the coerced confession claim. *See White*, 137 S. Ct. at 550 ("the Court considers only the facts that were knowable to the defendant officers" in determining qualified immunity).

IV. The Absence Of Any Particularized Case Law Prohibiting Petitioners' Interrogation Tactics Necessitates This Court's Review.

Koh stubbornly disregards the level of specificity required to place reasonable police officers on notice that their conduct was clearly unlawful, despite this Court's repeated warnings that "clearly established law should not be defined at a high level of generality." *White*, 137 S. Ct. at 552 (internal quotations omitted); *see also City and Cty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774, n.

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told him that he did not need an attorney" is completely untenable. Resp. at (i), 7. Koh has never claimed Petitioners knew the interpreter allegedly mistranslated the *Miranda* warnings from English to Korean. Moreover, at the motion to dismiss stage, Koh voluntarily dismissed his Sixth Amendment right to counsel claim and the district court specifically held "that Mr. Koh was not denied counsel in violation of the Fifth Amendment." Dkt. 82 at 11, 17. Koh's attempt to redefine his claim before this Court illustrates the great lengths he will traverse in order to avoid interlocutory review.

3 (2015) (collecting recent Supreme Court cases reversing denial of qualified immunity). The "dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (emphasis in original) (internal quotations omitted). Koh's response is devoid of any particularized case law prohibiting Petitioners' conduct during the interrogation.

Indeed, Koh failed to cite a single controlling decision that prevented Graf from raising his voice, touching, or sitting near Koh during the interrogation, or stating that "we could be here for days and days and days." Instead, Koh's weak attempt to overcome this deficiency by claiming "[t]he petition does not point to any law that suggests [Petitioners' actions during the interrogation] were constitutionally permissible" (Resp. at 32) fundamentally distorts and reverses the well-established principle that the burden is on the party seeking to defeat qualified immunity to identify precedent with facts sufficiently on point to "place…the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Furthermore, Koh's contention that Petitioners' entitlement to qualified immunity is not presently before this Court is baseless. Resp. at 30. This Court has wide discretion and is not precluded from hearing new issues that were not considered below. *See Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980) (question presented in petition for certiorari that was not heard in the district court or court of appeals does not prevent this Court from deciding the issue); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (same). Koh's reliance on *Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 201 (2012), badly

misses the mark because that case involved the absence of a factual record on which this Court could decide the case. *Id*. Here, the district court did, in fact, decide the question of qualified immunity based upon its review of the record and the mere fact that the Seventh Circuit chose not to do so given its declination of jurisdiction in no way prohibits or counsels against this Court's consideration of the issue.

V. This Court Should Resolve The Inter-Circuit Conflict On The Reviewability Of The Denial Of A Qualified Immunity Assertion Premised Upon A State Court's Fully Informed And Untainted Intervening Decision To Admit Evidence.

Koh contends "[t]he question of whether third-party actors intervened to cause a violation of Koh's rights that was an unforeseeable result of petitioners' own misconduct is a question that (a) necessarily involves fact disputes; and (b) is unrelated to the qualified-immunity question of whether petitioners violated Koh's clearly established rights." Resp at 33-34. Koh's argument misses the mark on both fronts. First, beyond generally pronouncing a factual dispute, Koh does not identify any fact that remains to be determined on whether there was any undue influence, or withholding or misrepresenting of evidence, relating to Petitioners' interactions with the prosecutors or the state court judge. Nor could he identify such a factual dispute given the district court's express finding that Petitioners did not fabricate or manufacture any evidence that was relied upon by the prosecution. App. 86a. All that remains is the purely legal issue of whether the trial court's admission of Koh's confession at trial severs the chain of causation and entitles Petitioners to qualified immunity.

To that question, Koh ignored the Fifth Circuit's on-point holding in *Murray v. Earle*, 405 F. 3d 278, 285 (5th Cir. 2005). In *Murray*, the Fifth Circuit held that a police officer who is forthcoming with the prosecutor with respect to the circumstances of an interrogation is entitled to qualified immunity from civil accountability for the prosecutor's independent decision to use the statements derived from that interrogation in a criminal proceeding. *Id.* In line with *Murray* (and the Second, Fourth, and Eleventh Circuits),[3] the same should be true for Petitioners, but the Seventh Circuit's refusal to even address this argument creates an inter-circuit conflict that now warrants this Court's review.

Koh's contention that Petitioners' causation argument is unrelated to qualified immunity ignores the first prong of a qualified immunity analysis, which is whether defendants violated a constitutional right. *Ashcroft*, 563 U.S. at 735. Here, Petitioners did not violate Koh's Fifth Amendment right because it was the prosecutors' decision to offer and the state court judge's decision to admit Koh's confession, not Petitioners' act of obtaining the statement, which caused the statement to be used against Koh during his criminal trial. *See Chavez v. Martinez*, 538 U.S. 760, 770 (2003) ("violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case") (emphasis omitted). As the Second Circuit explained in *Wray v. City of New York*, "[i]t is always possible that a judge who is not misled or deceived will err; but such an error is not reasonably foreseeable, or . . . it is not the 'legally cognizable result' of an investigative abuse.

3. *See* Pet. at 29-33.

Moreover, in the absence of evidence that [the defendant police officer] misled or pressured the prosecution or trial judge, he was not an 'initial wrongdoer'" and therefore, cannot be liable under §1983. 490 F.3d 189, 195 (2d Cir. 2007) (internal citations omitted). Accordingly, this case presents an excellent vehicle for resolution of an inter-circuit conflict on the availability of interlocutory review from a qualified immunity denial that turns on the legal question of whether a state court judge's fully informed admission of a suspect's statement severs the chain of causation on a Fifth Amendment coerced confession claim asserted under §1983.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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