No. 15–824

IN THE
Supreme Court of the United States

WAYNE BLANCHARD,

Petitioner,

v.

NANCY BROWN, individually and as the Special Administrator for the Estate of John Brown, Deceased,

Respondent.

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

BRIEF AMICUS CURIAE OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivision thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amici curiae* or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, each party has been given 10 days notice and consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's jurisprudence in *Johnson v. Jones*, 472 U.S. 511 (1995) and cases since have left Courts of Appeal of two minds on whether inferences drawn by district courts are reviewable. In *Johnson*, this Court opined that its distinction between the sufficiency of evidence and questions of law would be workable, but in practice, it has not. This distinction has divided the Courts of Appeals and legal community for over twenty years. In that time, this issue has come before this Court again and again without clarification, which has driven Courts of Appeals to try to reason a solution of their own. In attempts to correctly determine whether summary judgment should be granted, the Circuit Courts have grappled with the meaning of *Johnson*, and cases that followed, like *Scott v. Harris*, 550 U.S. 372 (2007), and *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014). Given the twenty years of confusion and the inability of the Circuit Courts to settle on a reading of this jurisprudence, this Court should grant Certiorari and clarify the distinction drawn in *Johnson*.

In addition, Circuit Courts have varied widely on what is and is not clearly established law under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). These differences arise from whether complete factual similarity to prior case law is necessary to rely on previous cases as clearly established law; and, what cases within, or without, a circuit a governmental official needs to be aware of to be protected. This confusion is detrimental to public servants, especially police officers and their municipalities, who must

train the officers differently on clearly established law across the country. This confusion has lasted over thirty years with no consensus on the part of the Circuit Courts, and it is time for this Court to review and set a standard for clearly established law that courts across the country can follow.

ARGUMENT

I. Officers are being deprived of immunity from suit because Courts of Appeals are split as to the extent of their jurisdiction to review the determinations of disputed facts and inferences of the district courts.

A. This Court's jurisprudence on appellate review of qualified immunity at the summary judgment stage is unclear as to the extent of the circuit court's jurisdiction.

The question of the extent of appellate jurisdiction arises because the denial of qualified immunity ordinarily comes to the appellate courts as an interlocutory appeal. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that denial of qualified immunity on the ground that the law in question was not "clearly established" could be reviewed under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). *Mitchell*, 472 U.S. at 526-27. Citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court noted that the policy of qualified immunity is to allow officials to take action that does not implicate clearly established rights

without fear of the consequences, which "are not limited to liability for money damages; they also include '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.'" *Mitchell*, 472 U.S. at 526. Thus, the Court concluded, "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Accordingly, continuing litigation after an erroneous denial of qualified immunity would render the trial court's decision to deny immunity both "conclusive and "effectively unreviewable on appeal from a final judgment." *Id.* at 526-527. Further, from the same principle "it follows … that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28.

Mitchell involved the legal question of whether (assuming a set of undisputed facts), the law was clearly established such that immunity should be denied. Ten years later, the case of *Johnson v. Jones*, 472 U.S. 511 (1995), tested the extent of the interlocutory appeal jurisdiction recognized in *Mitchell* in a case involving the other extreme – the sufficiency of the factual evidence offered to dispute the officials' version of events. In *Johnson*, the plaintiff's complaint accused five officers of excessive force in the process of arresting him, and the district court denied summary judgment on this claim. In his deposition, the plaintiff had testified that unnamed officers had used excessive force by beating him while

arresting and booking him. 472 U.S. at 307. Three of the officers admitted to being present at the arrest and near the booking room, but they denied that they beat him or saw anyone else do so. *Id.* at 307-08. The officers appealed the denial of summary judgment as to excessive force on the ground that there was no evidence contradicting their version of the facts. *Id.* at 308. At oral argument in the Seventh Circuit, defense counsel admitted that the officers could not prevail on qualified immunity if the factual issue of whether they beat the plaintiff were to be resolved against them. *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994). The Seventh Circuit dismissed the appeal as outside its interlocutory jurisdiction as a factual issue, *id.,* and this Court affirmed, *Johnson,* 472 U.S. at 320.

Reviewing the decision to allow interlocutory appeal jurisdiction in *Mitchell*, the *Johnson* Court examined the basis for its determination that the immunity claim was "conceptually distinct": specifically, "an appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." 472 U.S. at 312 (internal quotation marks omitted). Rather, the court needed only determine a question of law. *Id.* In *Mitchell*, the question was only whether the law was clearly established; in comparison, the *Johnson* court distinguished the case before it as one of "evidence sufficiency." *Id.* at 313.

