24-11299

In the

United States Court of Appeals for the Eleventh Circuit

Robbin Amanda Bayse,

Plaintiff-Appellee,

v.

Ted Philbin, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia
No. 1:22-cv-24—J. Randall Hall, *Chief Judge*

Brief of Professors Karen Blum, Bryan Lammon & Michael E. Solimine as Amici Curiae in Support of Plaintiff-Appellee

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August 29, 2024

* *For affiliation purposes only.*

Bayse v. Philbin, No. 24-11299

Certificate of Interested Persons and Corporate Disclosure Statement

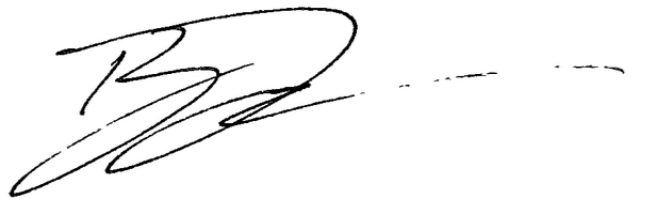
I hereby certify that in addition to the persons and entities listed in Defendants-Appellants' brief and Plaintiff-Appellee's brief, the following persons and entities might have an interest in the outcome of this case:

Blum, Karen, *Amicus Curiae*.

Lammon, Bryan, *Amicus Curiae and Counsel for Amici*.

Solimine, Michael E., *Amicus Curiae*.

Further, to my knowledge, no additional companies or corporations might have an interest in the outcome of this case.



August 29, 2024 Bryan Lammon

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Statement of Identity & Interest of Amicus*

We are law professors—Karen Blum is a Professor Emerita and Research Professor of Law at Suffolk University Law School, Bryan Lammon is a visiting professor of law at William & Mary Law School, and Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. In our scholarship, teaching, and professional service, we have given particular attention to the issue this appeal implicates: appellate jurisdiction over immediate appeals from the denial of qualified immunity. *See, e.g.*, Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018); Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 MO. L. REV. 1137 (2023); Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169 (2019).

We seek to aid this Court in its exposition and application of the law

* We provide our law-school affiliations for identification purposes only. No party or party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus contributed money that was intended to fund preparing or submitting this brief.

of federal appellate jurisdiction, a notoriously complicated area of law. We express no position on the merits of the plaintiff's claims.

In accordance with Federal Rule of Appellate Procedure 29(a)(2), we contacted counsel for all parties to this case about the filing of this amicus brief, and all counsel consented to its filing.

Statement of the Issues

Johnson v. Jones, 515 U.S. 304 (1995), held that when defendants appeal from the denial of qualified immunity at the summary-judgment stage, the courts of appeals lack jurisdiction to review the factual basis for the immunity denial. Yet several of this Court's cases read *Johnson* to allow review of this factual basis when a defendant also raises the core qualified-immunity issue, *i.e.*, whether a violation of clearly established law occurred. In other words, these cases hold that the scope of review in a qualified-immunity appeal is plenary when a defendant challenges both the factual basis for an immunity denial and the application of the qualified-immunity standard. We address two issues:

1. Is this both-questions rule a correct reading of *Johnson*?

2. Should this Court decline to exercise its discretion to review the

factual basis for the immunity denial in this case?

Summary of the Argument

This case implicates the jurisdictional limits on the scope of immediate appeals from the denial of qualified immunity—or simply, "qualified-immunity appeals." As Plaintiff-Appellee Robbin Bayse's brief explains, much of the Defendants-Appellants' argument on appeal disputes the facts that the district court determined a reasonable jury could find. Resp. Br. at 43–65. But under the Supreme Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995), this Court should take the district court's conclusion on that point as given for purposes of this appeal. *Id.* at 45. And the defendants' efforts to characterize the issue as a misapplication of the summary-judgment standard is nothing more than a reframed challenge to the district court's assessment of the record. *Id.* at 47–51.

