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Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals

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ASSUMED FACTS AND BLATANT CONTRADICTIONS IN QUALIFIED-IMMUNITY APPEALS

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When a district court denies qualified immunity at summary judgment, defendants have a limited right to immediately appeal that decision. In Johnson v. Jones*, the U.S. Supreme Court held that courts hearing these appeals have jurisdiction to address only whether the facts the district court took as true in denying immunity amount to a clearly established violation of federal law. They lack jurisdiction to look behind the facts that the district court assumed were true to see whether the evidence supports those facts. Despite this seemingly clear rule, defendants regularly flout* Johnson*'s jurisdictional limits, taking improper appeals that create extra work and impose wholly unnecessary costs and delays on civil rights plaintiffs. And the Court's decision in* Scott v. Harris*—which appears to violate Johnson's limits without mentioning* Johnson *or even appellate jurisdiction—has made the jurisdictional rules governing qualified-immunity appeals even less certain.*

In this Article, I address the law governing jurisdiction in qualified-immunity appeals from summary judgment. I show that Johnson *can be read to mean only that the courts of appeals generally lack jurisdiction to review whether the summary-judgment record supports the district court's assumed facts. I explain how to reconcile the analysis in* Scott *with the rule in* Johnson*:* Scott *created an exception to the general limit on reviewing the district court's assumed facts when something in the record blatantly contradicts those facts.*

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I argue—based on my analysis of twelve years of decisions invoking this exception—that Scott*'s blatant-contradiction exception is neither pragmatic nor needed. And I offer reforms, via Supreme Court decisions or rulemaking, that would both clarify and improve the law governing qualified-immunity appeals.*

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I. INTRODUCTION

Defendants have a right to immediately appeal a denial of qualified immunity.[1] But when a district court denies qualified immunity at summary judgment, that right to appeal is limited.[2] The scope of review—i.e., the particular issues over which the appellate court has jurisdiction—is narrow.[3] The courts of appeals have jurisdiction to address only part of the district court's decision: whether, under the facts that the district court took as true when denying qualified immunity, the defendant violated clearly established federal law.[4] The courts of appeals lack jurisdiction to review whether the summary-judgment record supports those assumed facts.[5] In other words, defendants may appeal, but they may challenge only the materiality of any factual disputes.[6] They cannot challenge whether those factual disputes are genuine.[7]

The Seventh Circuit's recent decision in *Koh v. Ustich* illustrates this limited scope of review.[8] Koh brought a Fifth Amendment claim against several officers who had allegedly coerced him into falsely confessing to the murder of his son.[9] The officers moved for summary judgment on qualified immunity grounds.[10] But the district court determined that a jury could find for Koh on this claim and denied immunity.[11] Koh spoke limited English, and the district

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[1] Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). Qualified immunity is a special defense in civil rights suits that protects government officials from damages unless they violate the plaintiff's "clearly established" rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also infra* Section II.B.

[2] *See* Johnson v. Jones, 515 U.S. 304, 307 (1995) (holding that "defendants cannot immediately appeal" a district court's denial of a motion for summary judgment to the extent it involves "a *fact*-related dispute about the pretrial record"); *see also* Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1845–50 (2018) [hereinafter Lammon, *Finality*] (discussing the limitations on a government defendant's right to appeal a district court's denial of qualified immunity).

[3] Lammon, *Finality*, *supra* note 2, at 1846.

[4] *Johnson*, 515 U.S. at 307; *see also* Behrens v. Pelletier, 516 U.S. 299, 313 (1996).

[5] *Johnson*, 515 U.S. at 307. *Johnson* recognized an exception to this rule when the district court does not identify the facts it assumed in denying qualified immunity. *Id.* at 319.

[6] *Id.* at 319–20.

[7] *Id.*

[8] 933 F.3d 836, 838 (7th Cir. 2019).

[9] *Id.* at 838, 843.

[10] *Id.* at 843.

[11] *Id.*

court determined that a reasonable jury could find that Koh was confused by an interrogation that was conducted mostly in English:

> Many of Mr. Koh's answers were altogether nonsensical, showing (or so a reasonable jury could find) that he did not understand what was going on. For example, Mr. Koh responded to [one officer's] question about what kind of person [Koh's son] was by narrating what happened yesterday morning. At another point in the interview, Koh answered a question about whether he saw a weapon by telling [the officer] about the tools he kept for his vending machine business. During one tense moment, [the officer] asked Mr. Koh[,] "Would God want [your son] to . . . have his father sitting here and telling us a story that's not true?"—a question that should obviously have been answered "no"—but Mr. Koh said "yeah." As the interview went on, Mr. Koh largely defaulted to giving one word or unintelligible answers, or responding that he did not know or could not remember.[12]

The district court also credited Koh's evidence that he was suffering from a lack of medication and sleep, and that one of the officers had threatened him.[13] The officers nevertheless appealed the denial of qualified immunity.[14]

On appeal, the officers presented their own version of the facts: they characterized the language barrier as a "limited English language proficiency" that was addressed via an interpreter.[15] The officers ignored the district court's conclusion that Koh "displayed signs of physical exhaustion when 'he sat hunched over in his chair' and hit himself in the head and chest."[16] And they claimed that the interrogation contained no threats.[17] The Seventh Circuit held that

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[12] *Id.* at 845 (fifth alteration in original).
[13] *Id.* at 846–47.
[14] *Id.* at 843.
[15] *Id.* at 845.
[16] *Id.* at 847.
[17] *Id.*

these factual challenges were outside of its limited jurisdiction.[18] And the officers offered no argument that, under the district court's facts, they did not violate Koh's clearly established rights.[19] Because the officers did not present any arguments that were within the scope of review, the Seventh Circuit dismissed the appeal for lack of jurisdiction.[20]

The decision in *Koh* was undoubtedly correct; the defendants took an entirely improper appeal. But *Koh* is not unique. With some frequency, defendants misunderstand or flout the jurisdictional limits on interlocutory appeals from denials of qualified immunity.[21] Courts generally sort out the jurisdictional issues and, perhaps after full briefing and even oral argument, dismiss these appeals for a lack of jurisdiction. But at that point, the damage has been done.[22]

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[18] *Id.* at 838 ("Because [the officers'] arguments are inseparable from the questions of fact identified by the district court, we dismiss these appeals for lack of jurisdiction."); *see also id.* at 844 ("While [the defendants] assert in their reply brief that they have taken all of the district court's factual determinations and reasonable inferences in the light most favorable to Mr. Koh, 'we detect a back-door effort to contest the facts,' namely the nature of Mr. Koh's confusion and lack of understanding due to the language barrier, the impact of the lack of medication and sleep, and the threat [one officer] leveled against Mr. Koh." (quoting Jones v. Clark, 630 F.3d 677, 680 (7th Cir. 2011))).

[19] *Id.* at 844–45, 848.

[20] *Id.* at 848 ("Because these appeals present factual challenges that are outside of our jurisdiction over an appeal of an order denying qualified immunity on summary judgment, we dismiss these appeals for lack of jurisdiction.").

[21] *See, e.g.*, Swain v. Town of Wappinger, 805 F. App'x 61, 62 (2d Cir. 2020) (mem.) ("[B]ecause the Defendants' argument on appeal amounts to a challenge of whether the evidence was sufficient[,] we lack jurisdiction to review the denial of qualified immunity."); Betton v. Belue, 942 F.3d 184, 192 n.3 (4th Cir. 2019) ("To the extent [the defendant] attempts to challenge the district court's conclusion that a genuine dispute of fact exists, such an argument lies outside our jurisdiction in this interlocutory appeal."); Sanford v. City of Detroit, 815 F. App'x 856, 859 (6th Cir. 2020) (dismissing some of the defendants' arguments because they were "based on factual disputes, which [the court] lack[s] jurisdiction to review"); Chestnut v. Wallace, 947 F.3d 1085, 1089 (8th Cir. 2020) ("[T]o the extent [the defendant's] argument is premised on this factual dispute, we would lack jurisdiction over his appeal."); White v. Mesa, 817 F. App'x 739, 740 (11th Cir. 2020) (per curiam) ("Because we find that the appellants' challenge rests on factual disputes, we dismiss this appeal for want of appellate jurisdiction."); Scott v. Gomez, 792 F. App'x 749, 753 (11th Cir. 2019) (per curiam) ("[The] appeal of the district court's order is entirely concerned with the sufficiency of the evidence. Accordingly, we may not exercise jurisdiction over this case.").

[22] *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1907 (2018) [hereinafter Blum, *The Message*] ("[Qualified-immunity] appeals have resulted in expensive, burdensome, and often needless delays in the litigation of civil rights claims.").

These appeals add unnecessary work, expense, delay, and uncertainty to the case.[23] The appeals normally pause all district court proceedings.[24] Parties research and brief both jurisdiction and the merits of the qualified-immunity appeals. And months pass between the notices of appeal and the eventual dismissals.

Much like the underlying law of qualified immunity, interlocutory appeals from denials of qualified immunity—or, simply, "qualified-immunity appeals"—are fraught with controversy, uncertainty, and litigation.[25] In 1995, the U.S. Supreme Court seemed to settle the scope of these appeals in *Johnson v. Jones*.[26] But the subsequent twenty-five years have seen frequent misunderstandings and litigation on this issue.[27] Things have become more difficult since 2007, when the Court decided *Scott v. Harris*.[28] The Court's analysis in *Scott* appeared to violate the normal jurisdictional limits on qualified-immunity appeals.[29] Yet the Court said nothing about appellate jurisdiction. Courts have since tried to reconcile *Scott* with the normal limits on qualified-immunity appeals, injecting further uncertainty and contention into

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[23] *Id.*

[24] The appeal in *Koh*, for example, stalled district court proceedings for sixteen months while the Seventh Circuit sorted out its jurisdiction. *See* Bryan Lammon, *Seventh Circuit Dismisses Fact-Based Qualified-Immunity Appeal in Coerced-Confession Case*, FINAL DECISIONS (Aug. 16, 2019), https://finaldecisions.org/seventh-circuit-dismisses-fact-based-qualified-immunity-appeal-in-coerced-confession-case.

[25] For a sampling of recent criticism of qualified immunity, see generally William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Blum, *The Message*, *supra* note 22; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case*]; Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093 (2018). On qualified-immunity appeals, see Blum, *The Message*, *supra* note 22, at 1907–15; Lammon, *Finality*, *supra* note 2, at 1845–50; Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169, 171–83 (2019) [hereinafter Solimine, *Qualified Immunity Appeals*].

[26] 515 U.S. 304 (1995).

[27] Blum, *The Message*, *supra* note 22, at 1912–15. For examples of recent cert petitions raising issues about the scope of qualified-immunity appeals, see Petition for Writ of Certiorari at 17–20, Hinson v. Bias, 141 S. Ct. 233 (2020) (mem.) (No. 19-872); Petition for a Writ of Certiorari at 14, Graf v. Koh, 140 S. Ct. 935 (2020) (mem.) (No. 19-624); Petition for Writ of Certiorari at 9, Vizcarra v. Ortiz, 140 S. Ct. 677 (2019) (mem.) (No. 19-614); Petition for a Writ of Certiorari at 10–11, Taffe v. Wengert, 140 S. Ct. 1106 (2020) (mem.) (No. 19-486).

[28] 550 U.S. 372 (2007).

[29] *Id.* at 379–80; *see also infra* Section III.A.

this area.[30] This uncertainty adds unnecessary expense, delay, and unpredictability to civil rights litigation.

In this Article, I clear up this area of the law and plot a course for improving it. I begin in Part II by setting out the general rule for the scope of review in qualified-immunity appeals from summary judgment, which stems primarily from the Court's decision in *Johnson v. Jones*.[31] Interpretations of *Johnson* vary.[32] But the best (and most widely accepted) reading of it is that courts of appeals lack jurisdiction to review the genuineness of a fact dispute in an interlocutory qualified-immunity appeal.[33] That is, if the district court concludes that the summary-judgment record supports a particular set of facts, the appellate court lacks jurisdiction to second guess that determination in an interlocutory appeal.[34] The court of appeals can instead address only whether those particular facts amount to a violation of clearly established federal law.[35] Again, not everyone agrees on this interpretation of *Johnson*.[36] Defendants regularly ignore or misunderstand *Johnson*'s jurisdictional limits.[37] Courts and plaintiffs occasionally have their own difficulties.[38] But, as Part II shows, most courts have endorsed this reading of *Johnson*, and it makes good practical sense.

In Part III, I tackle the wrench that *Scott v. Harris* threw into this general jurisdictional framework. The *Scott* Court appeared to do exactly what *Johnson* prohibited: it rejected the facts that the district court had assumed—holding that a video of a high-speed car chase "blatantly contradicted" those facts—and made its own

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[30] *See infra* Part III.

[31] 515 U.S. 304, 307 (1995).

[32] *See, e.g.*, Tuuamalemalo v. Greene, 946 F.3d 471, 484–85 (9th Cir. 2019) (Fletcher, J., concurring) (interpreting *Johnson* to mean that appellate jurisdiction exists only when the district court denied qualified immunity on the *defendant's* facts, but not when the district court denied immunity on the plaintiff's contested version of the facts); Stinson v. Gauger, 868 F.3d 516, 518, 529 (7th Cir. 2017) (en banc) (splitting over *Johnson*'s impact on jurisdiction to review a qualified-immunity appeal).

[33] *See Johnson*, 515 U.S. at 319–20 ("[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.").

[34] *See id.* at 313 (holding that "the District Court's determination that the summary judgment record . . . raised a genuine issue of fact" is "not appealable").

[35] *Id.*

[36] *See supra* note 32 and accompanying text.

[37] *See supra* note 21 and accompanying text.

[38] *See supra* notes 25–29 and accompanying text.

assessment of the summary-judgment record.[39] And *Scott* did so without mentioning *Johnson* or appellate jurisdiction. The courts of appeals have since struggled to reconcile *Johnson*'s rule with *Scott*'s analysis. None have gone so far as to hold that *Johnson* was implicitly overruled.[40] They've instead mostly settled on what's called the "blatant-contradiction" exception to *Johnson*. Under this rule, appellate courts still generally lack jurisdiction to review the genuineness of a factual dispute.[41] But *Scott* allows them to review that issue when something in the summary-judgment record "blatantly contradicts" the district court's assumed facts.[42] A few other ways of reconciling *Johnson* and *Scott* have been offered.[43] But the blatant-contradiction exception is the only one with any real traction in the courts of appeals.

That's not to say that the blatant-contradiction exception is a *good* rule of appellate jurisdiction. It's not. In fact, it's both unpragmatic and unnecessary. Determining whether the exception applies requires doing exactly what *Johnson* prohibits: reviewing the summary-judgment record.[44] So a court must review the summary-judgment record to see if it has jurisdiction to review that record. The exception also prevents courts and parties from determining whether appellate jurisdiction exists at the outset of an appeal. The defendant invokes the exception in its brief, and—given the difficulty courts have had in identifying blatant contradictions—the parties won't know whether the exception applies until the court says so. That determination normally comes only after full briefing and perhaps even oral argument. The blatant-contradiction exception also invites improper appeals, adds costs and delays to civil rights litigation, and adds to the burdens on appellate courts.[45]

All of this is unnecessary. Intuitively, there's no reason to assume that district courts are frequently making such egregious errors. And the data backs that up. I found over 200 cases that mentioned the blatant-contradiction exception in the 12 years after *Scott*.[46] In

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[39] 550 U.S. 372, 378–80 (2007).

[40] *See infra* note 170.

[41] *See infra* Section III.B.

[42] *Scott*, 550 U.S. at 380.

[43] *See infra* Section III.C.

[44] *See supra* notes 33–35 and accompanying text.

[45] *See infra* Section III.B.*4*.

[46] *See infra* Section III.B.*3*.

136 of those cases, the court of appeals squarely addressed whether something in the summary-judgment record blatantly contradicted the district court's assumed facts.[47] And in only 28 of those 136 cases—or 21%—the court held that a sufficient contradiction existed. If blatant contradictions were obvious and easy to identify, this number would be much higher. Indeed, although comprehensive data is not available, the best data we have suggests that appellate courts find errors in the denial of qualified immunity about 43% of the time.[48] Given the extra work and inconvenience the blatant-contradiction exception creates, we should expect the incidence of error to be similar, if not higher. The exception's existence nevertheless invites defendants to invoke it. This results in attempted appeals, fights over appellate jurisdiction, wasted merits briefing, and delayed district court proceedings.

In Part IV, I show how to clean up this aspect of qualified-immunity appeals. At least two things need to happen: (1) the scope of review in qualified-immunity appeals itself needs to be clearly established, and (2) the blatant-contradiction exception needs to go. These changes could be done via Court decision. Or they could be done via rulemaking.[49] Indeed, qualified-immunity appeals—like many areas of federal appellate jurisdiction—are ripe for rules-based reform.[50] I conclude by addressing how the Rules Committee might reform this and other aspects of qualified-immunity appeals.

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[47] The other opinions mentioned the blatant-contradiction exception as part of their legal background or otherwise could not be coded. *See infra* Section III.B.*3*.

[48] Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 135 tbl.A3 (2016).

[49] *See* 28 U.S.C. § 1292(e) (2018) (authorizing the U.S. Supreme Court to create procedural rules that provide for an immediate appeal of an interlocutory district court decision); *id.* § 2072(c) (authorizing the Court to create rules defining when a district court decision is final for purposes of 28 U.S.C. § 1291).

[50] Lammon, *Finality*, *supra* note 2, at 1850–51; Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767, 827–30 (2018); Solimine, *Qualified Immunity Appeals*, *supra* note 25, at 171.

II. THE GENERAL SCOPE OF REVIEW IN QUALIFIED-IMMUNITY APPEALS

A. THE FINAL-JUDGMENT RULE

District courts often decide a number of issues in the course of federal litigation.[51] Nearly all of these decisions are "interlocutory"—they are made at some point before the end of district court proceedings and leave other issues for later resolution. As a general rule, federal litigants must wait until the end of proceedings—when all issues have been decided and all that remains is enforcing the judgment—before appealing any interlocutory decisions.[52] This limit on appellate jurisdiction comes from 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over only "final decisions" of the district courts, and it is commonly called the "final-judgment rule."[53]

The final-judgment rule is thought to strike the general balance between the interests that underlie the timing of appeals.[54] The

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[51] I have adapted some of the next few paragraphs from Bryan Lammon, *Dizzying* Gillespie*: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 374–77 (2017) [hereinafter Lammon, *Dizzying* Gillespie]; Lammon, *Finality*, *supra* note 2, at 1814–15; and Bryan Lammon, Hall v. Hall*: A Lose-Lose Case for Appellate Jurisdiction*, 68 EMORY L.J. ONLINE 1001, 1001–02 (2018).