The Court denied that the line it drew between cases of "evidence sufficiency" and "questions of law" would be "unworkable." *Id.* at 318. Petitioners pointed out that appellate courts would have "great difficulty"

separating out the district court's "reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is "genuine")." *Id.* at 319. The Court conceded that, to the extent the trial court's order did not make it clear which facts it assumed as true when ruling on whether the law was clearly established, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Id.* However, this, the Court believed, would be "more manageable than the rule that petitioners urge us to adopt." *Id.*

B. With unclear guidance, courts of appeals have taken different approaches to review of qualified immunity at the summary judgment stage.

In light of the above discussion, the boundaries of appellate jurisdiction over the facts on which immunity decisions are based when reviewing the denial of qualified immunity are not clear. The Sixth Circuit laid out this split for the Court in its recent case *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013). One reading of *Johnson* is best summarized by Judge Sutton of the Sixth Circuit, who states that most courts "appl[y] the [Johnson] 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," precluding courts of appeals from correcting those inferences by taking away their jurisdiction to do so.

Id. at 678 (Sutton, J., concurring). This view draws broader limitations on jurisdiction to exclude both competing sets of facts and inferences made by the district court.

As a result of this view, many inferences drawn by the district court that lead to denial of summary judgment are not reviewed by the courts of appeals. To use an analogy and based on the inference drawn in this case, if a woodsman testified he did not hear someone call out and say "timber", such testimony does not warrant a factual conclusion that a tree did not fall when faced with direct evidence from a person who testifies to seeing it fall. In this case, appellate court ought to be able to reach a conclusion that the evidence does not support a conclusion that there is a dispute of a material fact when direct testimony supports the officers' version of the events. Restricting the Courts of Appeals in this manner seems out of step with this Court's own review of the record in cases such as *Scott v. Harris*, *Plumhoff v. Rickard* and *San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015).

Another view opens up jurisdiction for the courts of appeals to review these inferences and correct them. *Romo,* 723 F.3d at 678. Said another way, in this view, the courts of appeals cannot review the district court's determination of which facts are disputed on summary judgment, but may review inferences made by the district court in regards to undisputed facts. *Id*. This view, while possibly leading to slightly more judicial work on the front end, will preserve judicial resources and the official's immunity by avoiding a potentially unnecessary trial.

The Tenth Circuit consistently applies the first interpretation of *Johnson*, affirming the district court's denial of summary judgment on qualified immunity based on the view that they lack jurisdiction to review both the facts and inferences determined by the lower court. *See, e.g., Lewis v. Tripp,* 604 F.3d 1221 (10th Cir. 2010); *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008). Other circuits that follow this view are the Third and Sixth. *See, e.g., Kindl v. City of Berkley*, 798 F.3d 391 (6th Cir. 2015); *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009); *Blaylock v. City of Philadelphia*, 504 F.3d 405 (3rd Cir. 2007); *Romo*, 723 F.3d 670.

Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008), illustrates the inefficiency of this method. There, the court held that it was "not at liberty to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." *Id.* at 1154. The Tenth Circuit affirmed the lower court's denial of summary judgment, although a jury later found in favor of the defendants on the grounds of qualified immunity. *Fogarty v. Gonzales*, No. CV-05-0026 WJ/LFG, 2009 BL 8528 (D.N.M. Jan. 6, 2009). The jury trial in *Fogarty* was a waste of both municipal and judicial resources that could have been avoided if the Tenth Circuit had allowed itself to review whether the factual inferences drawn by the lower court had been property supported.

Meanwhile, the Seventh and Eighth Circuits apply the second view of *Johnson*, in which the inferences drawn by the district courts are reviewed. *See, e.g., Baird v. Renbarger*, 576 F.3d 340 (7th Cir.

2009); *New v. Denver*, 787 F.3d 895 (8th Cir. 2015). While this is more efficient, it still limits the court's ability to overturn cases that turn on incorrect determination of the material facts. For that reason, in one case, the Seventh Circuit has gone as far as to perform a *de novo* review of the case, including a review of what the material facts were and whether there was a genuine issue of material fact in the case. *See Weinmann v. McClone*, 787 F.3d 444 (7th Cir. 2015). Although *de novo* review is not demonstrative of the prevailing jurisprudence on the topic, it does demonstrate the extent that courts differ on the proper approach to interlocutory appellate jurisdiction, and the extent to which they need freedom in reviewing these cases to make the right determination.