We will not repeat those arguments. We instead write to address a line of Eleventh Circuit cases interpreting *Johnson*, which the Defendants-Appellants appear to invoke. *See* Op. Br. at vii (citing *Nelson v. Tompkins*, 89 F.4th 1289, 1296 (11th Cir. 2024), *petition for cert. filed* (No. 23-1374)). Some of this Court's cases have said that so

long as a defendant challenges whether a violation of law was clearly established, this Court's appellate jurisdiction extends to reviewing the genuineness of fact disputes. *See, e.g.*, *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996). We call this the "both-questions" rule, as it permits plenary review of qualified-immunity denials when defendants challenge both the genuineness of the fact disputes and their materiality.

This both-questions interpretation of *Johnson* is wrong. It is inconsistent with *Johnson*. It is also inconsistent with the Supreme Court's subsequent explanations of the scope of qualified-immunity appeals in *Behrens v. Pelletier*, 516 U.S. 299 (1996), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). And it conflicts with an immense body of caselaw in the other courts of appeals.

Although an en banc decision might be necessary to abrogate the both-questions rule, application of the rule is discretionary, and this panel should not apply it. There is no reason for this panel to second-guess the district court's assessment of the record. Indeed, given the errors of the both-questions rule, we doubt that any panel should ever apply it.

Argument

A. *Johnson v. Jones* holds that the courts of appeals normally cannot review the genuineness of fact disputes in qualified-immunity appeals.

Defendants have a right to immediately appeal from the denial of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985). But when a district court denies immunity at the summary-judgment stage, the scope of appeal is limited—only some aspects of the district court's decision are within the scope of review.

In denying a defendant's motion for summary judgment that seeks qualified immunity, a district court determines both the genuineness of any fact disputes and their materiality. *See* FED. R. CIV. P. 56(a). The genuineness determination—which is sometimes called the "evidence-sufficiency" determination—requires assessing the record and assuming (for the purposes of the motion) the most plaintiff-favorable version of the facts that a reasonable factfinder could find. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the parties dispute this version of the facts and have evidence to back up that dispute, a genuine fact issue exists.

The district court must then determine whether any genuine fact

issues are material. That requires asking the two core qualified-immunity questions. Assuming the most plaintiff-favorable version of the facts that a reasonable factfinder could find, the district court determines whether those facts make out a violation of law. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991). If they do, the district court then determines whether that law was clearly established at the time of the violation. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If the district court answers both of these questions affirmatively—that is, based on the most plaintiff-favorable version of the facts, a violation of clearly established law occurred—then the defendant would be liable under those facts. The genuine dispute over the facts is thus material, and the district court should deny qualified immunity.

In *Johnson*, the Supreme Court held that jurisdiction in a qualified-immunity appeal normally exists to review only the latter inquiries: do the facts taken as true by the district court show a violation of law, and was that violation clearly established? 515 U.S. at 319–20. A court of appeals lacks jurisdiction to review what facts a reasonable factfinder could find. *Id.* So defendants cannot challenge—and the court of appeals lacks jurisdiction to review—the factual basis for the district court's

denial of qualified immunity. The court of appeals must instead take the facts as the district court saw them and address only whether those facts make out a violation of clearly established law.

Johnson offered several reasons for this limit on the scope of qualified-immunity appeals. As a matter of precedent, *Johnson* discussed *Mitchell*'s focus on appealing the "purely legal issue" of whether the law was clearly established. *Id.* at 313 (discussing *Mitchell*, 472 U.S. at 526–30). (The Supreme Court later acknowledged that the genuineness of a fact dispute is itself a legal question, but it is one "that sits near the law-fact divide." *Iqbal*, 556 U.S. at 674.) As a matter of theory, *Johnson* noted that evidence-sufficiency issues overlap too much with the merits to be appealable via the collateral-order doctrine. 515 U.S. at 314.