[52] *See* 28 U.S.C. § 1291 (2018) ("The courts of appeals . . . shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." (emphasis added)); Gelboim v. Bank of Am. Corp., 574 U.S. 405, 408 (2015) ("A 'final decision' is one 'by which a district court disassociates itself from a case.'" (quoting Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995))); Catlin v. United States, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *see also, e.g.*, United States v. Williams, 796 F.3d 815, 817 (7th Cir. 2015) (concluding that a decision was final when it "end[ed] the litigation and [left] nothing but execution of the court's decision, the standard definition of 'final' under § 1291").

[53] *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part) (stating that "the final judgment rule [is] embodied in 28 U.S.C. § 1291"); Abney v. United States, 431 U.S. 651, 657 (1977) (same); *see also* Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (discussing "the 'final decision' rule"); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 356–60 (2010) (discussing the final-judgment rule's history).

[54] *See* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 35–36 (2d ed. 2009), https://www.fjc.gov/sites/default/files/2012/PrimJur2.pdf; Edward H.

benefits of delaying appeals are often spoken of in terms of efficiency. For example, postponing appeals saves litigants the expense, inconvenience, and delay—as well as potential harassment by better-resourced litigants—of multiple appeals.[55] Interlocutory appeals that might eventually become unnecessary—say, because the aggrieved party ultimately prevailed at trial—are avoided.[56]

And crucially, delaying appeals reduces appellate workloads.[57] Multiple appeals in a single action could require multiple panels of judges to familiarize themselves with a case. Each appeal would likely be decided separately. Different panels might duplicate each other's efforts. Consolidating all issues into a single appeal requires only a single panel of judges to learn the case, and that panel can resolve all issues in a single opinion.

But the final-judgment rule also has costs. Appellate decisions can correct errors and develop unclear areas of the law.[58] Cases that end in settlement—a common outcome in federal litigation—do not produce appealable decisions, leaving errors or issues unexamined.[59] In some cases, appellate intervention might also speed along district court proceedings or cut short what would later be deemed unnecessary litigation.[60] And the delay between an erroneous district court decision and vindication on appeal can cause substantial, sometimes irreparable, harms.[61]

By typically postponing appeals until the end of district court proceedings, the final-judgment rule reflects a belief that in most

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Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 157–58 (1984); Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267, 271 (2017); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1168–69 (1990) [hereinafter Solimine, *Revitalizing*]; Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1547–48 (2000).

[55] Solimine, *Revitalizing*, *supra* note 54, at 1168, 1178; Solimine & Hines, *supra* note 54, at 1548.

[56] Will v. Hallock, 546 U.S. 345, 350 (2006); Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987); Solimine, *Revitalizing*, *supra* note 54, at 1168; Solimine & Hines, *supra* note 54, at 1548.

[57] Solimine, *Revitalizing*, *supra* note 54, at 1168, 1178; Solimine & Hines, *supra* note 54, at 1548.

[58] Solimine, *Revitalizing*, *supra* note 54, at 1175.

[59] *Id.* at 1169, 1176; Solimine & Hines, *supra* note 54, at 1548.

[60] Solimine, *Revitalizing*, *supra* note 54, at 1176.

[61] *Id.* at 1169.

cases the benefits of delaying appeals outweigh the costs.[62] But like most rules, the final-judgment rule strikes that balance only generally. Sometimes the balance shifts because the need for immediate review outweighs (or is thought to outweigh) the loss in efficiency.[63] Sometimes it can even be more efficient—systematically speaking—to allow interlocutory appeals.

Congress and rulemakers have accordingly created several exceptions to § 1291 and the final-judgment rule. For example, 28 U.S.C. § 1292(a)(1) allows for the immediate appeal of certain orders regarding injunctive relief.[64] Section 1292(b) allows district courts to certify interlocutory orders for an immediate appeal in civil cases, which the courts of appeals then have discretion to review.[65] Federal Rule of Civil Procedure 54(b) allows district courts to certify for immediate appeal an order that resolves some (but not all) of the claims in a multi-claim or multi-party suit.[66] And Federal Rule of

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[62] *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911.2, Westlaw (database updated Apr. 2021) ("The final judgment rule . . . rests on a rough calculation that ordinarily the balance between the values of immediate appeal and delayed appeal swings in favor of deferring appeal.").

[63] *See supra* note 54 and accompanying text.

[64] Specifically, § 1292(a)(1) gives the courts of appeals jurisdiction over orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

[65] *See* 28 U.S.C. § 1292(b) (2018) ("When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . . ."). For more on § 1292(b), see generally 16 WRIGHT ET AL., *supra* note 62, § 3929; Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U. L. REV. 757 (2011); Solimine, *Revitalizing*, *supra* note 54; Tory Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183 (2014); Mackenzie M. Horton, Note, *Mandamus, Stop in the Name of Discretion: The Judicial "Myth" of the District Court's Absolute and Unreviewable Discretion in Section 1292(b) Certification*, 64 BAYLOR L. REV. 976 (2012); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959).

[66] *See* FED. R. CIV. P. 54(b) ("When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than

Civil Procedure 23(f) gives the courts of appeals discretion to review certain interlocutory orders regarding class certification.[67] Other examples exist.[68]

Courts have also created their own rules of appellate timing through interpretations of what it means for a decision to be final under § 1291.[69] The collateral-order doctrine is the most relevant example for present purposes.[70] That doctrine deems a district court decision final if it (1) conclusively determines an issue, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable in an appeal after a final judgment.[71] Courts have used the collateral-order doctrine to allow immediate appeals from a variety of district court decisions. For example, the doctrine allows appeals from orders denying a criminal

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all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). For more on Rule 54(b), see generally Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013).

[67] *See* FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . [if] a petition for permission to appeal [is filed] with the circuit clerk within 14 days after the order is entered . . . ."). For more on Rule 23(f), see generally Lori Irish Bauman, *Class Certification and Interlocutory Review: Rule 23(f) in the Courts*, 9 J. APP. PRAC. & PROCESS 205 (2007); Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13 (2007); Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROCESS 309 (1999); Solimine & Hines, *supra* note 54.

[68] *See, e.g.*, 9 U.S.C. § 16 (2018) (allowing immediate appeals from certain orders regarding arbitration); 18 U.S.C. § 3731 (2018) (allowing the prosecution in a criminal case to immediately appeal certain district court decisions before a final judgment).

[69] *See generally* Lammon, *Finality*, *supra* note 2.

[70] For more in-depth discussions of the collateral-order doctrine, see generally BAKER, *supra* note 54, at 42–45; Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998); Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 447–59 (2013) [hereinafter Lammon, *Rules*]; Petty, *supra* note 53, at 377–86; Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 47–57 (2007); Matthew R. Pikor, Note, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 CHI.-KENT L. REV. 619 (2017).

[71] Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

defendant's claim that bail is excessive.[72] It allows appeals from decisions that criminal proceedings would not violate a defendant's right to be free from double jeopardy.[73] It allows appeals from an order that a pretrial detainee be involuntarily medicated.[74] And it allows appeals from orders denying a variety of defenses, including those based on sovereign immunity, absolute executive immunity, and the U.S. Constitution's Speech and Debate Clause.[75]

The current regime of federal appellate jurisdiction—with a general final-judgment rule, a handful of statutory and rule-based exceptions, and a slew of judicial elaborations of what it means for a decision to be final—has been extensively discussed and critiqued elsewhere.[76] The immediate discussion focuses on one kind of appeal that is filed before the end of district court proceedings: appeals from the district court's denial of qualified immunity.

B. THE EXCEPTION FOR QUALIFIED-IMMUNITY APPEALS

Qualified immunity is a judge-made defense in civil rights actions.[77] When plaintiffs allege that government officials violated their federal rights, qualified immunity requires that the rights at issue be "clearly established" before the officials can be liable for damages.[78] That is, it's not enough that government officials violated the plaintiffs' rights. The contours of the violated rights

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[72] Stack v. Boyle, 342 U.S. 1, 7 (1951).

[73] Abney v. United States, 431 U.S. 651, 662 (1977).

[74] Sell v. United States, 539 U.S. 166, 177 (2003).

[75] P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141 (1993) (sovereign immunity); Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) (absolute executive immunity); Helstoski v. Meanor, 442 U.S. 500, 501 (1979) (Speech and Debate Clause of the U.S. Constitution).

[76] *See, e.g.*, 15A WRIGHT ET AL., *supra* note 62, §§ 3901–44; Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 179 (2001); Lammon, *Rules*, *supra* note 70, at 430–36. *See generally* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993); Petty, *supra* note 53; Steinman, *supra* note 70.

[77] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The qualified immunity literature is vast. For more in-depth discussions of the defense, see generally Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL OF RIGHTS J. 913 (2015); Baude, *supra* note 25; John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) [hereinafter Schwartz, *Qualified Immunity Fails*].

[78] Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam).

must have been sufficiently clear at the time of the alleged violation for the government officials to know that their actions violated the law.[79] If the right is insufficiently clear, the plaintiffs cannot recover any damages for the violation.

The primary purpose of this protection is both to ensure that government officials have sufficient notice that their actions violate the law and to allow for those officials to make reasonable mistakes without incurring liability.[80] The reasoning is that government officials need to exercise their discretion without concern about the cost and inconvenience of litigation unless that exercise of discretion is clearly unconstitutional.[81]

Qualified immunity has long been criticized, and that criticism has ramped up in recent years. Courts and commentators have questioned the historical and textual basis for qualified immunity,[82] argued that the immunity is neither necessary to protect nor effective at protecting government officials,[83] and criticized immunity's effects on precluding successful civil rights actions that would hold government officials accountable.[84] Indeed, efforts are

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[79] *Id.*

[80] Ziglar v. Abbasi, 137 S. Ct. 1843, 1866, 1868 (2017); *see also* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 14–27 (1997) [hereinafter Chen, *Burdens*] (explaining the Court's various justifications for qualified immunity—"fairness, overdeterrence, and social costs"—but showing that the Court has focused on social costs).

[81] *Ziglar*, 137 S. Ct. at 1866.

[82] *See, e.g., id.* at 1870–72 (Thomas, J., concurring in part and concurring in the judgment) (contending that qualified immunity should reflect immunities at common law); Baude, *supra* note 25, at 55–61 (challenging qualified immunity's supposed roots in the common law "good faith defense"); Smith, *supra* note 25, at 2101–02 (noting the multiple approaches to common law immunities that could "yield different approaches to qualified immunity").

[83] *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1164 (2020) [hereinafter Schwartz, *Selection Effects*] (finding that qualified immunity "does not effectively weed out insubstantial cases at the prefiling stage"); Schwartz, *Qualified Immunity Fails*, *supra* note 77, at 62 ("[T]here is limited evidence to support the hypothesis that qualified immunity [protects government officials] through screening cases or coercing settlement."); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 939 (2014) ("Given that law enforcement officers in my study only rarely . . . contributed to settlements or judgments, . . . qualified immunity can no longer be justified as a means of protecting officers from the financial burdens of personal liability." (footnote omitted)).

[84] *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Supreme Court's "one-sided approach to qualified immunity" that "gut[s] the deterrent effect of the Fourth Amendment"); Blum, *The Message*, *supra* note 22, at 1892;

afoot urging the Supreme Court to rethink the doctrine.[85] For the time being, however, qualified immunity remains the law. And some skepticism exists as to whether the Court will actually reexamine a doctrine it has so long supported.[86] I accordingly take much of the law of qualified immunity as it stands for purposes of this Article, and I focus my attention on the unique appellate-jurisdiction rules in this context.

In *Mitchell v. Forsyth*, the U.S. Supreme Court held that denials of qualified immunity can be immediately appealed under the above-mentioned collateral-order doctrine.[87] According to the *Mitchell* Court, denials of qualified immunity satisfy the doctrine's requirements: it (1) conclusively determines the entitlement to immunity, (2) resolves an important issue separate from the action's merits, and (3) is effectively unreviewable on appeal after a final judgment.[88]

Crucial to *Mitchell*'s holding was the Court's conclusion that qualified immunity is an immunity from suit. In addressing the collateral-order doctrine's third requirement—that a district court decision is "effectively unreviewable" in an appeal after a final judgment—the Court determined that qualified immunity was not

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Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015); Schwartz, *The Case*, *supra* note 25, at 1814; Smith, *supra* note 25, at 2103.

[85] For recent certiorari petitions and amicus briefs asking the Supreme Court to reconsider qualified immunity, see generally Petition for Writ of Certiorari, Cooper v. Flaig, 141 S. Ct. 131 (2020) (mem.) (No. 19-1001); Petition for a Writ of Certiorari, Corbitt v. Vickers, 141 S. Ct. 110 (2020) (mem.) (No. 19-679); Brief of Legal Scholars as *Amici Curiae* in Support of Petitioner, Baxter v. Bracey, 140 S. Ct. 1862 (2020) (mem.) (No. 18-1287); Brief of the Cato Institute as Amicus Curiae Supporting Petitioners, I.B. v. Woodard, 139 S. Ct. 2616 (2019) (mem.) (No. 18-1173); *see also* Brief in Opposition at 24, Davenport v. Estate of Cummings, 139 S. Ct. 2746 (2019) (mem.) (No. 18-1191) (opposing certiorari but arguing alternatively that the Court should "reverse qualified immunity in its entirety").

[86] *See* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1938 (2018) [hereinafter Chen, *Intractability*] ("[T]he doctrine likely will remain entrenched in its current form because of the Supreme Court's reluctance to consider empirical data in revising rules of constitutional enforcement . . . . The legal community . . . should not reasonably expect any transformation of the doctrine's basic structure . . . ."); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1858 (2018) ("[F]or decades at the nation's highest court, qualified immunity has been an unquestioned principle of American statutory law.").

[87] 472 U.S. 511, 530 (1985).

[88] *Id.* at 524–30.

a mere defense to liability.[89] It was an immunity from litigation itself.[90] According to the Court, the costs, burdens, and uncertainties of litigation can distract government officials from their duties, inhibit their actions, and scare qualified applicants from pursuing public service.[91] Qualified immunity freed government officials from those costs, burdens, and uncertainties so long as the officials did not violate clearly established law.[92] And if a case erroneously proceeded through pretrial discovery and trial, that freedom would be irretrievably lost.[93]

C. *JOHNSON*'S LIMIT ON THE SCOPE OF INTERLOCUTORY REVIEW

But not all aspects of a qualified-immunity denial can be immediately reviewed in an interlocutory appeal.[94] In any appeal, the court must determine which issues are properly before it—that is, within its scope of review.[95] Most appeals come from a traditional final judgment and thus do not present any scope-of-review issues—nearly every decision that comes before a final judgment merges into that judgment, placing all of those decisions within the scope of appellate review so long as subsequent events have not rendered them moot.[96] But when dealing with appeals before the end of

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[89] *Id.* at 526–27.

[90] *See id.* at 526 ("The entitlement is an *immunity from suit* rather than a mere defense to liability . . . .").

[91] *See id.* (expressing concern about "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982))).

[92] *See id.* ("*Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.").

[93] *Id.*

[94] *See* Lammon, *Finality*, *supra* note 2, at 1846.

[95] *See* 16 WRIGHT ET AL., *supra* note 62, § 3937 ("Once a court of appeals acquires jurisdiction, it is necessary to determine the extent of its power to act on the case.").

[96] *See id.* ("If appeal has been taken from a true final judgment that concludes all proceedings in the trial court, the appeal extends to all orders that have been properly preserved and that have not been mooted by subsequent events.").

district court proceedings, limits on the scope of interlocutory review occasionally exist.[97]

In 1995's *Johnson v. Jones*, the U.S. Supreme Court set out the general scope of review in a qualified-immunity appeal from summary judgment.[98] As I explain in the rest of this Section, *Johnson* holds that jurisdiction in a qualified-immunity appeal exists to review only whether the facts assumed by the district court amount to a violation of clearly established law.[99] The court of appeals lacks jurisdiction to review whether the summary-judgment record adequately supports those assumed facts.[100] In other words, defendants may appeal only the materiality of any fact disputes; they cannot appeal the genuineness of those disputes.

Yet twenty-five years after *Johnson*, parties and courts still occasionally dispute the decision's meaning. Defendants are the worst in this respect. With some frequency, they base their appellate arguments on a different set of facts than those the

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[97] Lammon, *Finality*, *supra* note 2, at 1846. Similar limits can be seen in some appeals from final agency decisions. For example, in appeals from final orders of removal in the immigration context, the courts of appeals cannot review denials of discretionary relief. 8 U.S.C. § 1252(a)(2)(B) (2018). Courts can, however, review constitutional claims or questions of law. *Id.* § 1252(a)(2)(D). Similarly, the Federal Circuit's jurisdiction to review decisions by the U.S. Court of Appeals for Veterans Claims extends to the validity and interpretation of statutes and the U.S. Constitution, but it does not extend to factual determinations or applications of law to fact. 38 U.S.C. § 7292 (2018).

[98] 515 U.S. 304, 307 (1995).

[99] *Id.* at 319–20.

[100] *Id.* at 313.

district court assumed.[101] Occasionally they argue based on *their own* version of the facts.[102]

These efforts have resulted in some strong rebukes from courts. An oral argument in a recent Fourth Circuit qualified-immunity appeal provides several illustrations.[103] The panel repeatedly corrected defense counsel who refused to accept the district court's assumed facts:

> You have to accept the facts the way they were articulated by the district court to argue this kind of an appeal. . . . [Y]ou don't want to accept those facts, it doesn't seem to me. You want to argue a different set of facts. You want to change the facts. And you can't do that here. In this kind of appeal you just can't do it.[104]

At one point, a member of the panel said that the defense was "twisting around and [wouldn't] accept the facts as articulated by the district court."[105] When counsel suggested that the court look into the record, one of the judges again laid out the law for jurisdiction in qualified-immunity appeals:

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[101] *See, e.g.*, Barry v. O'Grady, 895 F.3d 440, 443–45 (6th Cir. 2018) (noting that the defendant's "argument on appeal is based almost exclusively on disagreements with the district court's factual determinations and inferences"); McCue v. City of Bangor, 838 F.3d 55, 62–63 (1st Cir. 2016) (stating that the defendant "mischaracterize[d] the magistrate judge's statements about the facts"); Morales v. Chadbourne, 793 F.3d 208, 219 (1st Cir. 2015) (concluding that the defendant "would like [the court] to grant him qualified immunity based on his own version of the facts"); Penn v. Escorsio, 764 F.3d 102, 110–12 (1st Cir. 2014) (finding that the defendants' "arguments take issue with the district court's factual determinations"); Gutierrez v. Kermon, 722 F.3d 1003, 1011 (7th Cir. 2013) (stating that the defendant "undoubtedly relies on a disputed fact throughout his argument"); Bennett v. Krakowski, 671 F.3d 553, 559 (6th Cir. 2011) ("Defendants argue that they are entitled to summary judgment because no reasonable jury could conclude that they used excessive force against Plaintiff."); cases cited *supra* note 21.

