"THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED": LIMITING THE APPEALABILITY OF SUMMARY JUDGMENT ORDERS DENYING QUALIFIED IMMUNITY

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INTRODUCTION

Recent police shootings of unarmed African American teenagers in the United States raise, among many other concerns, questions about how the American judicial system should address police misconduct. Under the doctrine of qualified immunity, a police officer or any government official sued in his or her personal capacity is immune from suit and liability for damages unless the official's actions violated clearly established constitutional law.[1] When a litigant brings a constitutional tort action against an official in his personal capacity under § 1983,[2] one of the first hurdles that the litigant is likely to con-

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1 Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982) ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."); *see also* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 & n.74 (1989) (explaining that the doctrine of qualified immunity was a judicially created doctrine and that there is no basis for qualified immunity in the Constitution).

2 *See* 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."); *see also* Rudovsky, *supra* note 1, at 24–25 ("With the Court's contemporaneous expansion of substantive constitutional pro-

front is the official's motion for summary judgment on the ground of qualified immunity. If a court denies the summary judgment motion, finding a genuine issue of material fact as to whether the officer violated clearly established law,[3] the official can sometimes appeal.[4] Thus, the official gets yet another chance at achieving immunity from suit, allowing him the opportunity to appear before one trial judge and three appellate judges before ever appearing in front of a jury.[5]

The appealability standard, however, is confusing, especially because of the differences between the recent Supreme Court decisions in *Plumhoff v. Rickard*[6] and *Scott v. Harris*,[7] and the well-established precedents laid out in *Johnson v. Jones*[8] and *Mitchell v. Forsyth*.[9] Before 2007, the jurisdiction of appellate courts to review summary judgment orders denying qualified immunity was relatively clear: while appellate courts could review questions of law, they could not review questions of "'evidentiary sufficiency,' i.e. which facts a party may, or may not, be able to prove at trial."[10] In 2007, however, the Supreme Court in *Scott v. Harris* reviewed a denial of summary judgment based on qualified immunity by focusing on video evidence of a high-speed car chase, without any hesitation as to the appellate court's jurisdiction to review the factual record.[11] In 2014, the Supreme Court in *Plumhoff* heard another car chase case, and repeated the approach used in *Scott*—the Court reviewed the factual record and reversed the district court's denial of summary judgment.[12] Taken in conjunction,

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tections, § 1983 became the statute of choice for the litigation of constitutional tort actions." (citations omitted)).

3 FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

4 This Comment focuses specifically on the appealability of summary judgment orders denying qualified immunity. For an analysis of the appealability of motions to dismiss based on qualified immunity, see generally Mark R. Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals,* 114 PENN ST. L. REV. 1317 (2010) (discussing how *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) expands the limit on appellate fact-finding in *Johnson v. Jones*, 515 U.S. 304 (1995)).

5 U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

6 134 S. Ct. 2012 (2014).

7 550 U.S. 372 (2007).

8 515 U.S. 304 (1995).

9 472 U.S. 511 (1985).

10 *Johnson*, 515 U.S. at 313.

11 *Scott*, 550 U.S. at 378.

12 *Plumhoff*, 134 S. Ct. at 2020 ("The District Court order here is not materially distinguishable from the District Court order in *Scott v. Harris*, and in that case we expressed no

Plumhoff and *Scott* seem to set forth a standard granting broad appellate jurisdiction over orders denying qualified immunity, allowing appellate courts not only to review questions of law, but also to review questions of fact.[13] The Supreme Court's articulation of the appealability standard in *Plumhoff* and *Scott* thus strays significantly from the earlier Supreme Court decisions, such as *Johnson*.

Given the conflicting case law in *Scott* and *Johnson*, do courts have jurisdiction to review the factual record on interlocutory appeal of summary judgment orders denying qualified immunity? This Comment addresses several interpretations of what the appealability of qualified immunity summary judgment denials should be. Part I discusses the conflicting case law on the appealability standard. Part II discusses various appellate courts' interpretations of how to reconcile *Johnson* and *Scott*, focusing specifically on a case from the Sixth Circuit, *Romo v. Largen*.[14] Part III sets forth my own approach, which recognizes *Johnson* as the general rule, with *Scott* and *Plumhoff* as narrow exceptions. Part IV discusses counterarguments to my approach and Part V responds to these counterarguments.