But what *Johnson* especially emphasized was practicality. Appellate courts, *Johnson* noted, have no comparative advantage in determining the existence of genuine fact issues. *Id.* at 316. Courts of appeals are thus less likely to conclude that the district court erred—meaning there is less need for immediate error correction—in this context. *Id.* Further, record review can take substantial time. *Id.* This

review not only burdens the court of appeals. It also adds to the substantial delay in district court proceedings that qualified-immunity appeals cause. *See* JASON TIEZZI, ROBERT MCNAMARA & ELYSE SMITH POHL, UNACCOUNTABLE 28 (2024) (discussing the cost and delays caused by qualified immunity and finding "evidence that government defendants may use interlocutory appeals strategically, filing meritless appeals simply to drag out litigation"); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1907 (2018) ("[Qualified-immunity] appeals have resulted in expensive, burdensome, and often needless delays in the litigation of civil rights claims."); Bryan Lammon, *Sanctioning Qualified-Immunity Appeals*, 2021 ILL. L. REV. ONLINE 130, 138 (finding that improper, fact-based qualified-immunity appeals in 2020 took an average of 440 days to resolve); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1191 (1990) (discussing district court judges' belief that "defendants used [qualified-immunity appeals] as a delaying tactic that hampered litigation"). And determining whether a genuine fact issue exists can overlap with issues raised later at trial. *Johnson*, 515 U.S. at 316. Immediate appellate

review thus risks duplicative, overlapping appeals of similar issues—once in the qualified-immunity appeal and again in an appeal after trial. *Id.* at 316–17.

One or two narrow exceptions to *Johnson* exist. The first comes from *Johnson* itself and applies when the district court does not specify the facts it assumed to be true in denying immunity. With no explanation from the district court, the court of appeals can "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.* at 319. Alternatively, the court of appeals can remand for the district court to specify the genuinely disputed material facts. *See Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 146 & 148–50 (3d Cir. 2002).

A second possible exception comes from the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), in which the Supreme Court held that a court should not accept the plaintiff's version of events for purposes of summary judgment when a video of a car chase "blatantly contradicted" that version of events.[1] Several courts of

[1] It is far from clear that *Scott* actually created an exception to *Johnson*,

appeals have read *Scott* to create a "blatant-contradiction" exception to *Johnson*: the court of appeals can review the genuineness of fact disputes when something in the summary-judgment record blatantly contradicts the district court's assessment of that record. *See, e.g.*, *Henderson v. Glanz*, 813 F.3d 938, 950–51 (10th Cir. 2015); *Singletary v. Vargas*, 804 F.3d 1174, 1183 (11th Cir. 2015); *see also* Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. 959, 991–94 (2021) (reviewing circuit caselaw on this matter).

Absent one of these exceptions to *Johnson*, only part of the district court's denial of qualified immunity—whether the facts assumed to be true by the district court show a violation of clearly established law—is within a court's appellate jurisdiction. *Johnson* could not have been more clear on this point, ending the opinion by saying 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'

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given that *Scott* did not mention *Johnson* or appellate jurisdiction. *See George v. Morris*, 736 F.3d 829, 835–36 (9th Cir. 2013) (refusing to assume that *Scott* "implicitly abrogated a line of precedent").

issue of fact for trial." 515 U.S. at 319–20.

If *Johnson* left any uncertainty about the scope of qualified-immunity appeals, the Supreme Court resolved that uncertainty a year later in *Behrens*. The plaintiff in *Behrens* argued that there was no appellate jurisdiction over a qualified-immunity appeal because the district court had said that genuine fact issues existed. 516 U.S. at 312. This argument, the Supreme Court explained, misread *Johnson*. *Id.* at 312–13. Again, *Johnson* said that no appellate jurisdiction exists to review the genuineness of fact disputes. *Id.* at 313. So if a defendant challenges *only* the genuineness of fact disputes, there is nothing within the appellate court's jurisdiction. *Id.* But denials of qualified immunity at summary judgment are appealable *to the extent* that they raise abstract issues of law relating to immunity, such as whether the violated right was clearly established. *Id.* ("*Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the . . . standard of objective legal reasonableness." (quotation marks omitted)). So despite the district court's conclusion in *Behrens* that genuine issues of material fact existed, the defendant could appeal to