[102] *See, e.g.*, Campbell v. Mack, 777 F. App'x 122, 127 (6th Cir. 2019) ("Throughout his principal brief, [the defendant] presents disputed material facts in the light most favorable to him and relies on his preferred version of the disputed material facts to argue that the district court improperly denied him qualified immunity.").

[103] Oral Argument, Betton v. Belue, 942 F.3d 184 (4th Cir. 2019) (No. 18-1974), http://www.ca4.uscourts.gov/OAarchive/mp3/18-1974-20190918.mp3.

[104] *Id.* at 14:14; *see also id.* at 39:30 ("You're making a jury argument."); *id.* at 39:50 ("That's not the facts.").

[105] *Id.* at 40:08.

> [T]his is a special kind of appeal. You have a limited right for a police officer to appeal the denial of qualified immunity. But you have to accept the facts as articulated by the lower court and bring them up here. And that's the law. That's the law.[106]

When counsel again suggested that the court look at the facts, another judge said that "in the light most favorable to the nonmoving party, what happened here was horrendous."[107]

Defendants are not alone. Plaintiffs occasionally argue that *Johnson* prohibits all qualified-immunity appeals when the district court concludes that a genuine fact issue exists.[108] That is, the court of appeals cannot even address whether the district court's assumed facts amount to a violation of clearly established federal law. Courts also sometimes disagree about *Johnson*. For example, a Ninth Circuit judge recently suggested that, under *Johnson*, appellate jurisdiction exists only when the district court denies qualified immunity on the *defendant's* facts; the court of appeals lacks jurisdiction if the denial was based on the plaintiff's contested version of the facts.[109] Courts occasionally dismiss qualified-immunity appeals when the defendants challenge the district court's assumed facts, almost as though the courts were sanctioning the defendants for trying to go beyond the courts' limited

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[106] *Id.* at 40:20.

[107] *Id.* at 41:20.

[108] *See, e.g.*, Kalvitz v. City of Cleveland, 763 F. App'x 490, 493 (6th Cir. 2019) (rejecting plaintiff's motion to dismiss the appeal because the court found that it could "answer [a] legal question while ignoring the [defendants'] attempts at obfuscating the factual record below"); Iko v. Shreve, 535 F.3d 225, 235–36 (4th Cir. 2008) ("We agree with Plaintiffs that the officers' appellate argument . . . asks us to revisit a number of factual disputes. . . . [H]owever, the officers *also* argue that the right to be free from an excessive deployment of force by pepper spray was not clearly established . . . . We possess jurisdiction over such a legal determination.").

[109] Tuuamalemalo v. Greene, 946 F.3d 471, 480 (9th Cir. 2019) (Fletcher, J., concurring).

jurisdiction.[110] And since *Scott v. Harris*, additional readings of *Johnson* have emerged that try to reconcile the two cases.[111]

This confusion does no one any good, particularly because it creates opportunities for defendants to take unfounded appeals. So it's worth clearly establishing the rule in *Johnson*. Understanding the case requires diving into the several steps a district court might go through in denying qualified immunity at the summary judgment stage. Summary judgment is appropriate when the moving party (and in the context of qualified-immunity appeals, the defendant is always the moving party) shows that no genuine issues of material fact exist, such that the moving party is entitled to judgment as a matter of law.[112] A district court faced with a summary judgment motion on qualified immunity thus must first determine the most plaintiff-favorable version of the facts that the summary-judgment record could support. If the defendant disputes this version of the facts (and has evidence to back up that dispute), then a genuine fact issue exists.

The district court must then determine whether this fact dispute is material. That requires asking the two qualified-immunity questions.[113] Assuming that the most plaintiff-favorable version of the facts is true, the district court determines whether those facts make out a violation of federal law. If they do, the district court must then determine whether the law was clearly established at the time of the violation. If both of these questions are answered affirmatively, then the defendant would be liable under those facts, the dispute over the facts is material, and summary judgment would not be appropriate.

Johnson held that in a qualified-immunity appeal, the court of appeals generally has jurisdiction over only the second and third inquiries—whether the plaintiff's version of the facts show a constitutional violation and whether that violation was clearly

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[110] *Compare* Stinson v. Gauger, 868 F.3d 516, 518 (7th Cir. 2017) (en banc) (dismissing a qualified-immunity appeal because the defendants "fail[ed] to take the facts and reasonable inferences from the record in the light most favorable to [the plaintiff] and challenge[d] the sufficiency of the evidence on questions of fact"), *with id.* at 529 (Sykes, J., dissenting) (contending that the court had jurisdiction to address whether the defendants were entitled to qualified immunity when the record was viewed in the light most favorable to the plaintiff).

[111] *See infra* Part III.

[112] *See* FED. R. CIV. P. 56(a).

[113] *See, e.g.*, *Tuuamalemalo*, 946 F.3d at 476.

established.[114] The court of appeals lacks jurisdiction over the first inquiry—whether the summary-judgment record supports the district court's assumed version of the facts.[115] The court of appeals must instead take the facts assumed by the district court as true and address the other issues.[116]

In *Johnson*, for example, the Court lacked jurisdiction to review the defendants' arguments about what a reasonable jury could find.[117] The plaintiff in *Johnson* sued several police officers, alleging excessive force.[118] Three of the officers moved for summary

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[114] *See* Johnson v. Jones, 515 U.S. 304, 307 (1995). The U.S. Supreme Court has held that other questions—such as the plausibility of the pleadings and the existence of a *Bivens* remedy—are also within the scope of interlocutory review. *See* Ashcroft v. Iqbal, 556 U.S. 662, 674–75 (2009) (holding that jurisdiction exists to evaluate the pleadings); Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007) (holding that jurisdiction exists to determine whether a *Bivens* remedy exists). These nuances can be ignored for present purposes where the distinction that matters is between the genuineness of a fact dispute and all other questions.

[115] *Johnson*, 515 U.S. at 320. Lest there be any uncertainty about this holding, the Court repeatedly framed the issue as whether appellate courts can review the genuineness of fact disputes in a qualified-immunity appeal. *See id.* at 307 ("The order in question resolved a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial. We hold that the defendants cannot immediately appeal this kind of fact-related district court determination."); *id.* at 313 ("[*Mitchell*] explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are 'genuine,' but the purely legal issue what law was 'clearly established.'" (citation omitted)); *id.* at 314 ("Where, however, a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such 'separate' question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits."); *id.* at 316 ("[T]he issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily."); *id.* ("[Q]uestions about whether or not a record demonstrates a 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time."); *id.* at 317 ("We recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about pre-existing 'clearly established' law, or (b) a determination about 'genuine' issues of fact for trial, it still forces public officials to trial."); *id.* at 319 ("[The defendants argue that] if appellate courts try to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine'), they will have great difficulty doing so.").

[116] *Johnson* recognized a limited exception to this general rule when the district court does not identify the facts that it assumed in denying qualified immunity. *Id.* at 319. In such a case, the court of appeals can, itself, review the summary-judgment record to determine the most plaintiff-favorable version of the facts that the district court likely assumed. *Id.*

[117] *Id.* at 319–20.

[118] *Id.* at 307.

judgment and argued that the plaintiff lacked sufficient evidence to show that they (as opposed to the other two officers) had beaten the plaintiff or been present when the plaintiff was beaten.[119] The district court denied the officers' motion, concluding that sufficient circumstantial evidence existed to support the plaintiff's theory that the three officers participated.[120] And were a jury to find that the three officers participated, they would be liable. The officers immediately appealed the denial of qualified immunity.[121] But on appeal they argued only that the summary-judgment record did not contain sufficient evidence for a jury to find that they had beaten the plaintiff.[122] The Court held that the court of appeals lacked jurisdiction to review that matter.[123] The court of appeals had jurisdiction to address whether the officers' conduct clearly violated the U.S. Constitution, but the officers did not argue this point.

Johnson imposed this limit on the scope of interlocutory qualified-immunity appeals for precedential, theoretical, and practical reasons. As to precedent, the Court thought that *Mitchell* at least suggested this holding. *Mitchell*, the Court noted, focused on appeals about whether the law was clearly established, not whether a genuine fact issue existed.[124] The *Mitchell* opinion also frequently spoke of "issues of law" or "legal issues," which the *Johnson* Court saw as a sign that *Mitchell* had already resolved this issue.[125]

To be sure, the Court's emphasis on "legal issues" is somewhat awkward. The genuineness of a factual dispute is, after all, a legal issue. And we'll soon see that the Court's harping on jurisdiction to review "legal issues" has created some of the difficulty in reconciling *Johnson* and *Scott*.[126] The Court later acknowledged that whether a genuine issue of fact exists at summary judgment is itself a legal

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[119] *Id.*

[120] *Id.* at 308.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 320.

[124] *See id.* at 313 (stating that *Mitchell* "explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are 'genuine,' but the purely legal issue what law was 'clearly established'" (citations omitted)).

[125] *Id.* at 313–14.

[126] *See infra* Part III.

question.[127] But the Court views this question as one that "sits near the law-fact divide"—"a 'fact-related' legal inquiry."[128]

As to theory, the Court saw in the collateral-order doctrine's "conceptual theory of appealability" a focus on whether a district court's decision "involves issues significantly different from those that underlie the plaintiff's basic case."[129] *Mitchell* held that the clarity of a constitutional violation was separate from the merits because it raised sufficiently distinct questions.[130] But evidence sufficiency issues are different; questions about what facts a plaintiff could prove at summary judgment are too similar to questions about what facts the plaintiff could prove at trial, leaving little gap between the appealed issue and the merits.[131]

As to practicality, the Court considered "competing considerations that underlie questions of finality."[132] And those considerations, the Court thought, weighed against appealability:

- First, appellate courts have no comparative advantage in determining the existence of a genuine issue of fact.[133]
- Second, and relatedly, there is relatively less likelihood of a reversible error, or need for error

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[127] Ashcroft v. Iqbal, 556 U.S. 662, 674 (2009).

[128] *Id.* (quoting *Johnson*, 515 U.S. at 314).

[129] *Johnson*, 515 U.S. at 314.

[130] *See id.* ("[A]lthough sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits (*i.e.*, in the absence of qualified immunity).").

[131] *See id.* ("[When] a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such 'separate' question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits."). The *Johnson* Court noted the suggestion "that *Mitchell* implicitly recognized that 'the need to protect officials against the burdens of further pretrial proceedings and trial' justifies a relaxation of the separability requirement." *Id.* at 315 (first quoting 15A WRIGHT ET AL., *supra* note 62, § 3914.10; then citing *id.* § 3911; and then citing *id.* § 3911.2). Even taking that suggestion as true, the Court could not find sufficient "separability" when it comes to the genuineness of a fact dispute. *Id.*

[132] *Johnson*, 515 U.S. at 315.

[133] *See id.* at 316 (stating that "[i]nstitutionally speaking, appellate judges enjoy no comparative expertise in such matters" as "the existence, or nonexistence, of a triable issue of fact").

> correction, in this context compared to pure issues of law.[134]
> - Third, determining whether a record presents a genuine issue of fact can be a time-intensive undertaking not well-suited for interlocutory appeals.[135]
> - Fourth, determining whether a genuine fact issue exists likely overlaps with issues raised later at trial, creating a risk of duplicative, overlapping appeals of similar issues.[136]

The Court accordingly concluded that government officials bringing a qualified-immunity appeal "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."[137]

So if a defendant accepts the district court's assumed facts as true and argues only that those facts don't amount to a clearly established violation of law, the court of appeals has jurisdiction. That remains true even if the district court determined that a genuine fact issue existed. As the Court held in *Behrens v. Pelletier*, a genuine fact dispute alone does not defeat appellate jurisdiction.[138] Plaintiffs thus misread *Johnson* when they argue that the existence of genuine fact issues precludes an appeal entirely.[139] The court of appeals can simply take the district court's

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[134] *See id.* ("And, to that extent, interlocutory appeals are less likely to bring important error-correcting benefits here than where purely legal matters are at issue, as in *Mitchell*.").

[135] *See id.* ("For another thing, questions about whether or not a record demonstrates a 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time.").

[136] *See id.* at 316–17 ("[T]he close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about by the trial testimony) to require it, once again, to canvass the record.").

[137] *Id.* at 319–20.

[138] *See* 516 U.S. 299, 312–13 (1996) ("That is a misreading of the case. Denial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable." (citation omitted)).

[139] *See, e.g.*, cases cite supra note 108.

assumed facts and address the clarity of any constitutional violation.[140]

If a defendant refuses to accept the district court's facts and on appeal bases all of its arguments on a different set of facts, then the court of appeals has nothing to review. It cannot address whether the summary-judgment record supports the district court's assumed facts.[141] And because the defendant has addressed only whether a different version of the facts make out a clearly established constitutional violation, the court of appeals has nothing left to address. An appellate court in this circumstance must dismiss the appeal for lack of jurisdiction.[142]

When a defendant makes some arguments about clearly established constitutional law based on its own version of the facts *and* some arguments based on the facts assumed by the district court, most courts of appeals limit arguments to those based on the district court's assumed facts, ignoring those based on the defendant's.[143] The appellate court then dismisses part of the appeal—the defendant's challenge to the district court's facts and all arguments based on the defendant's alternative version of the facts—and addresses the denial of qualified immunity based solely on the district court's facts.

If we momentarily put *Scott v. Harris* aside, the general rule for jurisdiction in qualified-immunity appeals is fairly well-established. Its intricacies can occasionally create confusion. But most courts generally settle on these rules. And a few reforms—discussed in Part IV—can resolve this confusion.

III. THE UNPRAGMATIC AND UNNEEDED EXCEPTION FOR BLATANT CONTRADICTIONS

A. THE JURISDICTIONAL ENIGMA OF *SCOTT*

Then came *Scott v. Harris*, in which the U.S. Supreme Court appeared to violate *Johnson*'s prohibition on reviewing the district

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[140] *Behrens*, 516 U.S. at 313.

[141] *Id.*

[142] *See, e.g.*, case cited *supra* note 21.

[143] *See, e.g.*, Livermore *ex rel.* Rohm v. Lubelan, 476 F.3d 397, 403 (6th Cir. 2007) ("[W]e may consider a pure question of law, despite the defendants' failure to concede the plaintiff's version of the facts for purposes of the interlocutory appeal . . . .").

court's assumed facts. *Scott* involved a high-speed car chase that ended in a police officer ramming the plaintiff's car off of the road, seriously injuring the plaintiff.[144] When the plaintiff sued for excessive force, the district court concluded that genuine fact issues precluded summary judgment on qualified immunity: based on the most plaintiff-favorable version of the facts, a jury could conclude that the plaintiff did not pose a sufficient threat to justify such a use of force.[145] On interlocutory appeal, the Eleventh Circuit took the plaintiff's version of the facts as true and affirmed.[146] But when the case reached the Supreme Court, the Court reviewed some of the evidence for itself—notably, a dash-cam video of the chase—and concluded that the video "blatantly contradicted" the district court's assumed facts.[147]

The opinion in *Scott* never mentioned appellate jurisdiction, much less *Johnson*. This was odd. The parties disputed appellate jurisdiction in their merits briefing and directly addressed *Johnson*.[148] The plaintiff characterized the dispute as a challenge to the district court's conclusion that genuine fact issues existed.[149] The defendant responded that it was seeking review only of the legal conclusion that he had violated clearly established law.[150] An entire amicus brief supporting the plaintiff argued that there was no appellate jurisdiction.[151]

Yet appellate jurisdiction never came up during oral argument.[152] And the *Scott* majority opinion said nothing about it. *Scott*'s analysis nevertheless appeared to contravene *Johnson*'s limitation on reviewing the genuineness of a fact dispute. The district court (as well as the Eleventh Circuit and Justice Stevens

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[144] 550 U.S. 372, 375 (2007).

[145] *Id.* at 376.

[146] *Id.*

[147] *Id.* at 379–80.

[148] *See* Reply Brief for Petitioner at 1–5, *Scott*, 550 U.S. 372 (No. 05-1631) (arguing that the Court has jurisdiction and citing to *Johnson*); Brief for Respondent at 1–2, *Scott*, 550 U.S. 372 (No. 05-1631) (stating that petitioner was "clearly attempting to argue the evidentiary sufficiency of the factual findings made by the District Court," which is "clearly prohibited by *Johnson v. Jones*").

[149] Brief for Respondent, *supra* note 148, at 1.

[150] Reply Brief for Petitioner, *supra* note 148, at 4.

[151] Brief of the American Civil Liberties Union and ACLU of Georgia as *Amici Curiae* Supporting Respondent at 22, *Scott*, 550 U.S. 372 (No. 05-1631).

[152] *See generally* Transcript of Oral Argument, *Scott*, 550 U.S. 372 (No. 05-1631), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/05-1631.pdf.

in dissent) assumed a different set of facts than the majority of the Court.[153] The Eleventh Circuit and district court, for example, saw sufficient evidence in the record for a jury to conclude that the plaintiff "remained in control of his vehicle," "slowed for turns and intersections, and typically used his indicators for turns," "did not run any motorists off the road," and did not threaten to harm anyone.[154] The Supreme Court, however, saw on the video "a Hollywood-style car chase of the most frightening sort" that "plac[ed] police officers and innocent bystanders alike at great risk of serious injury."[155] *Johnson* seemingly would have prohibited the Court from assuming facts different from what the district court assumed. The *Scott* majority nevertheless assumed its own version of the facts based on the videotape.[156]

The Court's analysis in *Scott* has never been sufficiently explained. When given the opportunity to do so several years later in *Plumhoff v. Rickard*,[157] the Court provided a nonsensical explanation.[158] *Plumhoff* involved an excessive-force claim against police who shot a fleeing suspect.[159] The plaintiffs argued that the appeal was improper under *Johnson*, as the dispute involved only matters of evidence sufficiency.[160] The Court disagreed for two reasons. First, the Court asserted that the issues in *Plumhoff* were different from those in *Johnson*; the officers in *Plumhoff* did not claim that other officers were responsible for the use of force (like the officers in *Johnson* argued) but argued only that their conduct did not violate the Fourth Amendment.[161] This statement, as Tobias Barrington Wolff has pointed out, "mischaracterizes" the dispute in *Plumhoff*.[162] Disputed fact issues existed as to the circumstances

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[153] *See Scott*, 550 U.S. at 390 (Stevens, J., dissenting) (noting that the Court "[o]mitted" facts regarding what initiated the police chase); Harris v. Coweta County, 433 F.3d 807, 810–11 (11th Cir. 2005).