While a broad grant of appellate jurisdiction over qualified immunity summary judgment denials seems attractive because of its promise of coherence, its advantages do not outweigh its drawbacks. A broad appealability standard would increase the appellate docket, cause unwise use of appellate resources, and delay litigation. Furthermore, I argue that a broad appellate standard constrains a plaintiff's ability to recover and rarely allows a plaintiff the opportunity to appear before a jury. I will propose, instead, an interpretation that simultaneously reconciles *Scott* and *Johnson* and sets forth a limited appealability standard.

I. FROM *MITCHELL* AND *JOHNSON* TO *SCOTT* AND *PLUMHOFF*

In 1985, the Supreme Court in *Mitchell v. Forsyth* set forth the rule on whether appellate courts had jurisdiction to review qualified immunity summary judgment denials: appellate courts only had juris-

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doubts about the jurisdiction of the Court of Appeals under § 1291. Accordingly, here, as in *Scott*, we hold that the Court of Appeals properly exercised jurisdiction, and we therefore turn to the merits.").

13 *Id.* at 2020–22 (finding appellate jurisdiction to review whether the officers violated petitioner's Fourth Amendment rights or any clearly established Fourth Amendment rule, and relying on the factual record in reversing the district court determination); *Scott*, 550 U.S. at 378 (reviewing the district court's denial of a qualified immunity summary judgment motion by focusing on video evidence).

14 Romo v. Largen, 723 F.3d 670 (6th Cir. 2013).

diction to review questions of law on interlocutory appeal.[15] The *Mitchell* Court began its analysis by placing qualified immunity determinations into the collateral order doctrine, as articulated in *Cohen v. Beneficial Industrial Loan Corp.*[16] In *Cohen*, the Supreme Court held that a district court order could be appealed on an interlocutory basis if the order fell within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[17] The *Cohen* doctrine has been broken down into three requirements: the order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from final judgment."[18]

In *Mitchell*, the Court held that because the purpose of qualified immunity is the right not to stand trial, the doctrine would be undermined if the case were to proceed to final judgment without interlocutory appeal.[19] Thus, the *Mitchell* Court held that qualified immunity summary judgment denials fulfilled the first and third requirements of the *Cohen* test: they are "effectively unreviewable on appeal from a final judgment" and interlocutory appeals would "conclusively determine the disputed question."[20]

In determining that qualified immunity appeals meet the second *Cohen* requirement of presenting "a claim of rights separable from, and collateral to, rights asserted in the action," the Supreme Court had to engage in a more complex analysis. It used this opportunity to limit the appealability of qualified immunity to situations in which "the 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."[21] The *Mitchell* Court acknowledged that in determining the legal question in qualified immunity appeals, the appellate court would often be forced to consider the plaintiff's factual allegations.[22] The Court concluded, however, that although the appellate court would likely need to consider facts in its

15 472 U.S. at 527–28, 528 n.9.

16 *Id.* at 524–30 (citing Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949)).

17 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

18 Johnson v. Jones, 515 U.S. 304, 310 (1995) (quoting Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993)).

19 *Mitchell*, 472 U.S. at 526–28.

20 *Id.* at 527.

21 *Id.* at 528 n.9.

22 *Id.* at 528.

interlocutory review, the legal questions raised would cause the question on review to be separate enough from the merits of the underlying action to fit within the *Cohen* separability requirement.[23] Since the decision in *Mitchell*, courts have placed appeals of qualified immunity summary judgment denials within the collateral order doctrine.[24]

Scholars have reasoned that "[t]he [*Mitchell*] decision makes sense only as a determination that the need to protect officials against the burdens of further pretrial proceedings and trial justifies a clear departure from ordinary concepts of finality, including the ordinary requirements of the collateral order doctrine."[25] Indeed, the *Mitchell* Court explained the importance of protecting government officials: qualified immunity "is an *immunity from suit* rather than a mere de-

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23 *Id.* at 528–29 (internal citations omitted) ("To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause. In the case of a double jeopardy claim, the court must compare the facts alleged in the second indictment with those in the first to determine whether the prosecutions are for the same offense, while in evaluating a claim of immunity under the Speech and Debate Clause, a court must analyze the plaintiff's complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct. In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine, the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.").