argue that the facts taken as true by the district court did not amount to a clear constitutional violation. *Id.*; *see also Ortiz v. Jordan*, 562 U.S. 180, 190 (2011) (noting that permissible qualified-immunity appeals "typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law").

In short, and putting aside any exceptions to *Johnson* (none of which the defendants in this case invoke), defendants might present two types of arguments in qualified-immunity appeals. *First*, under the version of the events that the district court thought a reasonable jury could find, the defendants did not violate the law, or that law was not clearly established. *Second*, under some other version of events (probably one more favorable to the defendant), the defendants did not violate the law, or that law was not clearly established. *Johnson* and *Behrens* hold that appellate jurisdiction exists over only the first argument. Appellate courts lack jurisdiction over the second. So if the defendant makes only the first argument—relying on the version of the events that the district court thought a reasonable jury could find—the court of appeals can hear the case. If the defendant makes only the

second argument—relying on some other version of events—the court of appeals lacks jurisdiction. And if the defendant makes both (say, as alternative arguments), the court of appeals should address the first argument but dismiss the appeal insofar as it makes the second argument.

B. Some of this Court's caselaw misreads *Johnson* to permit plenary review when defendants challenge both the genuineness of fact disputes and their materiality.

Several of this Court's cases are consistent with the above, recognizing that some parts of an immunity denial are immediately appealable while others are not. *See, e.g.*, *Jackson v. City of Atlanta*, 97 F.4th 1343, 1351 (11th Cir. 2024); *Morton v. Kirkwood*, 707 F.3d 1276, 1281 (11th Cir. 2013); *Valdes v. Crosby*, 450 F.3d 1231, 1235–36 (11th Cir. 2006); *Sheth v. Webster*, 145 F.3d 1231, 1236 (11th Cir. 1998) (per curiam). As this Court said in *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 (11th Cir. 1998), a denial of qualified immunity is immediately appealable "to the extent that it turns on 'an abstract issu[e] of law relating to qualified immunity—typically, the issue whether the federal right allegedly infringed was clearly established.'" (Quoting *Behrens*, 516 U.S. at 313.) And as this Court explained in

Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000), jurisdiction exists "to consider an appeal from a denial of qualified immunity because the 'issues appealed . . . concern[ed] not which facts the parties might be able to prove, but, rather, whether or not certain given facts show[] a violation of clearly established law.'" (Quoting *Sheth*, 145 F.3d at 1236).[2]

But some of this Court's cases do not read *Johnson* to separate qualified-immunity appeals into appealable and non-appealable parts. These cases say that so long as a defendant argues on appeal that there was no violation of clearly established law, this Court can review the record for itself to determine the genuineness of any fact disputes. *See, e.g.*, *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1315 (11th Cir. 2005); *Stanley v. City of Dalton*, 219 F.3d 1280, 1286–87 (11th Cir.

[2] *See also Heggs v. Grant*, 73 F.3d 317, 320 (11th Cir. 1996) (per curiam) ("[A]t this interlocutory stage, we may not review a district court's finding 'that there exists a genuine issue of material fact regarding the conduct claimed to violate clearly established law.'" (quoting *Babb v. Lake City Cmty. Coll.*, 66 F.3d 270, 272 (11th Cir. 1995) (per curiam)); *Ratliff v. DeKalb Cnty.*, 62 F.3d 338, 340 (11th Cir. 1995) ("In reviewing the district court's denial of summary judgment, we—in most qualified-immunity interlocutory appeals—accept the facts which the district court assumed for the purposes of its decision about whether the applicable law was clearly established.").