C. *This question has repeatedly arisen in cases before this court since* Johnson*, without clarification resulting.*

Far from being an isolated issue that only comes up every ten years, the question of which issues are encompassed within the *Johnson* category of factual issues that are insulated from review on interlocutory appeal not only vexes the appellate courts, but has repeatedly been raised in this Court, and yet the standard has not been clarified.

Already, in the term immediately following *Johnson*, the Court revisited its distinction between appealable and nonappealable issues in *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). Among the arguments the respondents made as to why there was no jurisdiction over the appeal was that the district court had denied summary judgment on the ground

that material issues of fact remained. The Court rejected an expansive reading of *Johnson* that would make every denial of summary judgment on the ground of material issues of fact nonappealable. The Court explained:

> "*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*."

Id. Again, the Court spoke in terms of a mere sufficiency determination, as distinguished from an "abstract issue of law," but did not address any gradations in between.

More recently, *Scott v. Harris*, 550 U.S. 372 (2007), arose on interlocutory appeal of a denial of immunity on summary judgment. *Harris v. Coweta* County, 433 F.3d 807, 811 n.3 (11th Cir. 2005). The opinion addressed the narrow circumstance in which the facts as asserted by the plaintiff (nonmovant) were "blatantly contradicted" by a videotape of the officers' chase. *Id.* at 380. Justice Scalia, writing for the Court, wrote that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* Thus, the Court viewed it as being

within its jurisdiction to decide whether the trial court had used the proper standard to decide whether a factual dispute was genuine. Notably, *Scott* did not cite at all to *Johnson*, in which the Court had determined that decisions about whether there was a genuine dispute of fact were *not* within the appellate courts' interlocutory appeal jurisdiction (perhaps because there was no recorded evidence in that case).

Yet, *Ortiz v. Jordan*, 562 U.S. 180 (2011), returned to the same formulaic description of *Johnson*'s holding: "Immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a "purely legal issue," but not "when the district court determines that factual issues genuinely in dispute preclude summary adjudication." *Id.* at 188.

Plumhoff v. Rickard, 134 S.Ct. 2012 (2014), another high-speed chase case, addressed the confusion created by *Scott* in light of *Johnson*, but it did not further clarify *Johnson*. According to the Court, the issue raised on appeal in *Plumhoff* was not,

> "that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried."

Id. at 2020. To further justify the determination that there was appellate jurisdiction, the Court noted that the district court order in the case before it was not materially different from the order in *Scott*, and in *Scott* the Court had not questioned its appellate

jurisdiction. Indeed, this is true: *Scott* did not even address the question of whether there was appellate jurisdiction under *Johnson*.

As this Court's cases have failed to point toward a clear rule as to the precise confines of the appellate court's jurisdiction to review a district court's denial of immunity on summary judgment, parties have attempted to seek this Court's guidance, to no avail. For instance, in *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), the officers complained that the district court mixed immaterial disputes of facts with undisputed facts to conclude that the record was unclear about what had transpired in the final moments before officers shot an individual. *Id.* at 835. The Ninth Circuit had ruled that, under *Johnson*, the question of which facts were material, like the question of whether there was a genuine dispute of fact, was beyond appellate jurisdiction. *Id.* at 835-36. The officers sought certiorari, which was denied on June 2, 2014. *Morris v. George*, 134 S. Ct. 2695 (2014).

In another case addressing the scope of review of the district court's determinations of undisputed facts *Ellison v. Lesher*, 796 F.3d 910 (8th Cir. 2015), raised the question of whether, under *Johnson*, the court of appeals is constrained to only those facts that the district court expressly identified as undisputed facts, and cannot look at the record to determine whether there were other undisputed facts supporting a different conclusion. The Eighth Circuit ruled that it was constrained to assess the immunity argument based on the facts the district court expressly identified, and it could not even consider arguments based on additional facts that may have been undisputed, but that the district court did not identify.

Id. at 915, 917. Certiorari was denied on Jan. 19, 2016. *Lesher v. Ellison*, No. 15-761, ___ S. Ct. ___ (2016).