24 *But see* Edmund L. Carey, Jr., Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1584 (1985) (advocating that certified interlocutory appeals under 28 U.S.C. § 1292(b) are a "superior alternative" to the use of the collateral order doctrine for interlocutory appeals of qualified immunity summary judgment denials). While Carey's approach both seems to resolve the problem that qualified immunity might not meet the separability requirement of the collateral order doctrine and ensures that only controversial questions of law are appealable, his approach has its own shortcomings. First, appealability would simply depend on whether the district court and appellate court approved the appeal. This discretionary decision would likely vary in different districts and different circuits, only adding to the confusion. More importantly, there is no indication that the Court is looking to abrogate all of the existing precedent placing qualified immunity appeals within the collateral order doctrine. Carey's approach would make a previous body of case law on the appealability of qualified immunity denials irrelevant. The *Mitchell*, *Jones*, and *Scott* cases, to start, would become immaterial. Although Carey's approach has strengths, the Court will likely not abandon its precedent of placing of qualified immunity appeals within the collateral order doctrine.

25 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.10 (2d ed. 1991); *see also* Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Scott, 9 NEV. L.J. 185, 195 (2008) (describing qualified immunity as a "prophylactic to protect" officials from standing trial when they did not violate clearly established constitutional rights).

fense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[26] Thus, the Court took steps to ensure that officials got a second chance to be granted qualified immunity on appeal, in order to free up officials to do their government duties, rather than be distracted by litigation matters.[27]

The *Mitchell* holding was clarified ten years later in *Johnson v. Jones*. In that case, Jones, a diabetic who was arrested while having an insulin seizure, claimed that police officers beat him during his arrest.[28] Jones claimed that the police officers used excessive force because they believed he was intoxicated.[29] Jones therefore sued five police officers under § 1983, three of whom claimed that they were not at the scene where the alleged beating occurred.[30] Despite their claims, the district court found that there was enough circumstantial evidence to support Jones's contention that the three officers were in fact at the scene.[31] Invoking *Mitchell*, a unanimous Supreme Court held that appellate courts had no jurisdiction to review which facts a party may or may not be able to prove at trial.[32] Rather, appellate courts may only review the appeals of qualified immunity summary judgment decisions "'to the extent that [they] turn[] on an issue of law.'"[33] The *Johnson* Court explained that questions of fact, such as the one presented in this case, do not meet the separability requirement of the collateral order doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*[34] Furthermore, the Court expressed that appealability of factual questions would lead to litigation delays and repeti-

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26 *Mitchell*, 472 U.S. at 526.

27 *See* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); Harlow v. Fitzgerald, 457 U.S. 800, 816–17 (1982) (explaining that one of the policies behind qualified immunity is ensuring that capable individuals are not deterred from government jobs because of the threat of litigation); *see also* 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) ("In theory, qualified immunity benefits society. It allows officials to work instead of being tied up in legal proceedings.").

28 515 U.S. 304, 307 (1995).

29 *Id.*

30 *Id.*

31 *Id.* at 308.

32 *Id.* at 313.

33 *Id.* (emphasis omitted).

34 *Id.* at 314–15 ("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 . . . . To take what petitioners call a small step beyond *Mitchell* . . . would more than relax the separability requirement—it would in many cases simply abandon it.").

tive review by an appellate court that has less expertise than a district court in determining whether genuine issues of fact exist for the purpose of determining summary judgment.[35] In sum, as laid out in *Mitchell* and *Johnson*, an appellate court only had jurisdiction to hear qualified immunity appeals that turned on issues of law, not those based on facts related to the sufficiency of evidence.

