No. 11-540

IN THE

Supreme Court of the United States

NORTH LAS VEGAS POLICE DEPARTMENT, ET AL.,

Petitioners,

v.

SHEILA CONATSER, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct in holding that it lacked jurisdiction to review the denial of qualified immunity based on a district court's conclusion that there was a genuine dispute of material fact, in the absence of evidence definitively contradicting that conclusion.

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INTRODUCTION

It is settled law that appellate courts lack jurisdiction to hear an interlocutory appeal from a denial of qualified immunity predicated on a genuine dispute of material fact. *See Johnson v. Jones*, 515 U.S. 304 (1995); *see also Ortiz v. Jordan*, 131 S. Ct. 884 (2011). The lower courts are in agreement that if there is any room at all for interlocutory appellate review of a denial of qualified immunity based on the district court's determination that there is a genuine dispute of fact, such review may occur only in cases where a source of truly indisputable evidence, such as a videotape, definitively disproves one side's version of events.

As the Petition itself demonstrates, these principles are the subject of broad agreement among the circuits, including the Ninth Circuit whose decision is at issue here. Far from demonstrating a conflict among the circuits, the Petition documents a consensus among them.

This case involves a straightforward application of the core principle of *Johnson* in an unpublished and nonprecedential disposition. A man was fatally shot during an encounter with nine police officers. The police officers claim that they shot him because he charged them with a knife; two neighbors who witnessed the incident claim the man was not threatening the officers when he was shot. The record contains no videotape or similar evidence that could show one side's version of the facts is indisputably incorrect. The district court therefore denied summary judgment because of a genuine dispute of material fact. This case presents nothing more than a classic, run-of-the-mill factual dispute

that our justice system has long committed to resolution by a jury.

With no circuit split as to the governing law, this case is plainly unworthy of this Court's review. Even assuming there existed some conflict in need of this Court's resolution (as Petitioners insist in spite of the appellate court consensus they identify), this case would be a poor vehicle for addressing any such conflict: under the rule Petitioners advocate, which is also the consensus legal standard in the circuits, the decision below was correct. For these reasons, this Court should deny the Petition.

STATEMENT OF THE CASE

On the evening of June 9, 2006, Phillip Conatser, the son of Respondents Sheila and Allan Conatser, was fatally shot by Petitioners Edmond Finizie and Peter Smirga, officers of the North Las Vegas Police Department (NLVPD). Pet. App. 6a. The officers had come to the Conatser residence in response to an emergency call from Sheila Conatser, who told police that Phillip was having a panic attack, was violent and suicidal, and had a history of mental illness. *Id.* Within approximately thirty minutes, nine NLVPD officers surrounded the residence with Phillip inside. *Id.* at 7a-8a. Officers from the Crisis Intervention Team (CIT), who are trained to deal with individuals experiencing mental health crises, were not called to assist; according to the testimony of Petitioner Finizie, CIT was not called because no CIT officer was on duty that night and because of Finizie's belief that a person who is suicidal is not necessarily experiencing a mental health crisis. *Id.* at 8a.

When the residence was surrounded, the NLVPD dispatch center contacted Phillip Conatser by

telephone to tell him that officers were outside and wanted to speak with him. *Id.* At this point in the factual narrative, Petitioners' and Respondents' versions of the facts diverge significantly. Respondents rely on the testimony of two neighbors, Valerie Verona and Anthony Cortez, at a coroner's inquest that occurred after the shooting; Petitioners rely on the testimony of the officers, including Petitioners themselves. *See id.* at 9a-13a.

By all accounts, Phillip came out of the residence and implored the officers to kill him. *Id.* at 8a-9a. According to the officers, he was screaming and using profanity. *Id.* at 8a-9a. In contrast, neighbor Verona testified that he simply said "go ahead, shoot me, shoot me," *id.* at 9a, and neighbor Cortez characterized Phillip's behavior as calm. *Id.* at 12a.