2000). That is, so long as defendants raise both questions—the genuineness of fact disputes and their materiality—appellate review is plenary. Defendants-Appellants cited one of these cases in their opening brief. *See* Op. Br. at vii (citing *Nelson*, 89 F.4th at 1296).

This both-questions rule can be traced back to *Johnson v. Clifton*, 74 F.3d 1087 (11th Cir. 1996). (Given that this case starts with the same name as *Johnson v. Jones*, we refer to it as "*Clifton*.") *Clifton* started with *Johnson*'s rule, noting that a court hearing a qualified-immunity appeal "can simply take, as given, the facts that the district court assumed when it denied summary judgment." *Id.* at 1091. But *Clifton* then added an alternative option that does not appear in *Johnson*: "Or, the court of appeals can conduct its own review of the record in the light most favorable to the nonmoving party." *Id.* In support of this option, *Clifton* first cited the above-mentioned exception from *Johnson* itself that asks appellate courts to determine what facts the district court likely assumed to be true when the district court does not specify them. *Id.* But *Clifton* then added that an appellate court can review the materiality of fact disputes "because such a determination is

part of the core qualified immunity analysis." *Id.*[3]

This last line gave rise to the "both-questions" interpretation of *Johnson*. Subsequent cases said that *Johnson* applies only when the sole issue on appeal is the genuineness of fact disputes. *See, e.g.*, *Hall v. Flournoy*, 975 F.3d 1269, 1276 (2020); *Bryant v. Jones*, 575 F.3d 1281, 1294 n.19 (11th Cir. 2009); *Gonzalez v. Lee Cnty. Hous. Auth.*, 161 F.3d 1290, 1294 (11th Cir. 1998). According to these cases, *Johnson* did "not affect this Court's authority to decide, in the course of deciding the interlocutory appeal, those evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues, *i.e.*, the legal issues." *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996). These decisions thus hold that so long as a defendant raises the "core qualified immunity issue"—whether the law was clearly established—this Court

[3] *Clifton* also mentioned the possibility of exercising pendent appellate jurisdiction. *See id.* Defendants-Appellants have not invoked pendent appellate jurisdiction, so we do not address it. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) (explaining how the party-presentation principle normally requires courts to address cases as the parties present them); *see also Ceres Gulf v. Cooper*, 957 F.2d 1199, 1207 n.16 (5th Cir. 1992) (explaining that although courts must address a lack of jurisdiction on their own initiative, they should not address arguments supporting jurisdiction that the parties did not timely raise).

can review both the genuineness of fact disputes and the existence of a clear constitutional violation. *See McMillian v. Johnson*, 88 F.3d 1554, 1563 (11th Cir.), *amended on reh'g*, 101 F.3d 1363 (11th Cir. 1996).

Again, all of this stems from *Clifton*'s statement that the genuineness of fact disputes is "a necessary part of the core qualified immunity analysis." 74 F.3d at 1091; *see McMillian*, 88 F.3d at 1563; *Cottrell*, 85 F.3d at 1486. The both-questions rule thus reads *Johnson* not to separate qualified-immunity appeals into appealable and non-appealable parts, but to bar only a narrow class of qualified-immunity appeals. *See Bryant*, 575 F.3d at 1294 n.19 (stating that *Johnson* "narrowly defined the proscribed class of cases as those where a defendant merely contests the merits of the plaintiff's underlying action").

C. The both-questions rule is wrong, inconsistent with *Johnson*, inconsistent with other Supreme Court decisions, and conflicts with the law of other circuits.

The both-questions rule is wrong for at least four reasons.