[154] *Harris*, 433 F.3d at 815–16.

[155] *Scott*, 550 U.S. at 380.

[156] *Id.*

[157] 572 U.S. 765 (2014).

[158] *See* Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1375 (2015) ("'Confounding' would be a polite term for [the Court's explanation in *Plumhoff*]; 'nonsense' might be closer to the mark.").

[159] 572 U.S. at 768.

[160] *Id.* at 772–73.

[161] *Id.* at 773.

[162] Wolff, *supra* note 158, at 1375.

under which the officers used force: whether the suspect posed a danger at the time he was shot and how the police responded to that threat.[163] Second, the Court said that "[t]he District Court order [in *Plumhoff*] is not materially distinguishable from the District Court order in *Scott v. Harris*," in which the Court had "expressed no doubts about the jurisdiction of the Court of Appeals."[164] But *Scott* did not address or explain jurisdiction.[165] To rely on it as precedent for appellate jurisdiction thus leaves appellate jurisdiction unexplained.

The basis for jurisdiction in *Scott* remains a mystery. And the inconsistency between *Johnson* and *Scott*, coupled with the Court's lack of explanation, has left the courts of appeals to question the scope of appellate jurisdiction in interlocutory qualified-immunity appeals.

Jurisdiction isn't *Scott*'s only problem; the case has raised all sorts of issues. Some commentators have addressed how the case affects claims of excessive force and the defense of qualified immunity.[166] Others have used *Scott* to question courts' reliance on videos as objective evidence; video must be interpreted and construed, so videos cannot always provide indisputable proof of events.[167] And still others have addressed *Scott*'s effects on civil

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[163] *Id.*

[164] *Plumhoff*, 572 U.S. at 773.

[165] *See* Wolff, *supra* note 158, at 1375 ("On this important and unsettled question of appellate jurisdiction, *Plumhoff* essentially says, 'We did this in *Scott*—though we did not tell you why—so now we're going to do it again.'").

[166] *See, e.g.*, Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 217, 233 (2017) (stating that *Scott* "cemented" the change in excessive-force law to concerns over the objective reasonableness of officers' conduct).

[167] In perhaps the most famous illustration of this, Dan Kahan, David Hoffman, and Donald Braman showed that perceptions of the *Scott* video varied, with those variances depending on the viewer's characteristics (race, sex, income, etc.). Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879 (2009). Granted, "a relatively large majority" of study participants interpreted the video the same as the Supreme Court. *Id.* at 864. But when the video was allowed to "speak for itself"—as the Court suggested it could—"what it [said] depend[ed] on to whom it [was] speaking." *Id.* at 903; *see also* Naomi Mezey, *The Image Cannot Speak for Itself: Film*, *Summary Judgment*, *and Visual Literacy*, 48 VAL. U. L. REV. 1, 26 (2013) [hereinafter Mezey, *The Image*] (arguing that *Scott* exaggerated the objectivity of video evidence); Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 18 (2008) (noting that, "[i]n *Scott v. Harris*, the Court fell victim to the widespread and dangerous belief . . . that film captures reality"); Howard M.

procedure generally—seemingly changing the summary-judgment standard so that courts can use videos and other purportedly objective evidence to resolve genuine fact disputes.[168] Indeed, it is

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Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 609, 625 (2009) [hereinafter Wasserman, *Orwell's Vision*] (describing the subjectivity of video evidence and using *Scott* as an illustration); Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of* Scott v. Harris, JUDICATURE, Jan.–Feb. 2008, at 180, 184 [hereinafter Wasserman, *Video Evidence*] ("But the reality is that video evidence provides no greater certainty about 'what really happened' during the chase than live-witness testimony from the pursuer and pursued."). *Scott* also was mentioned several times in a recent *Journal of Legal Education* symposium on "Visual Images and Popular Culture in Legal Education." *See, e.g.*, Naomi Jewel Mezey, *Teaching Images*, 68 J. LEGAL EDUC. 74, 76 (2018) (discussing using *Scott* to teach about videos in the context of summary judgment); Elizabeth G. Porter, *Imagining Law: Visual Thinking Across the Law School Curriculum*, 68 J. LEGAL EDUC. 8, 13 (2018) ("The police dashcam video in *Scott v. Harris* provides a quintessential example, allowing students to discuss the summary judgment standard, qualified immunity, the Fourth Amendment, critical race theory, the jury system, appellate review, and the role of the Supreme Court, among other matters . . . ."); Richard K. Sherwin, *Visual Literacy for the Legal Profession*, 68 J. LEGAL EDUC. 55, 59 (2018) ("Among court cases, the poster child for naïve judicial decision-making regarding visual evidence may well be *Scott v. Harris*.").

[168] *See, e.g.*, Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 427 (2018) ("*Scott* seemed to erase the typical summary judgment deference if plaintiff's position 'blatantly contradicts' the record."); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 851 (2018) (using *Scott* as evidence that summary judgment is transforming into a procedure for allowing judges to resolve fact disputes before trial); Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 109–10 (2007) (citing *Scott* as evidence that the Supreme Court is increasing courts' authority to decide cases before they get to a jury); Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1767 (2014) [hereinafter Porter, *Taking Images Seriously*] (suggesting that *Scott*'s reliance on video evidence "eviscerated the bedrock rule that a court on summary judgment should view all facts in the light most favorable to the nonmoving party"); Wasserman, *Orwell's Vision*, *supra* note 167, at 624 (arguing that *Scott* misapplied summary judgment in two respects: (1) it ignored all other evidence in favor of the video, treating the video as conclusive proof of what happened; and (2) it ignored any other interpretations of the video); Wolff, *supra* note 158, at 1352 ("At the heart of *Scott v. Harris* lies the potential for a radical doctrinal reformation: a shift in the core summary judgment standard, undertaken to justify a massive expansion of interlocutory appellate jurisdiction in qualified immunity cases."); Amelia G. Yowell, Note, *Race to Judgment? An Empirical Study of* Scott v. Harris *and Summary Judgment*, 85 NOTRE DAME L. REV. 1759, 1778 (2010) (finding that *Scott* has had a minimal impact on summary judgment rates generally but also finding that cases citing *Scott* more often grant summary judgment); *see also* Bryan Lammon, *First Circuit Illustrates Scott v. Harris's Two Effects on Civil Procedure*, FINAL DECISIONS (May 31, 2019), https://finaldecisions.org/first-circuit-illustrates-scott-v-harriss-two-effects-on-civil-procedure (discussing *Scott*'s impact on both

now a common refrain in some courts that when video evidence exists at summary judgment, the facts must be viewed in light of the video.[169]

My focus, however, is appellate jurisdiction. As a starting point, *Johnson* seems to remain good law. The U.S. Supreme Court has continued citing it without questioning its validity.[170] So the case cannot be deemed implicitly overruled—particularly given that implicit overrulings are improper.[171] Reconciling *Johnson* and *Scott* accordingly must preserve some aspect of *Johnson*.[172]

A variety of options have been proposed.[173] But only one has emerged as widely accepted in the courts of appeals: the blatant-contradiction exception, which holds that *Scott* created a limited exception to *Johnson*'s jurisdictional bar. In the remainder of this Part, I explain the blatant-contradiction exception and how courts

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summary judgment and appellate jurisdiction); Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2250–51 (2018) (citing *Scott* as evidence that judges decide summary judgment motions on their own view of the facts). *But see* Blum, *The Message*, *supra* note 22, at 1918–19 (contending that the problem with judges' resolving factual disputes in qualified-immunity cases predated *Scott*).

[169] *See, e.g.*, Bland v. City of Newark, 900 F.3d 77, 86 n.7 (3d Cir. 2018) ("[T]he Supreme Court has instructed courts to consider video evidence in the record and to 'view[] the facts in the light depicted by the videotape,' especially when it 'blatantly contradict[s]' the nonmovant's narrative." (alterations in original) (quoting Scott v. Harris, 550 U.S. 372, 380–81 (2007))); Carnaby v. City of Houston, 636 F.3d 183, 187 (5th Cir. 2011) ("Although [the court] review[s] evidence in the light most favorable to the nonmoving party, [it] assign[s] greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene.").

[170] Plumhoff v. Rickard, 572 U.S. 765, 773 (2014); Ashcroft v. Iqbal, 556 U.S. 662, 673–74 (2009).

[171] *See* Stinson v. Gauger, 868 F.3d 516, 523 (7th Cir. 2017) (en banc) (noting that *Scott* did not overrule *Johnson*); George v. Morris, 736 F.3d 829, 835–36 (9th Cir. 2013) (same); Romo v. Largen, 723 F.3d 670, 675–76 (6th Cir. 2013) (same).

[172] This assumes that the two cases should be reconciled. Adam Steinman has questioned whether courts should infer legal rules from the results of cases, rather than just relying on the expressly stated rules the court used to reach that result. *See generally* Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947 (2017); Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737 (2013). The need to reconcile *Johnson* and *Scott* is particularly questionable given that *Scott* never mentioned jurisdiction. Courts have nevertheless sought to reconcile the two cases, so I take on that task, too. But it's worth wondering whether the courts of appeals should continue to apply *Johnson*'s rule without trying to reconcile it with *Scott*'s analysis.

[173] *See, e.g.*, Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 219–21 (2008) (discussing the different ways courts have distinguished *Scott*).

have used it. I then show what a poor rule the exception is, drawing on my study of over 200 decisions that have invoked the exception since *Scott*. I show that the exception is profoundly unpragmatic and unnecessary. Given the blatant-contradiction exception's high costs and few benefits, courts should reject it. I discuss how best to reject it in the next Part. I end this Part by briefly discussing two other ways judges have proposed reconciling *Johnson* and *Scott* and explain that—in addition to being as unpragmatic and unnecessary as the blatant-contradiction exception—they also effectively deem *Johnson* overruled.

B. THE BLATANT-CONTRADICTION EXCEPTION

1. The Exception Explained. Most courts have read *Scott* to implicitly create an exception to *Johnson*'s jurisdictional bar. Under this exception, courts of appeals still generally lack jurisdiction to review a district court's conclusion that the summary-judgment record presents a genuine issue of fact. But under *Scott*, the courts have jurisdiction to do so when something in the record blatantly contradicts the district court's assumed facts.

This reading of *Johnson* and *Scott* emerged shortly after *Scott* was decided in 2007. In *Blaylock v. City of Philadelphia*—one of the first post-*Scott* decisions to wrestle with these issues—the Third Circuit was the first court to offer this reading.[174] The Third Circuit thought that *Scott* "represent[ed] the outer limit of the principle of *Johnson v. Jones*—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."[175] The Sixth Circuit soon followed suit in *Wysong v. City of Heath*.[176] As the *Wysong* court saw things, the *Scott* decision *must* have modified the rule in *Johnson*; otherwise, the Court could not have reached the decision it did.[177] And the Sixth Circuit agreed with *Blaylock* that courts may now review the genuineness of a fact dispute when the record blatantly contradicts the district court's assumed facts.[178]

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[174] 504 F.3d 405, 414 (3d Cir. 2007).

[175] *Id.*

[176] 260 F. App'x 848, 853 (6th Cir. 2008).

[177] *See id.* ("[L]ogic dictates that *Scott* must have modified *Johnson*'s language about jurisdiction in order to reach the result it did.").

[178] *Id.*

The Sixth Circuit saw this "as a principled way to read *Johnson* and *Scott* together and to correct the rare 'blatan[t] and demonstrabl[e]' error without allowing *Scott* to swallow *Johnson*."[179]

Applying this exception, courts have occasionally held that a video (like the one in *Scott*) blatantly contradicted the district court's assumed facts.[180] But not all blatant contradictions have been found in videos. Some cases have found blatant contradictions in witness testimony. In *Wysong v. City of Heath*, for example, the Sixth Circuit held that the plaintiff's deposition blatantly contradicted the district court's assumed facts.[181] The plaintiff asserted—and the district court assumed—that he was unconscious and thus could not have resisted arrest.[182] But the plaintiff testified in his deposition that he couldn't remember the events surrounding his arrest.[183] The court concluded that this deposition, along with the lack of any other evidence that the plaintiff was unconscious, blatantly contradicted his version of events.[184] The defendants' version of events was thus deemed unrefuted—they had their own testimony, and the Sixth Circuit said that the plaintiff could not "beat something with nothing."[185]

Other cases have found blatant contradictions in physical evidence. In *Johnson v. Niehus*, the Eleventh Circuit held that a plaintiff's testimony was so contradicted by physical and other

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[179] *Id.*

[180] *See, e.g.*, Dockery v. Blackburn, 911 F.3d 458, 466 (7th Cir. 2018); Farrell v. Montoya, 878 F.3d 933, 938 (10th Cir. 2017); Ehlers v. City of Rapid City, 846 F.3d 1002, 1010 (8th Cir. 2017); Singletary v. Vargas, 804 F.3d 1174, 1183 (11th Cir. 2015); Marvin v. City of Taylor, 509 F.3d 234, 239 (6th Cir. 2007).

[181] 260 F. App'x 848, 857 (6th Cir. 2008).

[182] *Id.* at 850.

[183] *Id.* at 851.

[184] *Id.* at 857.

[185] *Id.* at 858; *see also* Burton v. Downey, 805 F.3d 776, 784–85 (7th Cir. 2015) (holding that a plaintiff's own sworn statements contradicted his version of the facts); Hunt v. Massi, 773 F.3d 361, 365 n.2 (1st Cir. 2014) (holding that a plaintiff's testimony that he was "too weak to resist" arrest was "'blatantly contradicted' by his own concessions and the record evidence"); DeSantis v. City of Santa Rosa, 377 F. App'x 690, 693 (9th Cir. 2010) (O'Scannlain, J., dissenting) (contending that the plaintiff's version of the facts was "blatantly contradicted by the record"; the plaintiff had equivocal testimony from one witness that the decedent was walking towards the officers when they shot him, while seven other eyewitnesses said that the decedent was sprinting); Price-Cornelison v. Brooks, 524 F.3d 1103, 1111 (10th Cir. 2008) (disagreeing over whether the plaintiff's testimony blatantly contradicted her version of the facts).

evidence that the testimony could not create a genuine issue of material fact.[186] The case involved the police shooting a motorist during a traffic stop, and the plaintiff claimed that he was shot while his vehicle was stationary and not threatening harm to anyone.[187] But the court of appeals thought that the physical evidence contradicted the plaintiff's version of events: "the tire tracks and paint transfer between vehicles, and the placement of the shell casings . . . tell the same tale as reported by the officers on the scene."[188]

And other cases have focused on the lack of evidence to support a district court's assumption. In *Bishop v. Hackel*, the Sixth Circuit held that there was no record support for a fact assumed by the district court—that is, the absence of evidence in the record blatantly contradicted the district court's assumed facts.[189] The case involved alleged deliberate indifference to one prisoner's threat to another prisoner, and the district court held that a fact issue existed as to whether the plaintiff informed the defendants of past abuse.[190] But on appeal, the Sixth Circuit concluded that the record included no evidence that the plaintiff complained to any of the defendants.[191] So "[t]he district court was simply incorrect in its conclusion that [the plaintiff's] testimony about complaints to unidentified corrections officers created a genuine issue of material fact as to whether [the plaintiff] reported abuse to the defendants in this case."[192] The court concluded that "[s]uch an inference [was] unsupported by the record and thus demonstrably false."[193]

Most courts of appeals have endorsed the blatant-contradiction reading of *Johnson* and *Scott* and have applied the exception at least

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[186] 491 F. App'x 945, 946 (11th Cir. 2012) (per curiam).

[187] *Id.* at 950–51.

[188] *Id.* at 951.

[189] 636 F.3d 757, 769 (6th Cir. 2011).

[190] *Id.*

[191] *Id.* In his deposition, the plaintiff said that he could "not recall" the officers to whom he complained. *Id.*

[192] *Id.*

[193] *Id.*; *see also* Cooper v. Martin, 634 F.3d 477, 481 (8th Cir. 2011) (holding that a lack of record evidence blatantly contradicted the factual basis for the district court's immunity denial).

once to review a district court's factual assumptions.[194] Of the three that haven't—the Fourth, Fifth, and D.C. Circuits—the Fourth and Fifth Circuits have at least acknowledged the blatant-contradiction exception in the legal-background section of opinions or held that no blatant contradiction existed.[195] The academic literature has also predominantly taken this view of *Johnson* and *Scott*.[196]

The blatant-contradiction reading of *Johnson* and *Scott* is probably the best way to reconcile the two cases. It explains what the U.S. Supreme Court did in *Scott* while leaving most of *Johnson* intact. The general rule remains the same: courts hearing a qualified-immunity appeal generally cannot review the genuineness of a fact dispute. *Scott* merely adds a seemingly narrow exception to the jurisdictional bar for instances of blatant contradictions. Granted, this reconciliation is not perfect; it requires divining an ill-defined exception to *Johnson* from a case that never mentioned it.[197] But it works logically.