According to the officers, Petitioner Smirga repeatedly ordered Phillip to keep his hands up and get down on his knees, and Phillip ignored him and continued screaming. *Id.* at 9a. Both neighbors testified that they did not hear the officers issue any commands. *Id.*

The officers disagree among themselves whether Phillip then approached the officers or turned to retreat into the house: two officers testified that he retreated; one officer claims that he advanced. *Id.* at 9a & n.2. In any event, Petitioner Smirga fired a Taser at Phillip and at the same time another officer fired a "less lethal beanbag round" at him. *Id.* at 10a. Phillip fell, but tried to "fight through the Taser cycle" and stand up. *Id.* Petitioner Smirga testified that at this time he saw a knife in Phillip's hand. *Id.* According to the officers, although they fired an entire can of mace in Phillip's face and shot him with

a second beanbag round, Phillip charged Smirga and Finizie and swung his knife at them, cutting Finizie's hand. *Id.* at 10a-11a. According to the officers, Phillip then retreated to the residence, leaving the door ajar. *Id.* at 11a. The officers sent a police dog after Phillip, but the dog became disoriented because of the mace. *Id.*

According to the officers, Phillip then reemerged from the house, charging the officers with a knife raised "in an overhead, 'ice pick' fashion." *Id.* Two officers fired additional "less lethal" shots (a beanbag round and a rubber bullet) at Phillip, and then Petitioners Finizie and Smirga shot Phillip a total of six times with their service revolvers. *Id.* at 11a-12a. Phillip died at the scene. *Id.* at 12a.

The two neighbors who witnessed the incident tell a very different story about the moment of the fatal shooting. Anthony Cortez testified that Phillip remained calm, did not attack the officers, and did not pose a threat to them. *Id.* Although Valerie Verona testified that when Phillip first emerged from the house and asked the officers to shoot him, she heard an officer say that Phillip had a knife, *id.* at 9a, she also testified that she did not see Phillip attack or threaten the officers, *id.* at 12a. It is undisputed that Phillip was separated from the officers throughout the incident by a low fence, perhaps three feet high. *Id.* at 10a & n.3, 12a.

Respondents sued Petitioners under 42 U.S.C. § 1983 and analogous state tort law, alleging that the officers used excessive force in violation of the Fourth Amendment and unconstitutionally deprived plaintiffs of their liberty interest in their familial relationship with their son in violation of the

Fourteenth Amendment. *Id.* at 13a. Respondents also brought claims against the NLVPD and the City of North Las Vegas for having a policy or practice of ratifying or being deliberately indifferent to the excessive use of force, and for having negligently hired and failed to train or supervise their officers. *Id.*

The district court granted summary judgment to the defendants on the familial relationship, municipal liability, and negligent supervision and training claims, but denied summary judgment in all other respects. *Id.* at 32a. As relevant to the instant Petition, the court held that it could not grant qualified immunity to Petitioners because of a genuine dispute of material fact based on the different accounts of events given by the neighbor-witnesses and by the officers, respectively. *See id.* at 23a-24a, 30a-31a. As the court explained, the parties' divergent accounts of events at the moment of the fatal shooting were crucial: "Although it objectively was reasonable for Finizie and Smirga to shoot Phillip if he charged the officers with the knife raised in an 'ice pick' fashion, the neighbors aver Phillip did not attack the officers." *Id.* at 23a. The Ninth Circuit dismissed Petitioners' interlocutory appeal for lack of jurisdiction because the officers' qualified immunity defense turns on a genuine disputed issue of material fact. *Id.* at 2a-3a.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split Regarding The Treatment Of Factual Disputes In Qualified Immunity Appeals.

Petitioners argue that certiorari should be granted because there is a conflict among the circuits

regarding the application of *Johnson v. Jones*, 515 U.S. 304 (1995), which governs the limits on appellate jurisdiction over qualified immunity appeals that turn on disputed questions of fact. But far from identifying any circuit split, the Petition demonstrates broad agreement among the courts of appeals, including the Ninth Circuit, regarding the application of *Johnson*, and specifically its interaction with the subsequent decision upon which Petitioners place primary reliance, *Scott v. Harris*, 550 U.S. 372 (2007).