First, it is inconsistent with *Johnson*, which recognized that some parts of a qualified-immunity denial are immediately appealable while others are not. The defendants in *Johnson* argued that it would be

difficult for appellate courts to "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')." 515 U.S. at 319. This raised a question of how an appellate court will "know what set of facts to assume when it answers the purely legal question about 'clearly established' law." *Id.*

The Supreme Court responded that a "court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id.* *Johnson* thus recognized that courts of appeals will have jurisdiction to review one aspect of an immunity denial (whether a violation of clearly established law occurred) but not another (what facts a reasonable jury could find). The both-questions interpretation of *Johnson* thus rests on a premise—that these issues are inseparable—that *Johnson* itself rejected.

Granted, *Johnson* was a case in which the defendants challenged only the genuineness of the fact disputes. The case was thus a simple application of *Johnson*'s rule: the court of appeals lacked jurisdiction over all of the defendant's arguments, so the court of appeals lacked jurisdiction over the entire appeal. But *Johnson* did not say that its rule

was limited to those cases in which the defendant's only arguments were fact based.

Second, the both-questions rule conflicts with subsequent Supreme Court decisions that reinforce the separability of issues in qualified-immunity appeals. As discussed above, *see supra* at 11–12, *Behrens* explained "that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." 516 U.S. at 313. So under *Johnson*, a defendant can argue only that "the conduct which the District Court deemed sufficiently supported for purposes of summary judgment" entitles the defendant to qualified immunity. *Id.*

Iqbal further explained that *Johnson*'s discussion of appellate jurisdiction over legal issues did not extend to the genuineness of fact disputes. 556 U.S. at 674. (Although well-known for its holding on pleading standards, *Iqbal* also involved a question of appellate jurisdiction over a qualified-immunity appeal.) The Supreme Court noted that "only decisions turning 'on an issue of law' are subject to immediate appeal." *Id.* (quoting *Johnson*, 515 U.S. at 313). Granted, "determining whether there is a genuine issue of material fact at

summary judgment is a question of law." *Id.* But "it is a legal question that sits near the law-fact divide"—"a 'fact-related' legal inquiry" that is outside the scope of qualified-immunity appeals. *Id.* (quoting *Johnson*, 515 U.S. at 313)).

So according to *Iqbal*, qualified-immunity appeals are permissible when they "turn on 'abstract,' rather than 'fact-based,' issues of law." *Id.* (quoting *Johnson*, 515 U.S. at 317). The genuineness of fact disputes is not the sort of "abstract" issue of law that counts. *Id.* And the "concerns that animated the decision in *Johnson*"—avoiding appellate review of a potentially "vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials," which are "matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment," *id.*—apply whether the argument on appeal comprises solely factual issues or consists of factual arguments made alongside arguments about the clarity of the law.

Third, the both-questions interpretation of *Johnson* conflicts with an immense body of caselaw from other circuits. Like this Court, other courts of appeals hold that they lack jurisdiction over the entirety of an

appeal if all of a defendant's arguments concern the facts that a reasonable jury could find. *See, e.g.*, *Gillispie v. Miami Twp.*, 18 F.4th 909, 917 (6th Cir. 2021) ("Ultimately, if the factual disputes are so central as to serve as the basis for the defendant's legal argument on appeal, then we do not have jurisdiction over the appeal at all."). In all other cases, the court of appeals must separate the non-appealable issues (what facts a reasonable jury could find) from the appealable issues (whether those facts show violation of clearly established law) and address only the latter. *See, e.g.*, *id.* at 917 ("But if we find that the factual disputes are not crucial to the appeal, we will 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')." (citation and quotation marks omitted)); *Iko v. Shreve*, 535 F.3d 225, 234 (4th Cir. 2008) ("[O]ur first task on appeal is to separate the district court's legal conclusions regarding entitlement to qualified immunity, over which we have jurisdiction, from its determinations regarding factual disputes, over which we do not."). These courts accordingly take as given the district court's assessment of what facts a reasonable jury could find, limiting

appellate review to whether those facts show a violation of clearly established law.[4] This Court appears to stand alone in saying otherwise.