2. Evaluating the Blatant-Contradiction Exception. That is not to say that the blatant-contradiction exception is a good rule of appellate jurisdiction. It's not. For starters, it has some theoretical and doctrinal problems. The Supreme Court has never explained the exception. The exception instead comes from attempts to decipher what the Court did in *Scott*.[198] So at its best, the blatant-

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[194] *See, e.g.*, Hunt v. Massi, 773 F.3d 361, 365 n.2 (1st Cir. 2014); Raspardo v. Carlone, 770 F.3d 97, 128 n.29 (2d Cir. 2014); Davenport v. Borough of Homestead, 870 F.3d 273, 280 (3d Cir. 2017); Bishop v. Hackel, 636 F.3d 757, 769 (6th Cir. 2011); Dockery v. Blackburn, 911 F.3d 458, 466 (7th Cir. 2018); Ehlers v. City of Rapid City, 846 F.3d 1002, 1010 (8th Cir. 2017); Wilkinson v. Torres, 610 F.3d 546, 553 (9th Cir. 2010); Henderson v. Glanz, 813 F.3d 938, 950 (10th Cir. 2015); Singletary v. Vargas, 804 F.3d 1174, 1183 (11th Cir. 2015). As explained below, a few Sixth Circuit opinions offer or endorse other readings of *Johnson* and *Scott*; I leave those cases for later. *See infra* Section III.C.

[195] *See* Rich v. Palko, 920 F.3d 288, 293 n.3 (5th Cir. 2019); Witt v. W. Va. State Police, 633 F.3d 272, 276–77 (4th Cir. 2011).

[196] *See* Blum, *The Message*, *supra* note 22, at 1917 (reading *Scott* to create the blatant-contradiction exception); Wolff, *supra* note 158, at 1372 (same); Arielle Herzberg, Note, *"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, 316–17 (2015) (interpreting *Johnson* and *Scott* to allow appellate courts to review the factual record when the "district court relied upon a blatantly incorrect set of facts").

[197] *See* Fuentes v. Riggle, 611 F. App'x 183, 191 (5th Cir. 2015) (per curiam) (stating that the blatant-contradiction reading "is problematic, as it would extrapolate a significant, and nebulous, exception to the general rule in *Johnson* from an opinion (*Scott*) that never addresses jurisdiction").

[198] *See* cases cited *supra* note 194.

contradiction exception is an inferred, unexplained exception to one Supreme Court decision (*Johnson*) created by another decision (*Scott*) that never mentioned it.[199]

Even if *Scott* implicitly created an exception to *Johnson*, the exception is fairly inconsistent with *Johnson*'s reasoning. *Johnson* focused on the collateral-order doctrine's separateness requirement: orders can be appealed under that doctrine when (among other things) the issues in the appeal differ significantly from those that underlie the merits.[200] And *Johnson* acknowledged that appeals of the core qualified-immunity question—whether certain facts make out a clearly established violation of federal law—will somewhat overlap with the merits.[201] But appeals about what a reasonable jury could find were different—they were too close to questions that a jury might face were a case to go to trial.[202] So appeals disputing a district court's conclusion that a genuine fact issue exists were improper under the collateral-order doctrine.[203]

Appeals arguing that the district court's assumed facts are blatantly contradicted by the record are not meaningfully different when it comes to separateness. *Johnson* held that there should be no interlocutory appeals about whether the district court's assumed facts are wrong, but the blatant-contradiction exception allows those appeals when the assumed facts are *really* wrong.[204] Whatever difference might exist between being wrong and *really* wrong, that difference doesn't change the lack of separation that comes with reviewing the district court's assumed facts.

And as the research on video evidence shows, a question exists concerning whether judges can reliably identify blatant contradictions.[205] Videos, like all evidence, must be interpreted.[206]

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[199] Again, as Adam Steinman has explained, it's not even clear that this reconciliation is necessary. *See supra* note 172.

[200] *See supra* note 131.

[201] Johnson v. Jones, 515 U.S. 304, 314 (1995).

[202] *Id.*

[203] *Id.*

[204] *See* Barry v. O'Grady, 895 F.3d 440, 448 (6th Cir. 2018) (Sutton, J., dissenting) (characterizing the blatant-contradiction rule as one that applies when "the district court's inferences are really wrong, not just conventionally wrong").

[205] *See supra* notes 167–168 and accompanying text.

[206] *See* Wasserman, *Orwell's Vision*, *supra* note 167, at 620 ("No video is unambiguous or singular in its meaning or significance; the viewer of a video must evaluate and interpret its

Viewers (including judges) often fail to recognize the subjectivity of interpreting videos, thinking that their perception reflects objective reality.[207] What some judges might deem a blatant contradiction might not be so blatant to others.[208]

That all being said, doctrinal and theoretical issues alone do not necessarily torpedo a procedural rule. Practicalities also matter.[209] Putting aside doctrinal and theoretical problems, and assuming that judges can reliably identify blatant contradictions (and that doing so is appropriate at summary judgment), a question remains of how courts and parties use the blatant-contradiction exception.

In short, it's not pretty. To evaluate the blatant-contradiction exception, I sought out every interlocutory qualified-immunity appeal that invoked some variation on the exception in the twelve years since *Scott* was decided.[210] Analysis of these decisions shows that the exception is neither pragmatic nor necessary, imposing high costs with few (if any) offsetting benefits.

3. The Basics. In the 12 years after *Scott*, courts have invoked the blatant-contradiction exception at least 228 times. In about a third of the cases, the court only mentioned the exception as part of its legal background and did not clearly apply it.[211] That left 136 cases in which the courts have squarely addressed whether the blatant-contradiction exception applied. A blatant contradiction existed in

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message, as with any other form of evidence or testimony. And interpretation must overcome the inherent limits of the video's frame; for example, the video's picture may not show what happened outside the camera's view or the causation for actions shown or what depended on 'the camera's perspective (angles) and breadth of view (wide shots and focus).'" (footnote omitted) (quoting Silbey, *supra* note 167, at 29, 38)).

[207] *See supra* note 167.

[208] As much can be seen in Justice Stevens's dissent in *Scott* and the empirical study of the video in *Scott*. *See* Scott v. Harris, 550 U.S. 372, 390 (2007) (Stevens, J., dissenting) ("[T]he tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue."); *see also supra* note 167 (discussing Kahan et al. study).

[209] *See* Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2200–01 (1989) ("Civil procedure is a pragmatic enterprise. In evaluating a rule of procedure, the salient questions usually are 'Does it work? If so, how?'").

[210] See the Appendix for a discussion of my methodology.

[211] As explained in the Appendix, the courts invoked some variation on the blatant-contradiction exception in an interlocutory qualified-immunity appeal 228 times. In 86 cases, the court only mentioned the exception. An additional 6 cases could not be cleanly coded one way or another.

only 28 cases (or 21%). Of those cases, 21 were unanimous.[212] In an additional 7 cases, a split panel held that a blatant contradiction existed.[213]

That leaves 108 cases—79%—in which the court held that the exception does not apply. Of these, 100 were unanimous. Another 8 were split decisions.[214]

4. An unwieldy and inefficient jurisdictional tool. The blatant-contradiction exception is an unpragmatic tool for determining appellate jurisdiction for at least two reasons. First, applying the exception is perverse. It requires that courts do the work and analysis that *Johnson* sought to avoid, all to determine whether they can avoid that work and analysis. Recall that *Johnson* was grounded largely in practicalities.[215] The Court sought to keep qualified-immunity appeals manageable by focusing appellate

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[212] *See* Dockery v. Blackburn, 911 F.3d 458, 461 (7th Cir. 2018); Carter v. Carter, 728 F. App'x 419, 422 (6th Cir. 2018); Farrell v. Montoya, 878 F.3d 933, 938 (10th Cir. 2017); Davenport v. Borough of Homestead, 870 F.3d 273, 280 (3d Cir. 2017); Ehlers v. City of Rapid City, 846 F.3d 1002, 1010 (8th Cir. 2017); Henderson v. Glanz, 813 F.3d 938, 950 (10th Cir. 2015); Singletary v. Vargas, 804 F.3d 1174, 1183 (11th Cir. 2015); Burton v. Downey, 805 F.3d 776, 785 (7th Cir. 2015); Oquendo v. Las Vegas Metro. Police Dep't, 611 F. App'x 474, 474 (9th Cir. 2015); Hunt v. Massi, 773 F.3d 361, 365 n.2 (1st Cir. 2014); Khother v. DeEulis, 527 F. App'x 461, 462–63 (6th Cir. 2013); Johnson v. Niehus, 491 F. App'x 945, 951 (11th Cir. 2012) (per curiam); Neal v. Melton, 453 F. App'x 572, 576 (6th Cir. 2011); Williams v. Sandel, 433 F. App'x 353, 362 (6th Cir. 2011); Cooper v. Martin, 634 F.3d 477, 480–81 (8th Cir. 2011); Bishop v. Hackel, 636 F.3d 757, 769 (6th Cir. 2011); Pourmoghani-Esfahani v. Gee, 625 F.3d 1313, 1315 (11th Cir. 2010); Wallingford v. Olson, 592 F.3d 888, 892 (8th Cir. 2010); Weatherford *ex rel.* Thompson v. Taylor, 347 F. App'x 400, 402 n.3 (10th Cir. 2009); Wysong v. City of Heath, 260 F. App'x 848, 853–54 (6th Cir. 2008); Marvin v. City of Taylor, 509 F.3d 234, 239 (6th Cir. 2007).

[213] *See* Guerra v. Bellino, 703 F. App'x 312, 319 (5th Cir. 2017); Saylor v. Nebraska, 812 F.3d 637, 647 (8th Cir. 2016) (Kelly, J., dissenting); Rudlaff v. Gillispie, 791 F.3d 638, 642, 644–45 (6th Cir. 2015); Blackwell v. Strain, 496 F. App'x 836, 845, 848 (10th Cir. 2012); Rodriguez v. City of Cleveland, 439 F. App'x 433, 457, 459 (6th Cir. 2011); Wilkinson v. Torres, 610 F.3d 546, 555 (9th Cir. 2010); Thomas v. Durastanti, 607 F.3d 655, 670–71 (10th Cir. 2010).

[214] *See* Estate of Lopez *ex rel.* Lopez v. Gelhaus, 871 F.3d 998, 1014–16, 1023 (9th Cir. 2017); Chatman v. Ft. Lauderdale Police Dep't, 688 F. App'x 870, 874–75 (11th Cir. 2017); Rowlery v. Genesee Cnty., 641 F. App'x 471, 477, 479 (6th Cir. 2016); Eldridge v. City of Warren, 533 F. App'x 529, 536 (6th Cir. 2013); George v. Morris, 736 F.3d 829, 835–36, 840 (9th Cir. 2013); Newman v. Guedry, 703 F.3d 757, 760, 765 (5th Cir. 2012); DeSantis v. City of Santa Rosa, 377 F. App'x 690, 691, 693 (9th Cir. 2010); Price-Cornelison v. Brooks, 524 F.3d 1103, 1021 (10th Cir. 2008) (O'Brien, J., dissenting in part, concurring in part, concurring with the result in part).

[215] *See supra* Section II.C.

courts on the issues that they're best suited to address in an interlocutory nature: constitutional law and its clarity.[216] *Johnson* meant to minimize record review. Appellate courts, after all, are no better suited than district courts in determining whether a summary-judgment record raises a genuine fact dispute. Appellate courts do, however, have a comparative advantage in deciding purely legal issues—they have fewer cases, more resources, and decide collectively. Moreover, record review can be laborious and time-consuming, further delaying district court proceedings while the qualified-immunity appeal is pending.[217]

To determine whether the blatant-contradiction exception applies, a court of appeals must do exactly what *Johnson* sought to avoid: review the record. Any time a defendant invokes the exception, the appellate court must address whether the record blatantly contradicts the district court's findings. That requires reviewing the summary-judgment record, assessing its contents against the district court's assumed facts, and determining whether the district court was *really* wrong (as opposed to just wrong) in concluding that a genuine fact dispute exists.[218] So to determine whether it can avoid the work that *Johnson* said appellate courts shouldn't do in an interlocutory appeal, the appellate court must do that very work.

Second, the blatant-contradiction exception is a murky rule that creates uncertainty about appellate jurisdiction and inevitably invites litigation. Most appellate jurisdictional rules should be clear.[219] Clear appellate-jurisdiction rules ensure that litigants know when they can appeal. Litigants are accordingly less likely to appeal when appellate courts lack jurisdiction or miss their opportunity to appeal by appealing too late. Clear rules also allow appellate courts to identify a lack of jurisdiction easily and early in the course of appeals. When courts swiftly identify improper

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[216] *See supra* note 133 and accompanying text.

[217] *See supra* note 135 and accompanying text.

[218] *See supra* note 204 and accompanying text.

[219] Lammon, *Finality*, *supra* note 2, at 1837. This is not to say that all jurisdictional rules should be (or can be) simple and clear. *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 3 (2011) ("[J]urisdictional clarity is largely a chimera, done in by its own inherent complexities."); Elizabeth Y. McCuskey, *Clarity and Clarification:* Grable *Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 388 (2012) ("[C]larity is not costless. Bright-line jurisdictional rules have the potential to remand the desirable cases with the undesirable ones.").

appeals, they can dismiss them and minimize both the delays in district court proceedings and the time and effort that parties spend litigating the merits of the appeal. And clear appellate-jurisdiction rules minimize side litigation over appellate jurisdiction.

As far as jurisdictional rules go, the blatant-contradiction exception is a muddy one.[220] On its face, the exception might seem straightforward. The court of appeals has jurisdiction to review the district court's assumed facts when something in the summary-judgment record blatantly contradicts those assumptions. If the contradictions are truly blatant, then they should be obvious.[221]

But it's not that simple. In practice, blatant contradictions are not always obvious. The cases mentioned above in which courts split over the existence of a blatant contradiction suggest as much.[222] Blatant contradictions can be even harder to identify when courts are asked to apply the exception to something other than video, such as deposition testimony.[223] Even worse are the cases in which the defendants argue that a *lack* of evidence blatantly contradicts the district court's assumed facts;[224] addressing these arguments might require substantial record review by the courts.

This uncertainty has consequences. It invites defendants to appeal whenever they have a non-frivolous argument that a blatant contradiction exists. That means more qualified-immunity appeals and additional issues in those appeals. Granted, courts often stress the rarity of the exception and the extreme circumstances in which it applies.[225] But litigants often think that theirs is the rare, exceptional case. That gives them a reason to try.

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[220] *See* Barry v. O'Grady, 895 F.3d 440, 448 (6th Cir. 2018) (Sutton, J., dissenting) ("A rule that applies based on the medium of evidence or based on whether the district court's inferences are really wrong, not just conventionally wrong, is not a rule—and as standards go it is a terribly confusing way to decide something as essential as the subject matter jurisdiction of the court.").

[221] Herzberg, *supra* note 196, at 317.

[222] *See* cases cited *supra* notes 213–214.

[223] *See* cases cited *supra* note 185.

[224] *See supra* notes 189–193 and accompanying text.

[225] *See* McKenney v. Mangino, 873 F.3d 75, 81 n.4 (1st Cir. 2017) (noting the "isthmian exception" to *Johnson* that *Scott* created for versions of the facts that are blatantly contradicted by the summary-judgment record); Wallace v. City of Alexander, 843 F.3d 763, 767 (8th Cir. 2016) (noting that the *Scott* "exception is to be narrowly construed to prevent interlocutory appeals in constitutional tort actions from creating 'additional, and unnecessary, appellate court work'" (quoting Johnson v. Jones, 515 U.S. 304, 309 (1995))];

These appeals cannot be quickly resolved. When defendants invoke the exception, the plaintiff will always dispute whether a sufficient contradiction exists. The exception will thus always involve a fight among the parties that needs judicial resolution. To resolve that dispute, the court must delve into the summary-judgment record. Until the court does so, jurisdiction remains uncertain. So when defendants invoke the blatant-contradiction exception, uncertainty over appellate jurisdiction often lingers until the court decides the entire appeal.

The exception thus creates extra work for courts and litigants, and it delays the prosecution of civil-rights suits. Even when the court determines that it lacks jurisdiction and thus cannot review the merits of the appeal, it must beat back attempts to invoke it.[226] The exception creates additional work for parties, too, particularly plaintiffs. Qualified immunity already increases the cost of litigating civil rights cases, and interlocutory qualified-immunity appeals are part of that cost.[227] The blatant-contradiction exception adds to those costs. Risk-averse plaintiffs will likely brief both jurisdiction—arguing that there is no blatant contradiction—and the merits of qualified immunity. They might even argue the merits of qualified immunity on two different sets of facts: those assumed by the district court and those urged by the defendants. There's no easy way to avoid this work. Even when the jurisdictional issue is raised early via a motion to dismiss the appeal for a lack of jurisdiction (a not-uncommon procedure), courts often carry the

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Roosevelt-Hennix v. Prickett, 717 F.3d 751, 759 (10th Cir. 2013) ("[W]e emphasize that the [blatant-contradiction] exception means what it says. Litigants should be cognizant of the limited nature of the exception, and of their duty of candor to this court, before bringing such an appeal."); Landis v. Phalen, 297 F. App'x 400, 404 (6th Cir. 2008) ("*Scott*'s exception applies only to the 'rare' case at the 'outer limit' where a district court makes a 'blatan[t] and demonstrabl[e] error.'" (alterations in original) (quoting Wysong v. City of Heath, 260 F. App'x 848, 853 (6th Cir. 2008))); Carter v. City of Wyoming, 294 F. App'x 990, 992 (6th Cir. 2008) ("*Scott* stands only for the narrow proposition that summary judgment is appropriate when one party's story 'is blatantly contradicted by the record, *so that no reasonable jury could believe it*.'" (quoting Scott v. Harris, 550 U.S. 372, 380 (2007))).

[226] *See* Bryan Lammon, *Appellate Jurisdiction in* Sanchez-Gomez*: A Hard Case that Should Be Easy*, 96 WASH. U. L. REV. ONLINE 1, 7 (2018) [hereinafter Lammon, *A Hard Case*] (explaining that increasing attempts to appeal can be just as burdensome as increasing the actual opportunities for appeals).

[227] Schwartz, *Selection Effects*, *supra* note 83, at 1105; *see also* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 330 (2020); *supra* note 84 and accompanying text.

issue with the case to decide it after full briefing (and potentially oral argument).

The blatant-contradiction exception also delays the resolution of civil rights cases. Defendants have every reason to appeal the district court's assumed facts when they have a non-frivolous argument that something in the summary-judgment record blatantly contradicts those facts. They might do so with a genuine hope of prevailing on appeal, or they might want to delay district court proceedings (or a mix of both).[228] And if they want delay, they often get it. The filing of a qualified-immunity appeal normally deprives the district court of jurisdiction to address the claims at issue in the appeal. District courts *can* declare the appeal frivolous and proceed with the litigation, but there's no indication that they regularly do so.[229] Allowing defendants to inject blatant-contradiction issues into appeals amplifies these delays and costs.[230]

5. An Unneeded Exception. The blatant-contradiction rule is thus an unwieldy and inefficient rule of appellate jurisdiction. The exception might be justified if it created substantial offsetting benefits. But it doesn't. In fact, the exception serves no compelling purpose.