The *Johnson* Court considered two possible problems with its approach. First, the Court responded to a concern that lawyers may add meritless legal questions to qualified immunity appeals that really turn on factual questions simply to ensure that the appellate court would review the order.[36] The Court suggested that this would not be a serious problem, though, because the appellate courts will be able to recognize such behavior.[37] The *Johnson* Court thus predicted that courts of appeals were not likely to exercise pendent appellate jurisdiction to expand the scope of their appellate authority.[38] Finally, Appellate Rule 38 is likely to deter frivolous appeals.[39]

A second concern, which the *Johnson* Court took more seriously, was that appellate courts would be forced to undergo a "cumbersome" review of the record when a district court did not state the facts upon which it relied in making a summary judgment decision.[40] The *Johnson* Court explained that an occasional review of the record is "still, from a practical point of view, more manageable than" allowing review of the factual record in every qualified immunity appeal.[41] The Supreme Court expanded on *Johnson* in its 1996 *Behrens v. Pelle-*

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35 *Id.* at 315–17.

36 *Id.* at 318; *see also* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 51 (1995) (stating in dicta that courts of appeals can exercise pendent appellate jurisdiction if two decisions are "inextricably intertwined" or "review of the former decision was necessary to ensure meaningful review of the latter"); Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After* Swint, 49 HASTINGS L.J. 1337, 1452–56 (1998) (arguing that courts often conclude that qualified immunity appeals meet the requirements of *Swint* for pendent appellate jurisdiction to apply).

37 *Johnson*, 515 U.S. at 318.

38 *Id.* ("Even assuming, for the sake of argument, that it may sometimes be appropriate to exercise 'pendent appellate jurisdiction' over such a matter . . . it seems unlikely that courts of appeals would do so in a case where the appealable issue appears simply a means to lead the court to review the underlying factual matter . . . ." (citing Natale v. Ridgefield, 927 F.2d 101, 104 (CA2 1991) (explaining that pendent appellate jurisdiction should only be invoked in "exceptional circumstances"))). The significance of pendent appellate jurisdiction will be further discussed *infra* Part V.

39 FED. R. APP. P. 38 ("If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.").

40 *Johnson*, 515 U.S. at 319.

41 *Id.*

tier[42] decision, holding that appellate courts have jurisdiction to review facts if the district court did not lay out the facts that it relied upon in its determination that the conduct violated clearly established law.[43]

Then, in 2007, the Supreme Court seemed to set forth a new standard of appealability for qualified immunity summary judgment denials. In *Scott v. Harris*, the Supreme Court decided an appeal of a summary judgment order denying qualified immunity by reviewing the record, and thus implied that an appellate court could review issues of fact, at least in some circumstances.[44] The *Scott* Court held that an officer acted reasonably after the Court reviewed the officer's actions in a video of a high-speed car chase.[45] The Court rationalized its use of record evidence by stating: "When 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."[46] Here, however, the Supreme Court seemed to obscure the standard laid out in *Mitchell* and *Johnson*. Although these previous cases held that the appellate court could not fact-find in a qualified immunity appeal, the *Scott* Court implied that the appellate court may engage in fact-finding at times.[47] Furthermore, the *Scott* Court never mentioned any jurisdictional problems in finding facts.[48]

In 2014, the Supreme Court stated in *Plumhoff v. Rickard* that the lack of discussion of jurisdiction in *Scott* was due to the fact that "[the Court] expressed no doubts about the jurisdiction of the Court of Appeals under § 1291."[49] The *Plumhoff* Court interpreted *Scott* to hold that "an immediate appeal may be taken to challenge 'blatantly and demonstrably false' factual determinations."[50] Furthermore, the *Plumhoff* Court distinguished the case before it from that of *Johnson* by suggesting that the issue in *Plumhoff* turned on legal questions of whether the officer's conduct violated the Fourth Amendment and clearly established law, rather than a factual question of whether the

42 516 U.S. 299 (1996).

43 *Id.* at 313.

44 Scott v. Harris, 550 U.S. 372, 378–81 (2007).

45 *Id.*

46 *Id.* at 380–81.

47 *Id.* at 377–78.

48 Brown, *supra* note 25, at 220–21 (arguing that the Supreme Court did not hesitate in finding jurisdiction because the video evidence was clearer than evidence in other cases).