Finally, the both-questions rule limits the scope of *Johnson* so much as to effectively render the case a nullity. According to that rule, *Johnson* bars appellate jurisdiction only when a defendant "appeals

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[4] For a mere sampling of recent examples, see *Ramsey v. Rivard*, 110 F.4th 860 ,866 (6th Cir. 2024) ("We have jurisdiction over an interlocutory appeal from the denial of qualified immunity at summary judgment to the extent that the defendant limit[s] his argument to questions of law premised on facts taken in the light most favorable to the plaintiff." (quotation marks omitted)); *Bevill v. Wheeler*, 103 F.4th 363, 372 (5th Cir. 2024) ("At this interlocutory juncture, this court 'cannot challenge the district court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true.'" (quoting *Cole v. Carson*, 935 F.3d 444, 452 (5th Cir. 2019) (en banc)); *Flores v. Henderson*, 101 F.4th 1185, 1190–91 (10th Cir. 2024) ("[I]f a district court concludes a reasonable jury could find certain specified facts in favor of the plaintiff, we must usually take them as true—and do so even if our own de novo review of the record might suggest otherwise as a matter of law." (quotation marks omitted)); *Smith v. Agdeppa*, 81 F.4th 994, 1001 (9th Cir. 2023) ("We have jurisdiction to the extent the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain facts showed a violation of clearly established law." (quotation marks omitted)), *petition for cert. filed* (No. 24-15); *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."); *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.").

based solely on the argument that the district court erred in evaluating evidentiary sufficiency." *Gonzalez*, 161 F.3d at 1294. "In other words, [this Court] do[es] not have jurisdiction to entertain [qualified-immunity] appeals when the defendant's argument is merely, 'I didn't do it.'" *Bryant*, 575 F.3d at 1294 n.19.

But those appeals must be exceedingly rare. Defendants challenging the factual basis for an immunity denial are not simply arguing that they "didn't do it." They are also arguing that because they "didn't do it" they are therefore entitled to prevail on the merits—that is, that they are entitled to qualified immunity on a set of facts different than those that the district court took as true in denying summary judgment. *See, e.g.*, *Gillispie*, 18 F.4th at 918 (noting defendants' argument that "because the district court erred in finding certain facts, the law was not clearly established").[5] These defendants are thus raising the core

[5] Indeed, the defendants in *Johnson* appear to have argued as much; the first heading in the argument section of their Supreme Court merits brief was, "A Defendant Who Denies Violating The Law At All May Assert Qualified Immunity." Brief for Petitioners at 8, *Johnson v. Jones*, 515 U.S. 304 (1995) (No. 94-455), 1995 WL 89284; *see also id.* at 6 (arguing that "the immunity doctrine protects all officials who did not violate clearly established law, a group that necessarily includes defendants who did not violate the law at all because they did not commit the acts alleged or because those acts were lawful").

qualified-immunity question. They are simply doing so based on different facts than those the district court used.

The both-questions rule thus has an exceedingly narrow application that nearly renders *Johnson* useless. We imagine that few defendants challenging the factual basis for an immunity denial do not also invoke qualified immunity (whether on their own version of the facts or on those the district court took as true). The both-questions rule thus collapses on itself, applying unless a defendant is foolish enough not to invoke qualified immunity in its argument.

D. Application of the both-questions rule is discretionary, and this Court should decline to apply the rule until this Court sits en banc to abrogate it.

When sitting as a three-judge panel, this Court is of course bound by its prior decisions. So an en banc sitting is likely necessary for this Court to overrule *Clifton* and abrogate the both-questions rule.[6]

But this Court can decline to apply the both-questions rule.

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[6] *Behrens* and *Iqbal* were likely sufficient to "undermine[]" the both-questions rule "to the point of abrogation." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). But this Court said in *Cottrell* that the both-questions rule was consistent with *Behrens*. 85 F.3d at 1485. And although this Court has not addressed the rule's consistency with *Iqbal*, this Court has continued to espouse the both-questions rule after *Iqbal*. *See, e.g.*, *Hall*, 975 F.3d at 1276.