In sum, not only have the courts of appeals reached divergent conclusions about the application of *Johnson* to situations where the issues raised are neither purely factual or purely legal, but the cases as to which the Court has granted certiorari have not served to fill in the gap between those two extremes, and if anything, have confused the matter further. Parties have repeatedly sought review in order to clarify the scope of appellate jurisdiction in this setting, to no avail.

D. The impenetrable guidance of Johnson *has not only confounded courts, but also the legal community.*

Legal scholars have also criticized the confusion generated by Johnson over the distinction regarding the Courts of Appeals' jurisdiction regarding the review of legal versus factual issues on interlocutory appeal. "Although the qualified immunity test can be succinctly stated, the judicially-developed doctrine surrounding it has caused consternation and confusion." Mark. R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 Nev. L.J. 185 (2008). Critics opine that "[t]he Court's jurisprudence contains serious jurisdictional and procedural errors." Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 Wash. & Lee L. Rev. 3, 52 (1998). The courts of appeals have asserted jurisdiction across a wide spectrum, from the review of material facts to a complete disregard of the lower court's findings. *Id.*

These assessments convey an obvious need for guidance post-*Johnson*.

In sum, the distinction in *Johnson* between "purely legal" issues and "purely factual" issues has in fact proved unworkable because so many cases fall somewhere between those extremes. This Court should grant *certiorari* to harmonize *Scott, Plumhoff* and *Johnson*, and to address the review of the spectrum of district court decisionmaking on summary judgment.

II. Courts' evaluation of what is "clearly established law" varies, creating unclear guidance for all parties to § 1983 litigation.

In order to protect "all but the plainly incompetent or those who knowingly violate the law" from personal liability in a constitutional tort action, the defense of qualified immunity is available to individual defendants. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity helps prevent "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). This protection therefore serves not only the interests of individual government actors, but also the public; "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.* at 819 (citing *Pearson v. Ray*, 386 U.S. 547, 554 (1967). However, the extent to which this protection is available to a government actor performing discretionary duties depends on the jurisdiction in

which they work. "Clearly established law" has different meanings in different circuits. Federal courts differ as to 1) the factual similarity between the circumstances of a case to prior case law necessary to find clearly established law, and 2) the types of authorities which clearly establish the law.

A. The level of factual similarity to prior case law necessary to establish qualified immunity is unclear.

Qualified immunity is intended to place individual government employees reasonably on notice of conduct that might violate someone's constitutional rights and expose them to civil liability. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("[I]n the light of pre-existing law the unlawfulness must be apparent."). However, this Court has held that in some circumstances, facts that are not "materially similar" to those of previous cases do not erase the possibility of clearly establishing the law. E.g., *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *United States v. Lanier*, 520 U.S. 259, 269-71 (1997). In *Lanier*, this Court held that the lack of prior case law with "fundamentally similar facts" is not required to provide notice to a government actor. *Id.* at 261. Whereas in some situations, "a very high degree of prior factual particularity may be necessary," in others, however, under facts that may have never appeared in a prior case, a "general constitutional" principle will "apply with obvious clarity," and thus courts will find that a government employee had fair notice of the illegality of his or her actions. *Id.* at 271-72. As the next section will show, the case law on which a government employee can rely to clearly

establish the law varies widely among the federal Circuits.

B. Courts of appeals differ on what authorities clearly establish law for purposes of qualified immunity, creating a circuit split and confusion that this Court has not resolved.

The standards for which authorities put a government actor on notice that his or her actions violate a plaintiff's clearly established constitutional rights are very different throughout the federal Circuits. These span jurisdictions which consider a narrow range of authority, such as the Eleventh Circuits, to those with very broad standards, such as the Ninth Circuit. Some Circuits lack a clear standard at all, such as the Third Circuit.

A narrow range of authority is accepted as determining "clearly established" law for purposes of qualified immunity in the Eleventh, Second, Sixth, Fourth, and Fifth Circuits. The Eleventh Circuit's definition is considered by some to be the most narrow. Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 Ariz. L. Rev. 1031, 1049-50 (2005). In the Eleventh Circuit, the law is "clearly established" when the U. S. Supreme Court, Eleventh Circuit Court of Appeals, or the supreme court of the state in which the matter arose has spoken on the issue. *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997). Therefore, a district court case that appears to be on point would not put a defendant on notice for purposes of clearly establishing the law. The Second Circuit similarly looks to a narrow body of case law as

persuasive in establishing qualified immunity, considering only Supreme Court and Second Circuit cases "existing at the time of the alleged violation." *Moore v. Vega*, 371 F.3d 110, 114 (2d. Cir 2004).