Recall the purposes of appellate review discussed previously: error correction and development of the law.[231] Interlocutory appeals are often justified on the ground that the benefits of appellate review are especially great in a particular context.[232] Occasionally, appeals are justified on the grounds that the costs are abnormally low, but that's more rare.[233] Either error rates are especially high or cause some unique harm that cannot be remedied

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[228] Schwartz, *Selection Effects*, *supra* note 83, at 1122.

[229] Solimine, *Qualified Immunity Appeals*, *supra* note 25, at 182; Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 48 (1998).

[230] Along these lines, Alan Chen has argued that the inherently fact-based nature of civil-rights claims and the qualified-immunity analysis render illusory the promise of early resolution of civil rights claims. Chen, *Intractability*, *supra* note 86, at 1946–48; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 264 (2006) [hereinafter Chen, *Facts*]; Chen, *Burdens*, *supra* note 80, at 28–54. Inevitable factual disputes require the very adjudication that qualified immunity is supposed to avoid. The addition of arguments over blatant contradictions only adds further delays as parties fight over what facts to assume when evaluating immunity.

[231] *See supra* note 58–61 and accompanying text.

[232] *See, e.g.*, Lammon, *Dizzying* Gillespie, *supra* note 51, at 377–79.

[233] *Id.* at 387, 392.

in a later appeal, or issues are escaping appellate review and interlocutory appeals are necessary to develop the law.[234]

The blatant-contradiction exception cannot be justified on law-development grounds. The exception allows courts of appeals to address a case-specific assessment of a summary-judgment record and the conclusion that the record presents genuine issues of fact. These matters are regularly reviewed on appeal, and their contours are well established. Interlocutory review of blatant contradictions is thus not necessary to develop the law.

All that remains is error correction. There might be some error-correction benefits with the blatant-contradiction exception. After all, an erroneous denial of summary judgment forces government officials to proceed to trial, thereby depriving them of one of the protections that qualified immunity provides—avoidance of the burdens of trial.[235] And that deprivation cannot be remedied in an appeal after trial.[236]

But all sorts of errors in a civil rights case might lead to a trial that an appellate court will later deem unnecessary. Only certain errors merit an interlocutory appeal. The Court has already held in *Johnson* that normal errors in concluding that a genuine fact issue exists do not warrant immediate appellate review.[237] *Scott*'s blatant-contradiction exception seemingly requires concluding that the interests in avoiding trial are somehow different when the district court's conclusion is especially erroneous.

There's an argument here that a meaningful difference exists. After all, this would not be the only area of appellate procedure that distinguishes between "normal" errors and clear ones.[238] Factual findings are reversed on appeal only if they are clearly erroneous; normal factfinding errors go uncorrected.[239] So perhaps particularly erroneous district court decisions in qualified-immunity cases merit a special rule.

I don't buy it. But even assuming that a meaningful difference exists between normal errors and egregious ones, that's not the only

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[234] *Id.* at 378–79.

[235] *See supra* notes 90–92 and accompanying text.

[236] *See supra* note 93 and accompanying text.

[237] Johnson v. Jones, 515 U.S. 304, 316 (1995).

[238] Special thanks to Ken Kilbert for this point.

[239] *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous . . . .").

relevant error-correction consideration. The other side of the error-correction coin is the frequency of errors. And errors that are egregious but rare don't warrant an appeal as of right. After all, plenty of litigants probably think that theirs is the special case of an egregious error and will appeal. Letting them appeal as of right will require courts to beat back all of these misguided attempts to identify the truly egregious errors.[240] And if the appeal is as of right, those attempts will come with full briefing and perhaps even oral argument.

In fact, we already have a tool for rare-but-egregious errors: mandamus. Although the exact scope of mandamus review is not settled, it's fairly well established that litigants can file a petition for a writ of mandamus with the court of appeals to correct especially egregious district court errors.[241] If a defendant thinks that a district court has truly gone outside the realm of reasonableness in assuming certain facts, it can petition the court of appeals for a writ of mandamus.

Mandamus procedures are tailored to this type of error. For one thing, mandamus is not an appeal as of right that grinds district court proceedings to a halt. It's instead discretionary, and the filing of a mandamus petition does not require a stay in the district court.[242] A court of appeals can deny a petition for mandamus without the opposing party responding.[243] Mandamus petitions (and responses to them) are shorter than normal briefs.[244] And the deferential standard of review tells litigants that mandamus is not regularly granted.[245]

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[240] *See* Lammon, *A Hard Case*, *supra* note 226, at 7 ("The courts of appeals must expend effort beating back all of these attempted appeals. These efforts can be just as burdensome and costly as actual appeals . . . .").

[241] *See* Steinman, *supra* note 70, at 1257–66 (describing the history and procedure of appellate mandamus).

[242] *See id.* at 1265 (noting that "a [mandamus] petition is not formally an appeal," rather "it actually initiates an entirely new action—an original action—in the court of appeals"); *cf.* Allman v. Smith, 764 F.3d 682, 684–86 (7th Cir. 2014) (staying district court proceeding pending a qualified-immunity appeal).

[243] FED. R. APP. PROC. 21(b)(1).

[244] A typed mandamus petition normally "must not exceed 7,800 words." *Id.* 21(d)(1). Principal briefs can contain up to 13,000 words. *Id.* 32(a)(7)(B)(i).

[245] *See* Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004) ("[Mandamus] is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" (quoting *Ex parte* Fahey, 332 U.S. 258, 259–60 (1947)).

Blatant contradictions are rare. Intuitively speaking, no reason exists to think that they are a problem. *Johnson*'s general ban on reviewing the genuineness of fact disputes rests in part on the premises that (1) district courts are unlikely to err in concluding that a genuine fact dispute exists, and (2) courts of appeals have no comparative advantage in determining the existence of a genuine fact dispute.[246] Those propositions hold just as much—and perhaps even more—when dealing with allegedly blatant contradictions. If district courts are unlikely to be wrong in concluding that a genuine fact dispute exists, they're even less likely to be *really* wrong. No reason exists to think that blatant contradictions are all that common. All of the time, effort, and delay that come from appeals invoking the blatant-contradiction exception seem unnecessary.

Reality confirms this intuition. As detailed above, cases in which courts have found a blatant contradiction are rare. Courts have held that a blatant contradiction existed only 28 times (or 21% of the 136 cases that decided the issue) in 12 years.[247] In nearly every case in which the court found a blatant contradiction, it reversed (in whole or in part) the denial of qualified immunity.[248] That is an extremely low incidence of blatant contradictions. We might add to that an additional eight cases in which a dissenting judge thought that a blatant contradiction existed. In those cases, a blatant contradiction might have been more arguable than otherwise, as at least one judge thought it existed.[249]

Even assuming that judges can reliably identify blatant contradictions, their frequency seems low. But the significance of this frequency is not immediately obvious. Although one might intuit that the number of blatant contradictions is low, we need some comparator to assess that number. And we cannot compare the frequency of reversals due to a blatant contradiction with reversals due to a regular error on the genuineness of a fact dispute; *Johnson* prohibits review of the latter question,[250] so there is no data on it.

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[246] *See supra* notes 133–134 and accompanying text.

[247] *See supra* notes 212–213 and accompanying text.

[248] In *Weatherford ex rel. Thompson v. Taylor*, 347 F. App'x 400, 402 n.3 (10th Cir. 2009), the Tenth Circuit held that the record blatantly contradicted some of the district court's assumed facts. It rejected those facts but still affirmed the denial of qualified immunity. *Id.*

[249] *See* cases cited *supra* note 214.

[250] *See supra* note 33 and accompanying text.

One possible comparator is the frequency of reversals in qualified-immunity appeals generally. After all, reversals indicate that the court of appeals found some reversible error in the district court's decision. A blatant contradiction almost always amounts to a reversible error.[251] Given that the blatant-contradiction exception requires a court to do more work than a normal qualified-immunity appeal, we might expect that the incidence of blatant-contradiction errors is close to the overall error rate, if not higher.

Comprehensive data on the reversal rate in qualified-immunity appeals is not readily available.[252] But in one study, Jonathan Remy Nash found that denials of qualified immunity at summary judgment were reversed (in whole or in part) roughly 43% of the time.[253] And regardless of how you count blatant contradictions—unanimous holdings (15%), majority holdings (21%), or at least one judge finding a blatant contradiction (26%)—the rates are lower than that for reversals in qualified-immunity appeals generally.

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The blatant-contradiction rule thus appears to create work for the courts of appeals with little offsetting benefit. It should be rejected. I address in the next Part how it might be rejected via judicial decision or rulemaking.

C. OTHER WAYS OF RECONCILING *JOHNSON* AND *SCOTT*

Before proposing reforms, I first address two other ways of reconciling *Johnson* and *Scott* that have been offered. These options have gained little traction in the courts. They also have many of the same practical problems as the blatant-contradiction exception. And they effectively deem *Johnson* overruled.

1. The Legal-Issues Alternative. A few courts have tried to reconcile *Johnson* and *Scott* by holding that the scope of qualified-

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[251] *See supra* note 248 and accompanying text.

[252] Joanna Schwartz, for example, recorded the outcome of interlocutory appeals in her study, but the numbers are far too small—41 interlocutory appeals, with 16 withdrawn and 1 pending—to draw any reliable conclusions about reversal rates. *See* Schwartz, *Qualified Immunity Fails*, *supra* note 83, at 40.

[253] Nash, *supra* note 48, at 135. Nash examined interlocutory qualified-immunity appeals decided between June 1, 2014, and May 31, 2015. *Id.* at 126. He excluded from his dataset cases which the court of appeals dismissed under *Johnson*. *Id.* at 126–27.

immunity appeals extends to all legal questions. "All legal questions" includes whether the summary-judgment record presents a genuine issue of fact; that is, after all, a question of law. All *Johnson* does is preclude jurisdiction to review factual issues. I call this the "legal-issues interpretation" of *Johnson* and *Scott*. Put aside for a second whether this makes any sense (it doesn't). I first explain the reasoning courts have used to arrive at the legal-issues interpretation of *Johnson* and *Scott* and give some examples of how it has been used. I then turn to why this interpretation makes no sense.

The legal-issues interpretation of *Johnson* and *Scott* comes from *Johnson*'s use of the terms "legal issue" and "issue of law."[254] *Johnson* emphasized that the issue over which courts normally have jurisdiction—whether the facts make out a violation of clearly established law—is a legal issue well suited for interlocutory review.[255] But this focus on legal issues sowed seeds of confusion. After all, the inquiry that *Johnson* prohibited—whether, based on the summary-judgment record, a genuine issue of fact exists—is *also* a legal issue. A court must determine whether the summary-judgment record presents a genuine issue of fact.[256]

Johnson said that this latter question was closer to the fact side of the law-fact divide.[257] But some courts have coupled *Johnson*'s discussion of jurisdiction over legal issues with the Court's decisions in *Scott* and *Plumhoff* to hold that jurisdiction now extends to *all* legal questions.

In *Roberson v. Torres*, for example, the Sixth Circuit held that it had jurisdiction to review whether findings in a state-court hearing

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[254] Johnson v. Jones, 515 U.S. 304, 313 (1995) ("The [*Mitchell*] opinion . . . referred specifically to a district court's 'denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*.'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985))).

[255] *See id.* at 313 ("[T]he appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." (quoting *Mitchell*, 472 U.S. at 528 n.9)).

[256] The U.S. Supreme Court later acknowledged its sloppy usage. In *Ashcroft v. Iqbal*, the Court (in addition to adopting the plausibility-pleading standard) held that the scope of an interlocutory qualified-immunity appeal included review of the adequacy of the pleadings. 556 U.S. 662, 672–73 (2009). In doing so, the Court distinguished *Johnson*. *Id.* at 674. The Court recognized that the inquiry barred by *Johnson* "is a question of law." *Id.* But "it is a legal question that sits near the law-fact divide"—"a 'fact-related' legal inquiry." *Id.* (quoting *Johnson*, 515 U.S. at 314). The inquiry it demands is not well suited for an interlocutory appeal. *Id.*

[257] *Johnson*, 515 U.S. at 313–16.

had preclusive effect in a § 1983 case.[258] The *Roberson* court read *Plumhoff* to clarify *Johnson*—*Johnson* prohibited interlocutory review of evidence-sufficiency questions.[259] But jurisdiction existed over legal issues, even those that would seem to touch on evidence sufficiency indirectly.[260] That is, *Plumhoff* "cabin[ed] the reach of *Johnson* to 'purely factual issues that the trial court might confront if the case were tried.'"[261] The *Roberson* court ultimately held that the preclusion issue was closer to a pure question of law than it was to an issue of evidence sufficiency.[262] The court accordingly had jurisdiction to address preclusion.[263]

Similarly, the Sixth Circuit held in *Harvey v. Campbell County* that it had jurisdiction to review whether the district court misapplied the legal standards for summary judgment.[264] In moving for summary judgment, the defendants pointed to the absence of evidence on inadequate training, and the plaintiffs did not respond with any evidence regarding that training.[265] The district court nevertheless denied the defendants' request for qualified immunity.[266] The Sixth Circuit reversed, and it characterized the district court's error as "based in part on a misapplication of the standards governing summary judgment practice," such that "a pure question of law [was] presented over which [the court had]

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[258] 770 F.3d 398, 403 (6th Cir. 2014).

[259] *See id.* at 402 (stating that *Plumhoff* "clarified that the reason that the order in *Johnson* was not immediately appealable was that 'it merely decided a question of evidence sufficiency, i.e., which facts a party may, or may not, be able to prove at trial'" (quoting Plumhoff v. Rickard, 572 U.S. 765, 772 (2014))).

[260] *See id.* (stating that jurisdiction existed over issues "that would appear to touch on evidence sufficiency less directly, such as whether 'an immediate appeal may be taken to challenge "blatantly and demonstrably false" factual determinations'" (quoting *Plumhoff*, 572 U.S. at 771)); *see also id.* ("Thus, a court of appeals would appear to have jurisdiction over so related a question as whether the district court properly adopted the plaintiff's version of the facts for purposes of ruling on the issue of qualified immunity.").

[261] *Id.* at 403 (quoting *Plumhoff*, 572 U.S. at 773).

[262] *Id.*

[263] *Id.*

[264] 453 F. App'x 557, 558 (6th Cir. 2011).

[265] *Id.* at 560.

[266] *Id.*

jurisdiction."[267] The court analogized this error to the one committed in *Scott*.[268]

Along these lines, at least one court has expressly held that its jurisdiction now includes the genuineness of fact disputes. In *Chappell v. City of Cleveland*, the Sixth Circuit read *Scott* as permitting an inquiry into not only whether a fact dispute is material, but also whether a fact dispute is genuine.[269] The *Chappell* court explained that the genuineness of a fact dispute is a legal question.[270] And in qualified-immunity appeals, the courts of appeals have jurisdiction over legal questions.[271] The *Chappell* court accordingly said that it had jurisdiction to review "legal errors as to whether the factual disputes (a) are *genuine* and (b) concern *material* facts."[272]

Writing separately in *George v. Morris*—or more specifically, "[c]oncurring in small part and [d]isagreeing in large part"—Judge Trott came to a similar conclusion.[273] Judge Trott suggested that *Scott* stood for the proposition that government officials should be free from litigation when the plaintiff has no case—when, "as a matter '*of law*,' the lawsuit cannot survive summary judgment."[274] And according to Judge Trott, *Scott* frees the courts of appeals from being bound by a district court's conclusion that a genuine fact issue existed.[275] *Scott* thus allows the court to examine the record as a

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[267] *Id.* at 558.

[268] *Id.* at 561; *see also* Feliciano v. City of Miami Beach, 707 F.3d 1244, 1250 n.3 (11th Cir. 2013) ("The requirement that the evidence be viewed in the light most favorable to the plaintiff can itself create an issue of law.").

[269] *See* 585 F.3d 901, 906 (6th Cir. 2009).

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] 736 F.3d 829, 840 (9th Cir. 2013) (Trott, J., concurring in small part and disagreeing in large part).

[274] *Id.* ("[*Scott* holds] that government officials will not be required to defend themselves in court if it appears to an appellate court from the record taken as a whole that the plaintiff has no case, and therefore as a matter '*of law*,' . . . the lawsuit cannot survive summary judgment." (citations omitted)).

[275] *See id.* at 848 (stating that an appellate court is "*not* automatically bound on interlocutory appeal by a district court's statement that a genuine dispute of material facts exists such as to require a trial").

whole and decide whether the plaintiff can prevail.[276] And Judge Trott saw this as compatible with *Johnson*; *Johnson* was a case in which the plaintiff had sufficient evidence to win, and *Johnson* prohibited review of this determination.[277] Judge Trott concluded that "*Johnson* remains viable, but only where the case involves a genuine issue of material fact, not when it does not."[278]

These decisions and their reconciliation of *Johnson* and *Scott* are difficult to defend. *Roberson v. Torres*—which, recall, held that its jurisdiction included review of whether findings in a state-court hearing had preclusive effect in a § 1983 case—probably stands on the surest ground.[279] Reviewing the abstract question of whether findings had preclusive effect in federal litigation will overlap little with the underlying merits of the underlying action.

But the other decisions and their reasoning border on the absurd. The decision in *Harvey v. Campbell County*—which held that jurisdiction existed to review whether the district court properly applied the summary-judgment standard—would seem to always allow plenary review of summary-judgment decisions as part of a qualified-immunity appeal. After all, most reversible summary-judgment decisions could be characterized as "misapplications" of the summary-judgment standard. The opinions contending that jurisdiction exists to review the genuineness of fact disputes are even worse. There are at least three problems with these opinions.

First, they are squarely inconsistent with *Johnson*. *Johnson* was clear that courts lack jurisdiction in a qualified-immunity appeal to review the genuineness of a fact dispute. The Court said as much in the opinion's last line: "[W]e hold 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."[280]

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[276] *See id.* at 849 ("*Scott v. Harris* . . . simply says . . . if after examining the 'record as a whole' it becomes clear to *an appellate court* that the plaintiff has *no* case sufficient to survive Rule 50(c), the unique preemptive purpose of qualified immunity prevails, and the case shall be dismissed now, not later."); *see also id.* ("[A]s defined by *Scott v. Harris*, the record taken as a whole issue is a *quintessential issue of law*, not just of disputed facts.").