Application of the rule is discretionary. *See Mencer v. Hammonds*, 134 F.3d 1066, 1070 (11th Cir. 1998) ("[I]f we are confronted with an appeal from a denial of qualified immunity, we may exercise our discretion to review the district court's preliminary determination as a means of reaching the issue of clearly established law."); *Cottrell*, 85 F.3d at 1486 (noting this Court's "discretion to accept the district court's findings, if they are adequate."). So "[e]ven when both 'evidence sufficiency' and clearly established issues are raised, [this Court] may, but [is] not required to, review the 'evidence sufficiency' issues." *Stanley*, 219 F.3d at 1287 n.11. And "[a]lthough [this Court] may do so, [it] often declines to address the sufficiency of the evidence issue." *Cook*, 414 F.3d at 1316. Instead, this Court normally "'accept[s] the facts which the district court assumed for purposes of its decision about whether the law was clearly established.'" *Id.* (quoting *Cooper v. Smith*, 89 F.3d 761, 762 (11th Cir. 1996)).

There is no reason for the Court to choose to apply the both-questions rule in this case. The district court reviewed the summary-judgment evidence, addressed the Defendants-Appellants' arguments about that evidence, and determined what facts a reasonable jury could

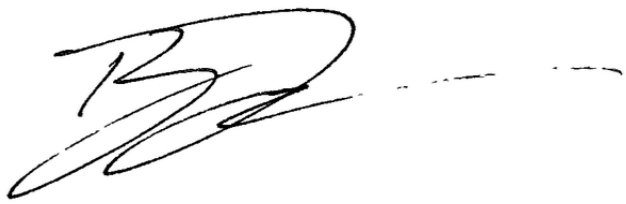
find. *See* Resp. Br. at 51–65. As *Johnson* noted, review of the summary-judgment record in a qualified-immunity appeal burdens the court of appeals while dragging out district court litigation. 515 U.S. at 316–17. A second look at the factual basis for the immunity denial in this case would do precisely that.

Indeed, even putting aside the above-discussed issues with the both-questions rule, we doubt that this Court should ever exercise its discretion to apply it rule. Appellate courts' time is better spent addressing the issues on which they have a comparative advantage: the existence and clarity of violations of federal law.

Conclusion

This Court's both-questions rule is wrong, and it adds to the complexity, expense, and delay that qualified-immunity appeals already impose on litigation. This Court should decline to apply the rule in this case. And in an appropriate case, this Court should sit en banc to overrule *Clifton* and the both-questions rule.

Respectfully submitted,



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August 29, 2024

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This brief complies with the word limit in Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,467 words, excluding the parts of the brief exempted by Rule 32(f), as counted by the word-processing software used to prepare the brief.

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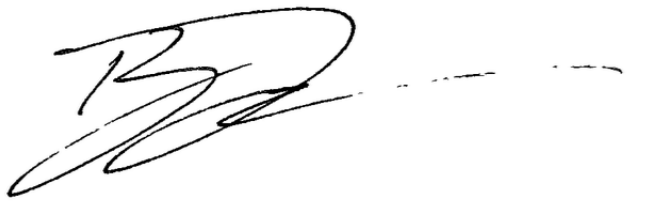

August 29, 2024 Bryan Lammon

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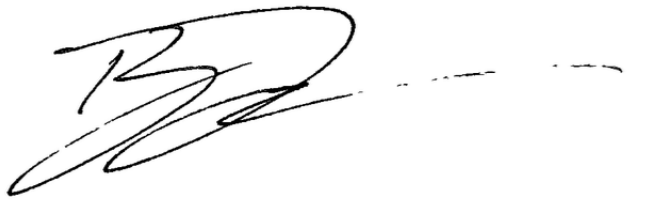

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