The Sixth Circuit also employs a narrow standard, looking first to the Supreme Court, then to decisions within its own circuit—including district court opinions. *Chappel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 579 (6th Cir. 1997). In extraordinary circumstances, decisions from courts outside of the Sixth Circuit may be considered to clearly establish the law. *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993). Similarly, the Fourth Circuit looks to Supreme Court, state supreme court, and Fourth Circuit Court of Appeals cases first, and only in the absence of such cases does it look to other circuits as persuasive authority for questions of qualified immunity. *Owens v. Lott*, 372 F.3d 267, 279-80 (4th Cir. 2004). The Fifth Circuit looks to extra-circuit precedent, but as persuasive, not binding, and may find qualified immunity and a lack of clearly established law sufficient to put a defendant on notice despite persuasive authority from other circuits. *See McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc) (per curiam); *see also* Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 Tex. L. Rev. 1283 (2012) (arguing that although the Fifth Circuit may theoretically consider extracircuit precedent, in practice, it usually does not).

In contrast to the clear, narrow standards of the above circuits, the Third Circuit has not yet

established a clear standard. *See* Catlett, *supra*, at 1045-46; *Brown v. Mulhenburg Twp.*, 259 F.3d 205, 220 (3d. Cir. 2001) (Garth, J., dissenting) ("Distressingly, the majority opinion fails to announce a standard by which the bench and the bar can test whether a particular legal principle—that is the particular constitutional right—is 'clearly established' for purposes of qualified immunity."); *see also Ray v. Township of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) (demonstrating that the Third Circuit looks to precedent from other circuits to determine whether law is clearly established or not.).

The First, Seventh, Eighth, Ninth, and Tenth Circuits have adopted broad approaches to determining what authority to continue as clearly establishing the law for purposes of qualified immunity. Catlett, *supra*, at 1048 n.138. The First Circuit looks "not only to Supreme Court precedent but to all available case law." *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 23 (2001). The Seventh Circuit looks to Supreme Court and Seventh Circuit controlling precedent, and in the absence of such precedent, looks to other case law. *Denius v. Dunlap*, 209 F.3d 944, 951 (7th Cir. 2000). Such case law need not exhibit precise factual similarity, but must show "such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Id.* (citing *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 430 (7th Cir. 1989)). The Tenth Circuit similarly begins the inquiry with Supreme Court and Tenth Circuit binding authority, and in the absence of both, looks to "the clearly established weight of authority from other courts" to

support a plaintiff's claim of clearly established violation of his or her rights. *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

The Eighth and Ninth Circuits' standards for what authority clearly establishes the law for purposes of qualified immunity are as broad as the Eleventh Circuit's standard is narrow. In the absence of a Supreme Court or Eighth Circuit Court of Appeals decision on the matter, the Eighth Circuit looks to "all available decisional law" including state, district, and other circuit court decisions. *Buckley v. Rogerson*, 113 F.3d 1125, 1129 (1998). Similarly, in the Ninth Circuit, if the Supreme Court or the Ninth Circuit Court of Appeals has not spoken to the issue, the court may look to decisions from other circuit courts, district courts—including unpublished district court opinions—and other state courts. *Sorrels v. McKee*, 290 F.3d 965, 970-71 (9th Cir. 2002). Therefore, a government employee may be denied the protection of qualified immunity in the Ninth Circuit based on another state's court decision, even if no binding Ninth Circuit authority clearly establishes that he or she violated the plaintiff's constitutional rights.

Not only are the standards of the circuits unclear and conflicting, they may not be in accordance with the Supreme Court's approach to the question of what authorities clearly establish the law for the purposes of qualified immunity. For example, in *Hope v. Pelzer*, the Court referred to authorities other than those accepted by the Eleventh Circuit Court of Appeals as clearly establishing the law — to a Department of Justice report. *Compare Hope v. Pelzer*, 122 S. Ct. 2508, 2514 (2002), *and id.* at 2525-26 (Thomas, J.,

dissenting), *with Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997).

In order for the concept of "clearly established law" to serve its purpose within the qualified immunity analysis, it must be equally clear what precedents the courts will look to in determining whether the law is clearly established. For that additional reason, this Court should grant *certiorari* to resolve this split.

CONCLUSION

For the foregoing reasons, *amicus* respectfully asks this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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