[277] *See id.* (reading *Johnson* and *Scott* as "plainly compatible").

[278] *Id.* at 850.

[279] *See supra* notes 258–263 and accompanying text.

[280] Johnson v. Jones, 515 U.S. 304, 319–20 (1995).

The Court has reiterated this limit in subsequent opinions. In *Behrens v. Pelletier*, the Court said that *Johnson* prohibited review of "whether the evidence could support a finding that particular conduct occurred."[281] So "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case."[282] In *Johnson v. Fankell*, the Court said that *Johnson* involved an "order denying [the defendants'] motion for summary judgment on the ground that the record showed a genuine issue of material fact whether the officials actually engaged in the conduct that constituted a clear violation of constitutional law," while *Mitchell* asked "whether a given set of facts showed a violation of clearly established law."[283] The Court noted that "although § 1291 did allow an interlocutory appeal in the latter circumstance, such an appeal was not allowed in the former."[284] And in *Ortiz v. Jordan*, the Court said that it had clarified in *Johnson* that appeals were available from only purely legal issues, such as whether the law was clearly established.[285] Appeals were not available "when the district court determines that factual issues genuinely in dispute preclude summary adjudication."[286]

Reading *Scott* to allow interlocutory review of the genuineness of a fact dispute thus effectively overrules *Johnson*. And as I said at the beginning of this Part, any theory that deems *Johnson* overruled cannot stand.

Second, these attempts at reconciling *Johnson* and *Scott* are occasionally incoherent. Because they cannot expressly deem *Johnson* overruled, they must find something for the case to do. In doing so, they give *Johnson* a silly meaning. Take *Roberson*, for example. The court there said that jurisdiction in a qualified-immunity appeal extends to all legal issues.[287] According to the *Roberson* court, *Johnson* deprives the court of jurisdiction to review only "purely factual issues that the trial court might confront if the

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[281] 516 U.S. 299, 313 (1996).

[282] *Id.*

[283] 520 U.S. 911, 922 (1997).

[284] *Id.*

[285] 562 U.S. 180, 188 (2011).

[286] *Id.*

[287] Roberson v. Torres, 770 F.3d 398, 402 (6th Cir. 2014).

case were tried."[288] *Chappell* is similar. It read *Johnson* as banning interlocutory review only of what happened.[289] That is, the only issues *Chappell* saw as outside the scope of a qualified-immunity appeal were factual issues—issues about what actually happened.[290]

These readings of *Johnson* are specious. They read *Johnson* to deprive appellate courts of jurisdiction over pure fact issues. But there aren't any pure fact issues in an appeal from summary judgment. Summary-judgment decisions do not resolve factual issues. They instead determine only whether meaningful factual questions exist. These decisions accordingly read *Johnson* to deprive courts of appellate jurisdiction over issues that aren't actually raised in an appeal from summary judgment. To purportedly give *Johnson* some continuing effect, these decisions render *Johnson* meaningless.

Judge Trott's interpretation goes even further afield. He says that *Johnson* prohibits review when there's a genuine issue of material fact, but the court can review the record to determine whether a genuine issue of material fact exists.[291] That's a useless rule. Applying it means that the court must always do precisely what *Johnson* would prohibit to determine whether *Johnson* prohibits it. Judge Trott also says that *Johnson* bars review of the summary-judgment record when the plaintiff has sufficient evidence to win.[292] But determining whether the plaintiff had sufficient evidence to win requires reviewing the summary-judgment record. Judge Trott essentially says that courts have no jurisdiction to review when they would affirm but have jurisdiction when they would reverse. That's silly.[293]

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[288] *Id.* at 403 (quoting Plumhoff v. Rickard, 572 U.S. 765, 773 (2014)). *Roberson* is also a bit incoherent. It reads *Johnson* as prohibiting review of what a party can prove at trial, but then says a court can review whether the district court properly adopted the plaintiff's version of the facts. Those seem to be variations of the same question.

[289] Technically, *Chappell* interpreted earlier Sixth Circuit cases that had in turn interpreted *Johnson*. *See* 585 F.3d 901, 905 (6th Cir. 2009) (quoting Leary v. Livingston County, 582 F.3d 438, 447–48 (6th Cir. 2008)).

[290] *See supra* notes 269–272 and accompanying text.

[291] *See supra* notes 274–275 and accompanying text.

[292] *See supra* note 276 and accompanying text.

[293] It is, however, how some courts approach appeals from the denial of intervention as of right. Under the "anomalous rule" for intervention appeals, appellate courts have jurisdiction

Most courts have accordingly rejected the legal-issues interpretation of *Johnson* and *Scott*, with several reiterating that they lack jurisdiction to review the genuineness of a fact dispute.[294] But it stealthily persists in the Sixth Circuit. *Roberson*, *Harvey*, and *Chappell* are all still good law. But, as noted above, the Sixth Circuit has several decisions that reject the legal-issues interpretation and endorse the blatant-contradiction exception.[295] And in *Jones v. Yancy*, the Sixth Circuit read *Johnson* to prohibit review of the genuineness of a fact dispute.[296] *Jones*, though a non-precedential decision, squarely conflicts with *Chappell*. Indeed, the Sixth Circuit appears to have acknowledged this internal conflict in its caselaw. In *Jacob v. Killian*, the court cited *Chappell* for the proposition that it had jurisdiction to review whether factual issues are both genuine and concern material facts.[297] It followed that cite, however, with a "but see" cite to *Jones v. Yancy*.[298]

2. The Inferences Alternative. A second alternative reconciliation of *Johnson* and *Scott* also comes from the Sixth Circuit, this time in a series of opinions by Judge Sutton. Judge Sutton has argued that *Scott* permits review of the inferences that a district court draws when denying qualified immunity at the summary-judgment stage.

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to review the denial so long as the district court erred in denying intervention. *See* 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1923 n.12, Westlaw (database updated Apr. 2021) (describing the "anomalous rule" as "if the district court's disposition of the petition to intervene was correct, then the reviewing court's jurisdiction would evaporate but if the district court was mistaken, the reviewing court would retain jurisdiction and must reverse"); 15B WRIGHT ET AL., *supra* note 62, § 3914.18 n.25 (same). But if the district court correctly denied intervention, the court of appeals lacks jurisdiction and must dismiss the appeal. This is a similarly silly rule, as it makes appellate jurisdiction turn on the merits of the appeal. And it is practically no different from saying that denials of intervention as of right are always immediately appealable. Bryan Lammon, *The "Anomalous Rule" for Intervention Appeals*, FINAL DECISIONS (Jan. 19, 2020), https://finaldecisions.org/the-anomalous-rule-for-intervention-appeals (noting that under this rule "[i]t ultimately makes little difference whether the court of appeals exercises jurisdiction to affirm the district court's decision or dismisses the appeal").

[294] *See, e.g.*, Brothers v. Zoss, 837 F.3d 513, 517 (5th Cir. 2016); Thompson v. Murray, 800 F.3d 979, 983 (8th Cir. 2015); Lewis v. Tripp, 604 F.3d 1221, 1225–26 (10th Cir. 2010) (Gorsuch, J.).

[295] *See supra* note 181 and accompanying text.

[296] 420 F. App'x 554, 557 (6th Cir. 2011).

[297] 437 F. App'x 460, 464–65 (6th Cir. 2011).

[298] *Id.* at 464.

First came his separate opinion in *Romo v. Largen*, in which he offered two possible readings of *Johnson*.[299] One reading deprives the court of jurisdiction to review disputes over historical facts.[300] A second reading of *Johnson* would preclude review of both historical facts and the inferences the district court drew from the plaintiff's evidence.[301] Judge Sutton favored the first reading of *Johnson* for a multitude of reasons.[302] But primary among them was that only the first reading was consistent with *Scott*.[303] As Judge Sutton saw it, there was no dispute in *Scott* about how Harris was driving; all that was disputed was the inference from those details of whether Harris was driving safely.[304] It would thus be inconsistent with *Scott* to read *Johnson* to prohibit an appellate court from holding that a district court drew the wrong inferences.[305]

Judge Sutton followed up on *Romo* with two dissenting opinions advocating this inferences interpretation. Dissenting in *Thibault v. Wierszewski*, Judge Sutton contended that *Johnson* deprived the court of jurisdiction "only when the defendant's argument boils down to an attack on the plaintiff's evidence-supported version of the facts."[306] Jurisdiction existed to reassess the inferences drawn from the most plaintiff-favorable version of the facts.[307] And Judge Sutton's dissent in *Barry v. O'Grady* said *Johnson* stands for the limited proposition that the court lacked jurisdiction to review whether "the plaintiff's record-supported facts are wrong."[308] The court otherwise had jurisdiction to review the district court's denial

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[299] 723 F.3d 670, 678 (6th Cir. 2013) (Sutton, J., concurring in part and concurring in the judgment).

[300] *See id.* ("One applies it only to prototypical 'he said, she said' fact disputes, in which the defendants (usually government employees) refuse to accept the truth of what the plaintiffs (usually individual claimants) say happened.").

[301] *See id.* ("The other applies the decision not just to whether the defendant officers accept the plaintiff's evidence-supported version of what happened but also to whether the defendants accept the district court's reading of the inferences from those facts . . . .").

[302] *Id.* at 678–87.

[303] *Id.* at 678.

[304] *Id.* at 679.

[305] *Id.*

[306] 695 F. App'x 891, 904 (6th Cir. 2017) (Sutton, J., dissenting).

[307] *See id.* ("[W]hen a defendant challenges the reasonableness of inferences the district court drew from the plaintiff's account of the facts, we must hear the appeal.").

[308] 895 F.3d 440, 446 (6th Cir. 2018) (Sutton, J., dissenting).

of qualified immunity.[309] Judge Sutton saw this reading of *Johnson* as essential for courts to meaningfully review denials of qualified immunity.[310]

Judge Sutton thus appears to distinguish two kinds of facts that a district court assumes when denying qualified immunity at the summary-judgment stage. There are the facts directly supported by the plaintiff's evidence, and there are plaintiff-favorable inferences that the district court draws from that evidence. *Johnson*, Sutton contends, precludes review of only the former; *Scott* and *Plumhoff* show that courts can review the latter.

This, too, is a problematic reconciliation of *Johnson* and *Scott*. Like the legal-issues interpretation, this inferences interpretation gives life to *Johnson* by reading it to prohibit review of whether the plaintiff's facts are wrong. But that sounds like a prohibition on reviewing factual *findings*. And judges are not supposed to find facts at summary judgment; again, they determine only whether a genuine fact issue exists.[311] This inferences interpretation thus preserves *Johnson* only by giving it a meaningless effect. That does not preserve *Johnson* at all.

Perhaps even more problematic is this interpretation's purported distinction between assumed facts and inferences drawn from those facts. This seems to distinguish between direct and circumstantial evidence. According to Judge Sutton, appellate courts cannot review a district court's acceptance of direct evidence—that is, evidence that does not require any inferences to get from the evidence itself to the fact its proponent seeks to prove.[312] But courts can review the inferences drawn from circumstantial evidence—evidence that requires an inference to get from the evidence to the fact that the evidence is offered to prove.[313]

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[309] *See id.* ("Otherwise, we have jurisdiction to decide—on de novo review—whether, after reading the factual record in the light most favorable to the plaintiff, the officer should win as a matter of law on the first or second prong of qualified immunity. That's all there is to it.").

[310] *Id.* at 445.

[311] *See supra* notes 110–116 and accompanying text.

[312] A witness's identifying a perpetrator is an example of direct evidence; if offered to show that the person identified was the perpetrator, no inferences would be required.

[313] Evidence that a murder suspect wrote love letters to the victim's spouse is a classic example of circumstantial evidence. The letters are relevant to show that the defendant murdered the victim, but several inferential steps are necessary to get from the letters to that

No reason exists in this context to differentiate between factual assumptions drawn from direct and circumstantial evidence. Both are perfectly acceptable forms of evidence, and they are not accorded different weight or importance. The distinction also makes little sense given the practical reasoning behind *Johnson*'s limit on appellate jurisdiction. Recall that the *Johnson* court gave several pragmatic reasons for prohibiting review of the genuineness of a fact dispute: the lack of an appellate court's comparative advantage, the lesser likelihood of errors, the time necessary to conduct record review, and the risk of duplicative appeals.[314] When it comes to these practical considerations, no difference between direct and circumstantial evidence exists.

Judge Sutton might, however, mean to distinguish between factual disputes—disputes over what happened—and legal disputes—disputes over the legal consequences of what happened. Even under the widely accepted meaning of *Johnson*, the courts of appeals lack jurisdiction to address the district court's assumptions about what happened. But the courts of appeals would still have jurisdiction to evaluate the legal meaning of those facts. If this is what Judge Sutton means by "inferences," then his interpretation of *Johnson* and *Scott* is not unique. But if that's what he means, he has not been terribly clear about it.

The inferences interpretation has not gained traction in the courts of appeals. Although a few recent certiorari petitions have urged the U.S. Supreme Court to endorse the inferences interpretation, the Court has denied them.[315] Judge Sutton's own court has rejected it as practically unworkable.[316] And the Sixth

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conclusion: the defendant loved the victim's spouse, so the defendant wanted an exclusive romantic relationship with the victim's spouse, so the defendant had a motive to murder the victim, so the defendant acted on that motive and murdered the victim.

[314] *See supra* notes 133–136 and accompanying text.

[315] *See, e.g.*, Petition for a Writ of Certiorari at 22–25, Graf v. Koh, 140 S. Ct. 935 (2020) (mem.) (No. 19-624); Petition for Writ of Certiorari at 25, Vizcarra v. Ortiz, 140 S. Ct. 677 (2019) (mem.) (No. 19-614); *see also Graf*, 140 S. Ct. at 935 (denying cert); *Vizcarra*, 140 S. Ct. at 677 (same).

[316] *See* Kindl v. City of Berkley, 798 F.3d 391, 401 (6th Cir. 2015) ("Permitting interlocutory appellate review under the guise of considering only 'inferences' would thus erase the well-established boundaries protecting the function of the ultimate factfinder and deviate from binding precedent set out in *Johnson* and its progeny."); Hopper v. Plummer, 887 F.3d 744, 757 (6th Cir. 2018) ("We are precluded from deciding an interlocutory appeal premised on a challenge . . . to the inferences a district court draws . . . .").

Circuit is not alone. The Seventh Circuit, in an opinion by Chief Judge Wood, also held that *Scott* did not allow the court "to revisit the inferences that the district court found could reasonably be drawn from" the summary-judgment record.[317]

IV. REJECTING BLATANT CONTRADICTIONS

Qualified-immunity appeals are rife with jurisdictional confusion and litigation. Two reforms would go a long way towards simplifying things. First, the general scope of review in a qualified-immunity appeal from summary judgment should be clearly set out. And second, the blatant-contradiction exception should go. Both can be accomplished via Court decision or rulemaking. If we go the rulemaking route, an opportunity exists to further improve appeals from the denial of qualified immunity.

A. THE COURTS

In an appropriate case, the U.S. Supreme Court could disavow the blatant-contradiction exception and reaffirm *Johnson*'s limit on qualified-immunity appeals: courts have jurisdiction to address only the clarity of the alleged constitutional violation and may not look behind the district court's assumed facts.

The Court could also make this process easier. After all, the district court's assumed facts are not always clear. *Johnson* emphasized that district courts should state their factual assumptions when denying qualified immunity.[318] It acknowledged, however, that district courts don't always do so.[319] And when they don't, appellate courts might have to conduct the record review that *Johnson* sought to avoid.[320]

There are ways to fix this. Some courts of appeals have emphasized the importance of district courts' articulating their

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[317] Hurt v. Wise, 880 F.3d 831, 839 (7th Cir. 2018), *overruled on other grounds by* Lewis v. City of Chi., 914 F.3d 472, 475 (7th Cir. 2019).

[318] *Johnson*, 515 U.S. at 319.

[319] *Id.*

[320] *Id.*; *see, e.g.*, Lewis v. Tripp, 604 F.3d 1221, 1228 (10th Cir. 2010) ("Given that we lack from the district court a set of facts about [the defendant's] conduct to guide our qualified immunity analysis, it falls on us to review the entire record . . . .").

assumed facts.[321] A few have remanded qualified-immunity appeals for a more thorough explanation of the district court's reasoning.[322] The U.S. Supreme Court could endorse these procedures.

Or the Court could go even further and follow the example of the Third Circuit. In *Forbes v. Township of Lower Merion*—in an opinion by then-Judge Alito—the Third Circuit created a supervisory rule that applied to all cases in which a district court denies qualified immunity because material facts are subject to genuine dispute: "So that we can carry out our review function without exceeding the limits of our jurisdiction under *Johnson v. Jones*, we will henceforth require the District Courts to specify those material facts that are and are not subject to genuine dispute and explain their materiality."[323] The Third Circuit made this rule because a district court's failure to identify genuinely disputed material facts undermines the jurisdictional rules of *Johnson*.[324] The court had created similar supervisory rules over procedural matters in the past.[325] It did the same here, "requir[ing] that future dispositions of a motion in which a party pleads qualified immunity include, at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues."[326] The Third Circuit has acknowledged the burden that this supervisory rule imposes on district courts.[327] The court

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[321] *See* Ransom v. Grisafe, 790 F.3d 804, 814–15 (8th Cir. 2015) (Riley, C.J., concurring) (emphasizing that district courts must thoroughly analyze qualified immunity before denying it and issue findings of fact/conclusions of law, similar to those required under Rule 52(a)(2)).

[322] *See, e.g.*, Dean v. Phatak, 911 F.3d 286, 290 (5th Cir. 2018) (remanding for the district court to "cite summary judgment evidence" that establishes a genuine issue of material fact as to qualified immunity); Booker v. LaPaglia, 617 F. App'x 520, 525–26 (6th Cir. 2015) (remanding for a more precise analysis of the defendant's entitlement to qualified immunity); Robbins v. Becker, 715 F.3d 691, 695 (8th Cir. 2013) (remanding for "a more detailed consideration and explanation," including specifying the facts the district court assumed).

[323] 313 F.3d 144, 146 (3d Cir. 2002) (Alito, J.) (citation omitted).

[324] *See id.* at 148 (noting that failure to identify genuinely disputed material facts "greatly hampered [the court] in ascertaining the scope of [its] jurisdiction").

[325] *Id.* at 148–49.