49 134 S. Ct. 2012, 2020 (2014).

50 *Id.* at 2018 (citations omitted).

officer was at the scene and responsible for the conduct.[51] The *Plumhoff* Court ultimately held that officers acted reasonably in terminating a high-speed car chase by firing fifteen shots into the suspect's vehicle.[52] Thus, after *Scott* and *Plumhoff*, appellate courts no longer needed to take the plaintiff's facts as true and only review legal questions with regard to qualified immunity denials, but they could look at the factual record in certain instances.

II. DIFFERENT INTERPRETATIONS OF THE APPEALABILITY STANDARD

The conflicting case law leaves appellate courts with a confusing framework for determining whether or not they may review facts. Appellate courts have thus had difficulty defining the appealability standard for qualified immunity summary judgment denials in a way that is consistent with both *Scott v. Harris* and *Johnson v. Jones*. While some courts have limited the applicability of *Scott,* other courts advocate a narrow reading of *Johnson*.

Professor Mark Brown argues that most appellate courts do not view *Scott* as a "blank check" permitting them to engage in fact-finding, but instead construe the case narrowly. [53] His survey of appellate courts demonstrates that most continue to defer to the district courts' determinations of whether a genuine issue of material fact exists.[54] Some courts have thus explicitly limited the holding of *Scott* to cases with video evidence[55] or to situations in which the facts alleged by the plaintiff are blatantly contradicted by the record.[56] Nevertheless, some judges have interpreted *Scott* as an invalidation of *Johnson*.

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51 *Id.* at 2019.

52 *Id.* at 2022.

53 Brown, *supra* note 4, at 1323 ("Even though it obviously created tension with *Johnson v. Jones*, *Scott* was generally given a limited reach by the Courts of Appeals. It was not generally treated as a blank check to engage in de novo fact-finding. Rather, district courts' findings of genuine issues of material fact continued to draw deference and respect on interlocutory appeal.").

54 *Id.*

55 *See, e.g.*, Mecham v. Frazier, 500 F.3d 1200, 1202 (10th Cir. 2007) (citing *Scott v. Harris* to suggest that the facts in this case were relatively uncontested because there was video evidence, and thus the appellate court could rely on these "essentially undisputed" facts).

56 *See, e.g.*, Bass v. Goodwill, 356 F. App'x 110, 115 (10th Cir. 2009) (holding that the court lacked jurisdiction to review an appeal because unlike in *Scott v. Harris*, the plaintiff's evidence here was not blatantly contradicted by the record); *see also* Sweat v. Shelton, 595 F. App'x 508, 511–12 (6th Cir. 2014) (explaining that there is a narrow exception to evaluating the factual record when there are blatantly contradictory facts); Roberson v. Torres, 770 F.3d 398, 402 (6th Cir. 2014) ("[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.").

For example, in a Tenth Circuit case, *Price-Cornelison v. Brooks*, Judge Terrence L. O'Brien's partial dissent and partial concurrence, suggested that the *Johnson* rule may be a "dead letter" after *Scott*.[57] He argued that in light of *Scott,* an appellate court *does* have jurisdiction to review a district court's determination that the evidence was sufficient to deny a summary judgment order based on qualified immunity.[58]

The two sides of the dispute are demonstrated in *Romo v. Largen,* a Sixth Circuit case.[59] In *Romo*, Officer Largen arrested Romo for driving while intoxicated.[60] Officer Largen claimed that he saw a similar car to Romo's driving recklessly a few minutes before arresting Romo.[61] Romo, on the other hand, insisted that he was not driving but sleeping in his car.[62] Romo brought a § 1983 suit, claiming that the officer lacked probable cause for the arrest.[63] The district court denied Officer Largen's motion for summary judgment based on qualified immunity, finding that there were genuine questions of material fact.[64]

The Sixth Circuit majority affirmed the district court, explaining that because of the Supreme Court's decision in *Johnson*, the appellate court was required to accept the district court's determination that genuine issues of material fact existed for purposes of denying a motion for summary judgment based on qualified immunity.[65] Furthermore, the *Romo* majority explained a complicated set of precedent, and concluded that "[t]his limitation is not prudential, optional, or discretionary. It derives from the limited nature of our interlocutory appellate jurisdiction under 28 U.S.C. § 1291 as interpreted in *Cohen v. Beneficial Industrial Loan Corp.* The limitation is in that sense 'jurisdictional.'"[66] The Sixth Circuit suggested that the only time it would be permitted to review a district court's determination as to whether a genuine issue of fact exists is when the trial

57 524 F.3d 1103, 1119 n.1 (10th Cir. 2008) (O'Brien, J., concurring).