Johnson considered a defendant's appeal of a denial of qualified immunity on a disputed factual record and held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. at 319-20. As this Court recently elaborated, *Johnson* means that

> immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a "purely legal issue," illustratively, the determination of "what law was 'clearly established'" at the time the defendant acted. However, instant appeal is not available, *Johnson* held, when the district court determines that factual issues genuinely in dispute preclude summary adjudication.

Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011) (quoting *Johnson*, 515 U.S. at 313).

In *Scott v. Harris*, this Court reviewed a denial of qualified immunity on a factual record that included

a videotape showing the relevant event (a car chase). 550 U.S. at 378. After reviewing the videotape, the Court held that, because "[r]espondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him," the appellate court should not have credited his account of the facts for purposes of identifying a genuine dispute of material fact at summary judgment. *Id.* at 380.

Scott discussed the significance of the videotape evidence solely as a matter of the applicable summary judgment standard, not as a factor bearing on the existence of appellate jurisdiction. Indeed, the Court did not discuss *Johnson*'s preclusion of interlocutory appeals of district-court denials of summary judgment premised on the existence of disputes of fact, and the issue was neither included in the questions presented nor decided by the Court. Nonetheless, because *Scott* was an interlocutory appeal from a district court decision finding a genuine dispute of fact in a qualified immunity case, the lower federal courts have understandably viewed it as suggesting that such an appeal is proper in some circumstances.

As the Petition itself shows, the appellate courts have had little difficulty harmonizing *Scott* and *Johnson*. Despite Petitioners' repeated characterization of the appellate courts as "struggl[ing] with" and exhibiting "confusion" over the relationship between *Johnson* and *Scott*, Pet. 14, 16, the Petition's discussion of the lower courts' treatment of *Johnson* and *Scott* reveals the emergence of an uncontroversial consensus approach: *Johnson* continues to preclude appellate jurisdiction where the application of qualified immunity turns on

a genuine factual dispute, but *Scott* carves out an exception permitting courts to discount a factual dispute as non-genuine when one side's version of the facts is definitively contradicted by indisputable record evidence. *See* Pet. 14-20.

As the Third Circuit explained, for instance, the ruling in *Scott* "may represent the outer limit of the principle of *Johnson v. Jones*," namely, that "where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review." *Blaylock v. City of Phila.*, 504 F.3d 405, 414 (3d Cir. 2007). The Petition's review of case law from the First, Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits reveals broad agreement on this approach—notwithstanding the Petitioners' insistence that the courts of appeals are in disarray. *See* Pet. 14-20. Petitioners fail to cite a single published cite from any court of appeals that disrupts this consensus.

The Ninth Circuit, which issued the decision below, is no exception. As Petitioners note, *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), addressed the *Johnson-Scott* issue just as the other circuits have done, by concluding that appellate jurisdiction is limited by genuine disputes of material fact but that appellate courts may determine in certain cases that factual disputes are not genuine:

> Our jurisdiction to review an interlocutory appeal of a denial of qualified immunity . . . is limited exclusively to questions of law. Where disputed issues of material fact exist, we must assume the version of facts presented by the plaintiff. . . . However, when the facts, as

> alleged by the non-moving party, are unsupported by the record such that no reasonable jury could believe them, we need not rely on those facts for purposes of ruling on the summary judgment motion.

Id. at 550 (citations and internal quotation marks omitted).

Petitioners make much of dicta in the decision below questioning whether *Scott* has any bearing on the jurisdictional analysis. *See* Pet. App. 3a-4a; Pet. 3. Although the panel's brief discussion on this point does not rely on the consensus view regarding the interaction between *Johnson* and *Scott*, Petitioners' characterization of the opinion as "explicit . . . that the Supreme Court's ruling in *Scott v. Harris* was in error," Pet. 3, is quite mistaken. The panel stated, correctly, that *Scott* did not formally address the scope of the *Johnson* rule, and that *Johnson* remains the law (a point Petitioners do not contest). More important, the panel did not purport to overrule the Ninth Circuit's prior decision in *Wilkinson* (which a three-judge panel lacks the power to do), nor was the result it reached on these facts incorrect under the consensus rule, as explained in Part II below.