[326] *Id.* at 149.

[327] *See* Reynolds v. Municipality of Norristown, 716 F. App'x 80, 82 (3d Cir. 2017); Barry v. O'Grady, 895 F.3d 440, 448 (6th Cir. 2018) (Sutton, J., dissenting) ("District courts are busy and will not parse out every inference they make in every denial of summary judgment.").

nevertheless requires that it be done.[328] Recently, Chief Judge Smith reminded district courts of their duty to sufficiently explain denials of qualified immunity so that the court can review them.[329] As Chief Judge Smith explained, "A comprehensive and detailed summary judgment opinion, specifying those facts that are undisputed as well as those that are material and subject to genuine dispute, is vital—and often essential—to [courts'] meaningful review on appeal."[330]

The U.S. Supreme Court could adopt a similar rule for all courts of appeals by requiring that district courts state the facts they assume in denying qualified immunity at summary judgment. The courts of appeals would then be limited to deciding whether those facts specified by the district court spell out a clear constitutional violation. Parties would thus know the exact factual basis for any appellate review, and defendants could not present a different set of facts in an appeal. This procedure would also save time and effort for appellate courts in divining the facts on which they are to assess a claim of qualified immunity.

To be sure, this procedure would have its own issues. There might, for example, be instances when district courts do not articulate all of their relevant facts. In such a situation, the courts of appeals could (as some currently do) remand for a more detailed analysis. The remand would no doubt add some delay to the proceedings. But it would focus the appellate court's energy on the task for which it's best suited.

What should courts do with actual blatant contradictions—when the district court actually assumes facts that have no support in the record? Then-Judge Gorsuch asked as much in his mild defense of the blatant-contradiction exception.[331] He contended that, without *Scott*, appellate courts might be bound "to accept a clearly mistaken factual account and so left to decide less a case or controversy than

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[328] *See Reynolds*, 716 F. App'x at 82–83 (reversing the district court for failure to specify the assumed facts for each claim); Conte v. Rios, 658 F. App'x 639, 642–43 (3d Cir. 2016) ("[T]he District Court failed to identify what factual issues were relevant to its deferral. These omissions constitute legal error . . . ."); Carroll v. Rochford, 71 F. App'x 124, 126–27 (3d Cir. 2003) (per curiam) (remanding because "the District Court did not identify the particular facts that are in dispute or explain the materiality of those facts").

[329] E.D. v. Sharkey, 928 F.3d 299, 310–11 (3d Cir. 2019) (Smith, C.J., concurring).

[330] *Id.* at 311.

[331] Walton v. Powell, 821 F.3d 1204, 1208 (10th Cir. 2016).

a hypothetical question."[332] Along those same lines, limiting courts of appeals to the district courts' assumed facts "would leave appellate courts often unable to adjudicate appeals from interlocutory rulings denying qualified immunity (rendering *Mitchell*'s promise a dead letter)."[333]

I don't see that as a cost. Far too much appellate time is spent dealing with—and often dismissing for lack of jurisdiction—improper qualified-immunity appeals. One might reasonably argue that interlocutory appeals from the denial of qualified immunity are warranted to address the clarity of the alleged constitutional violations. This can be justified on the (contested) instrumental grounds that avoiding litigation in cases of uncertainty is necessary to provide proper incentives to government officials. Or one can justify it on the ground that these officials should have fair notice that their actions violated the U.S. Constitution.

But no argument exists for allowing interlocutory appeals from the denial of qualified immunity just because doing so would short-circuit a suit that the plaintiff would eventually lose. The interest in avoiding litigation comes from the uncertainty of constitutional law, not from the uncertainty of liability. All other district court errors do not merit an immediate appeal. Although district courts might occasionally err in concluding that a genuine fact issue exists, immediately correcting those errors—like almost all other district court errors in a civil-rights suit—isn't worth the cost.

And as discussed previously, we already have a tool for appellate review of especially egregious errors: mandamus.[334] If a defendant thinks that a district court has truly gone outside the realm of reasonableness in assuming certain facts, it can petition the court of appeals for a writ of mandamus. Mandamus is rarely granted. Relying on mandamus to fix truly blatant contradictions could thus remove the incentive for defendants to invoke the exception anytime they have a non-frivolous basis for doing so.

B. THE RULES COMMITTEE

We don't need to wait, however, for a U.S. Supreme Court decision to reject the blatant-contradiction exception. There's also

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[332] *Id.*

[333] *Id.*

[334] *See supra* note 241–245 and accompanying text.

rulemaking. Congress gave the Court the authority to create rules regarding the timing of appeals, which the Court has delegated to the Rules Committee.[335] Under 28 U.S.C. § 2072(c), the Court may prescribe rules defining when a district court decision is final for purposes of § 1291. And under 28 U.S.C. § 1292(e), the Court can proscribe rules that provide "for an appeal of an interlocutory decision to the courts of appeals."

So the Rules Committee could reform the law governing interlocutory appeals from the denial of qualified immunity.[336] In doing so, the Committee could adopt all of the just-described procedures: it could require that district courts articulate their assumed facts when denying qualified immunity at summary judgment and require courts of appeals to stick to those assumed facts in assessing whether they make out a clear violation of federal law.

But the Rules Committee wouldn't have to stop there. Nor should it—qualified-immunity appeals are ripe for a variety of reforms. For example, the Committee might address the use of pendent appellate jurisdiction in qualified-immunity appeals. Pendent appellate jurisdiction allows courts of appeals to review a decision that would not normally be final or appealable when the court has jurisdiction

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[335] *See* 28 U.S.C. §§ 1292(e), 2072(c) (2018) (authorizing the Court to create procedural rules for interlocutory appeals). *See generally* Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution*,*"* 54 U. PITT. L. REV. 795 (1993) (discussing the Court's "new rulemaking authority").

[336] There is some question of whether Committee action on qualified-immunity appeals would "abridge, enlarge or modify any substantive right," which the Rules Enabling Act prohibits the Committee from doing. *Id.* § 2072(b). I leave that question for another day. I will note, however, that the *Report of the Federal Courts Study Committee*—which recommended the statutory provision that gave the Rules Committee the power to define when a district court decision is final—said that this power "would include authority both to change (by broadening, narrowing, or systematizing) decisional results under the finality rule of 28 U.S.C. § 1291." FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 96 (1990). And in *Johnson v. Fankell*, the Supreme Court held that there is no federal right to interlocutory review from the denial of qualified immunity when an action is brought in state court. 520 U.S. 911, 913 (1997). The Court noted that "[t]he right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in § 1291." *Id.* at 921. *Fankell* thus suggests that the Rules Committee's power to define what orders are "final" under § 1291 includes the power to define the existence and scope of qualified-immunity appeals.

over another, related decision.[337] Municipalities regularly invoke pendent appellate jurisdiction to immediately appeal municipal-liability claims alongside individual defendants' qualified-immunity appeals.[338] But this practice is unsound.[339] The Rules Committee could stop it.

The Committee could also address the appealability of the "*Bivens* question."[340] In *Wilkie v. Robbins*, the U.S. Supreme Court held that courts could address the availability of a *Bivens* remedy as part of an interlocutory qualified-immunity appeal.[341] This aspect of *Wilkie* has faced withering criticism, as the holding is inconsistent with both precedent and the theory underlying qualified immunity appeals.[342] And two recent Supreme Court decisions—*Ziglar v. Abbasi*[343] and *Hernandez v. Mesa*[344]—have

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[337] 16 WRIGHT ET AL., *supra* note 62, § 3937; Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After* Swint, 49 HASTINGS L.J. 1337, 1487 (1998).

[338] *See, e.g.*, Novoselsky v. Brown, 822 F.3d 342, 357 (7th Cir. 2016) (explaining that "the claim against the county is 'inextricably intertwined' with the case against [the individual defendant] and our review on appeal is proper" (quoting Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 51 (1995))); Pollard v. City of Columbus, 780 F.3d 395, 401 (6th Cir. 2015) ("[T]o the extent the issues raised in the City of Columbus's appeal are 'inextricably intertwined' with the officers' claims of qualified immunity, we may exercise pendent jurisdiction over the appeal.").

[339] *See* Bryan Lammon, *Municipal Piggybacking in Qualified-Immunity Appeals*, 126 PENN. ST. L. REV. (forthcoming 2021) (manuscript at 27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805019 ("However convenient the exercise of pendent appellate jurisdiction might be when looking at a single appeal, municipal piggybacking systematically creates extra work for parties and courts with no offsetting benefits."); Lammon, *Finality*, *supra* note 2, at 1849–50 ("An official's entitlement to qualified immunity has nothing to do with the municipality's liability; there's no intertwinement. And an individual's entitlement to qualified immunity can be meaningfully reviewed without addressing the municipality's liability.").

[340] The name comes from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which held that courts could imply a constitutional cause of action against federal officials.

[341] 551 U.S. 537, 549 n.4 (2007).

[342] Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006–2007 CATO SUP. CT. REV. 23, 75; Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199, 208–09 (2013).

[343] 137 S. Ct. 1843 (2017).

[344] 140 S. Ct. 735 (2020).

made things even worse.[345] Both decisions emphasized the context-dependent nature of the *Bivens* question: a fresh *Bivens* analysis is necessary anytime a case arises in a new context, which requires only a slight difference from previous contexts.[346] The case thereby invites more appeals on the *Bivens* issue, as defendants can now almost always argue that the circumstances of their case is a "new context," requiring an independent evaluation.[347] This further increases the costs and delays of civil rights suits.[348] And there are few (if any) benefits to letting defendants raise this issue in an interlocutory appeal.[349] Reform of qualified-immunity appeals could accordingly remove the *Bivens* question issue from the scope of interlocutory review.[350]

Another potential target for reform would be the opportunities for qualified-immunity appeals. The Court has held that government officials can appeal from the denial of qualified immunity at both the motion-to-dismiss and summary-judgment stages.[351] The courts of appeals have struggled with appeals from other kinds of decisions that implicate immunity, such as from district courts' evidentiary decisions, refusals to grant judgment as a matter of law, and motions granting a new trial.[352] Courts have even held that a district court's decision to delay ruling on qualified

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[345] Bryan Lammon, *Making* Wilkie *Worse: Qualified-Immunity Appeals and the* Bivens *Question after* Ziglar *and* Hernandez, U. CHI. L. REV. ONLINE (July 24, 2020) [hereinafter Lammon, *Making* Wilkie *Worse*], https://lawreviewblog.uchicago.edu/2020/07/24/making-wilkie-worse-lammon.

[346] *Hernandez*, 140 S. Ct. at 743; *Ziglar*, 137 S. Ct. at 1859–63; *see also* Lammon, *Making* Wilkie *Worse*, *supra* note 345.

[347] Lammon, *Making* Wilkie *Worse*, *supra* note 345.

[348] *Id.*

[349] *Id.*

[350] *Id.*

[351] Behrens v. Pelletier, 516 U.S. 299, 307 (1996).

[352] *See, e.g.*, Benson v. Facemyer, 657 F. App'x 828, 831 (11th Cir. 2016) (per curiam) (holding that the court had jurisdiction over the district court's denial of a post-verdict motion for judgment as a matter of law arguing qualified immunity); Carroll v. Ellington, 800 F.3d 154, 167 (5th Cir. 2015) (holding that the court had jurisdiction to review the denial of a Rule 50(b) motion seeking qualified immunity); Hill v. Crum, 727 F.3d 312, 317 (4th Cir. 2013) (holding that the defendants could appeal from the district court's denial of judgment as a matter of law on qualified immunity grounds, which accompanied a grant of a new trial).

immunity can sometimes be appealed.[353] Rulemaking could define when government officials can appeal from the denial of qualified immunity. It might also place a limit on the number of times a party may appeal. Justice Breyer's dissent in *Behrens* made a strong case for limiting the number of qualified-immunity appeals in a single case.[354] It might be worth revisiting the matter.

Finally, rulemaking might transform qualified-immunity appeals from appeals as of right to discretionary appeals.[355] This is the most preliminary—but perhaps also the most important—suggestion. Clearer rules might avoid some of the jurisdictional issues that plague qualified-immunity appeals. But so long as qualified immunity remains the law, appeals from the denial of qualified immunity will add delay and expense to civil rights litigation. It's worth considering whether all that delay and expense is worth a right to appeal, particularly when defendants regularly flout the jurisdictional limits on qualified-immunity appeals and courts dismiss these appeals for lack of jurisdiction. Sustained study of qualified-immunity appeals will be necessary before moving to discretion; we need to know, for example, how many qualified-immunity appeals there are each year, the reversal rate, and the delays they cause in district court proceedings. But a discretionary option should be on the table.

V. CONCLUSION

Confusion over the rule in *Johnson v. Jones* has gone on too long. Its contours need to be clearly established: in a qualified-immunity appeal from the denial of summary judgment, the courts of appeals have jurisdiction to address only whether the district court's

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[353] *Compare* Zapata v. Melson, 750 F.3d 481, 484 (5th Cir. 2014) (noting that the Fifth Circuit has "repeatedly held that a district court's order that declines or refuses to rule on a motion to dismiss based on a government officer's defense of qualified immunity is an immediately appealable order"), *with* Khorrami v. Rolince, 539 F.3d 782, 786, 790 (7th Cir. 2008) (holding that the court lacked jurisdiction to review a district court's decision to defer ruling on qualified immunity at the motion-to-dismiss stage unless the delay is long enough to be "a *de facto* denial"), *and* Weise v. Casper, 507 F.3d 1260, 1266 (10th Cir. 2007) (holding that the court lacked jurisdiction over the district court's decision to defer deciding qualified immunity until after limited discovery into whether the defendants were government officials who could claim qualified immunity).

[354] *Behrens*, 516 U.S. at 323 (Breyer, J., dissenting).

[355] Solimine, *Qualified Immunity Appeals*, *supra* note 25, at 183.

assumed facts amount to a clear violation of federal law. *Scott v. Harris*'s blatant-contradiction exception to that rule should be rejected. That exception is cumbersome and wasteful, and over a decade of experience with it shows that it has few (if any) offsetting benefits. Clearing up *Johnson* and *Scott* would go a long way towards clearing up the jurisdictional confusion that often plagues qualified-immunity appeals. This clearing up could be accomplished in an appropriate case. But rulemaking might be a superior route, as rulemaking can address many of the problems with qualified-immunity appeals. Whether part of wholesale appellate-jurisdiction reform or an effort on only qualified-immunity appeals, it's time for some change.

VI. APPENDIX: METHOD & METHODOLOGY

I sought to assemble every qualified-immunity appeal that had invoked *Scott v. Harris*'s blatant-contradiction exception for two reasons. First, reading every case that had invoked the exception would ensure a comprehensive understanding of how the courts of appeals understand the exception. Second, I wanted to empirically evaluate how courts have used the exception.

Simply pulling all appellate cases that cited *Scott* resulted in far too many false positives—that is, cases that cited *Scott* for reasons other than the blatant-contradiction exception. I accordingly searched Westlaw's U.S. Courts of Appeals Database for cases that invoked the exception in a qualified-immunity case. As I encountered variations on how courts phrased the rule, I added those variations to my search. As for my date range, my search began with the day after *Scott* was decided and ended twelve years later, on April 29, 2019.

I ultimately used the following search term:

> "qualified! immun!" AND ((blatant! /3 contradict!) OR "blatantly and demonstrably false" OR "visible fiction" OR "utterly discredit!" OR "incontrovertible evidence" OR (light /4 video!) OR (credit /4 video!) OR "to the extent supportable by the record" OR "unsupported by the record" OR "plainly foreclose!" OR "complete! discredit!" OR "wholly contradict!" or "conclusively disprove!") AND da(aft 4/29/2007)

The search returned 471 results. This search did not capture every decision that invoked some variation of the blatant-contradiction exception. For example, I found the Second Circuit's decision in *Raspardo v. Carlone* in my research, in which the court noted that it "need not accept conclusory allegations that are either contradicted by or lack support in the record."[356] I accordingly know that my search did not find every opinion. I do, however, think that the search was broad enough to find most of them. And importantly, I do not see any reason why cases that invoked a different variation

[356] 770 F.3d 97, 128 n.29 (2d Cir. 2014) (citing Scott v. Harris, 550 U.S. 372, 380 (2007)).

on the exception would skew in one direction—towards more or fewer blatant contradictions.

I then coded the results to identify false positives and categorize relevant cases. I coded the cases as follows:

(1) *Irrelevant: 242 cases*. A false positive that was not an interlocutory qualified-immunity appeal at summary judgment, did not invoke any variation on the blatant-contradiction exception, was superseded by a later opinion, or was otherwise not relevant to the study.
(2) *Mentioned: 86 cases*. The court mentioned the blatant-contradiction exception (or some variation of it) but did not clearly apply it. When determining whether a court clearly applied the exception, I looked for some clear indication from the court about whether the record contradicted the district court's assumed facts. If there was not a sufficiently clear statement to this effect, I coded the case as "mentioned."
(3) *No blatant contradiction: 108 cases*. The court applied the blatant-contradiction exception and concluded that nothing in the summary-judgment record blatantly contradicted the district court's assumed facts. Of these cases, 100 were unanimous, and 8 had a dissent.
(4) *Blatant contradiction: 28 cases*. The court applied the blatant-contradiction exception and concluded that something in the summary-judgment record blatantly contradicted the district court's assumed facts. Of these cases, 21 were unanimous, and 7 had a dissent.
(5) *Other: 6 cases*. Cases that could not be coded into one of the prior categories:
    - *Osberry v. Slusher*, 750 F. App'x 385 (6th Cir. 2018): Decided on a Rule 12(c) motion, and a video did not blatantly contradict the complaint.
    - *Bailey v. City of Ann Arbor*, 860 F.3d 382 (6th Cir. 2017): Decided on a motion to dismiss, and a video blatantly contradicted the complaint.
    - *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016): The court held that a video discredited the defendant's version of the facts.

- *Schmidt v. Gray*, 399 F. App'x 925 (5th Cir. 2010): The defendant argued blatant contradiction, but the court didn't engage the argument, instead reiterating the lack of jurisdiction over the factual dispute.
- *Snover v. City of Starke*, 398 F. App'x 445 (11th Cir. 2010): The defendants submitted a DVD in support of summary judgment but did not authenticate it. The district court rejected the DVD as unauthenticated, and the court of appeals held that this was acceptable.
- *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009): The court held that there was no blatant contradiction in the interlocutory review of a municipal-liability claim.