Even if the panel's result were irreconcilable with *Wilkinson*—and it is not—the unpublished and nonprecedential decision does not, and cannot as a matter of the Ninth Circuit's own rules, affect *Wilkinson*'s status as the law of the circuit. *See* 9th Cir. Loc. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent[.]"). Review by this Court is not required to address dicta in an unpublished opinion from a circuit in which—as Petitioners themselves point out—the binding,

precedential rule conforms to the consensus view. Pet. 13-14. Dicta in a non-precedential case hardly create a circuit split, as courts within the Ninth Circuit continue to be bound by the precedential rule expressed in published case law.

In sum, although the Petitioners frame their argument for certiorari around the charge that "there is an obvious confusion among the Circuits" regarding *Johnson* and *Scott*, Pet. 11, Petitioners' own analysis shows precisely the opposite. The consensus among the courts of appeals renders this Court's intervention unnecessary.

II. The Rule Petitioners Advocate Would Not Affect The Outcome In This Case.

The panel below had no need to consider the correctness of the consensus view that *Scott* establishes a narrow exception to the *Johnson* principle, because that exception could not apply to the facts of this case. The result reached by the court below is fully consistent with the limited scope of the exception to *Johnson*'s no-appeal rule that the consensus rule recognizes. Thus, the facts of this case present no occasion for addressing the legal issue because under the rule Petitioners' urge—a rule that no party and no circuit disputes—the outcome of this case would not change.

Under Petitioners' (and the consensus) rule, appellate courts may accept interlocutory review in the face of a district court's determination that there is a factual dispute when one side's version of events is definitively contradicted by objective and indisputable evidence in the record. Pet. 24. That principle cannot lead to reversal of the court of appeals in this case, because the parties present two

different versions of the facts, each supported by eyewitnesses, and Petitioners cannot point to any objective and indisputable record evidence that definitively contradicts Respondents' witnesses such that no reasonable jury could rule in Respondents' favor.

Attempting to substitute vehemence for evidence, Petitioners repeatedly insist that Respondents' version of events *cannot* be true—that Respondents' two eyewitnesses who claim the decedent was non-threatening must be entirely disbelieved and Petitioners are indisputably correct that Phillip was charging at the officers with a knife when they fatally shot him. *See* Pet. 11, 24. But Petitioners do not explain why their version of the story must be true, other than to insist upon it strenuously. Petitioners themselves acknowledge that two neighbors "described Philip Conatser as calm and non-threatening." Pet. 10. Petitioners nonetheless trumpet what they call "[t]he independent, objective, and uncontradicted evidence" of Finizie's earlier knife wound, Pet. 11, and declare that "[t]he stab wound suffered by Lt. Finizie impeaches the neighbors' testimony," Pet. 25. But Petitioners do not explain why Lt. Finizie's knife wound—which Petitioners themselves claim he sustained well before the lethal shots were fired—indisputably proves, in the face of the neighbors' contrary testimony, that Phillip *later* charged the officers with a knife and that this action justified the use of lethal force.

Lacking evidence like the videotape in *Scott* that conclusively proves one side wrong, this case presents a quintessential jury question: given two sets of witnesses telling conflicting stories, which is

the more credible? Our judicial system does not resolve factual disputes on the basis of one party's say-so, however vigorous. Unless this Court were to adopt a radical new rule unleashing appellate courts to invade the province of the jury and make credibility determinations as between conflicting witnesses telling different versions of events (a rule that even Petitioners do not suggest and that this Court's recent unqualified endorsement of the *Johnson* rule in *Ortiz* forecloses), Petitioners cannot prevail. There is thus no reason for this Court to grant certiorari to second-guess the panel's routine application of *Johnson* to these facts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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