58 *Id.*

59 723 F.3d 670 (6th Cir. 2013).

60 *Id.* at 672.

61 *Id.*

62 *Id.*

63 *Id.* at 671.

64 *Id.*

65 *Id.* at 674 ("In adjudicating this appeal, we are required by the limitations on interlocutory appeals of qualified immunity denials to accept the district court's finding that a genuine dispute of material fact existed as to whether Largen fabricated the whole or a part of his story about seeing a Dodge Ram pickup pass a semi tanker, and we refuse to consider Largen's factual disputations to the contrary.").

66 *Id.* at 674 n.2 (citations omitted).

court's determination is clearly contradicted by the record.[67] The appellate court thus suggested that "[*Scott*] is easily limited as an exception for blatantly contradicted facts[,]" and suggested that *Scott* should not "swallow" the rule set forth in *Johnson*.[68] Suggesting that there was no blatant contradiction in the case before it, the *Romo* majority explained that the appellate court did not have jurisdiction to review the determination that there were genuine issues of material fact.[69]

In his partial concurrence, Judge Jeffrey Sutton sharply disagreed with the majority's appealability interpretation and attempted to reconcile *Johnson* with *Scott* in a different way.[70] Judge Sutton suggested that *Johnson* be read narrowly, and that an appellate court need only accept a district court's interpretation of the facts in cases similar to *Johnson*, where the defendants refuse to accept the truth of the plaintiff's evidence.[71] The appellate court, according to Judge Sutton, had jurisdiction on interlocutory appeal to review all other inferences made by the trial court, and the rule prohibiting review of sufficiency-of-the-evidence questions applied only in cases where officials claim to not have done what the plaintiff alleged.[72]

Judge Sutton supported his argument using *Scott*, where the Supreme Court reviewed and reversed the district court's determination that a genuine dispute existed.[73] In order to interpret *Scott* correctly, Judge Sutton concluded that an appellate court must be able to review a district court's inferences.[74] Judge Sutton criticized the *Romo* majority's suggestion that *Scott* was limited to cases in which there was a blatant contradiction between the facts adopted and those in the record, by suggesting that the majority created "distinctions [between *Johnson* and *Scott*] that are not driven by meaningful differences."[75] He argued that the only way for an appellate court to determine whether the record blatantly contradicted a district court's determi-

67 *Id.* at 674 n.3.
68 *Id.* at 675 & n.3.
69 *Id.* at 674 n.2 ("[W]e are ruling on what is properly before us, and [we] say[] nothing about what is jurisdictionally not before us.").
70 *Id.* at 677.
71 *Id.* at 677–78.
72 *Id.*
73 *Id.* at 678–80.
74 *Id.*
75 *Id.* at 679.

nation is by reviewing the record, implying that the majority's opinion was based in circular reasoning.[76]

Although Judge Sutton's approach is attractive because it allows appellate courts to fact-find and thus makes the appealability standard seem more uniform across cases, I agree with the majority's view that (for the purposes of interlocutory appellate review) appellate courts should accept district court determinations of whether there is a genuine issue of fact. I argue that there should only be three circumstances when an official can appeal a qualified immunity summary judgment denial: first, when the appeal turns on a question of law; second, when the district court does not explain the facts it relied upon; and third, when the record is blatantly contradicted. Below, I set forth my own test for whether or not a court of appeals has jurisdiction to review facts in qualified immunity summary judgment appeals. I also present the counterarguments posed by Judge Sutton and respond to them.

III. MY APPROACH: A LIMITED APPEALABILITY STANDARD

I argue that *Johnson v. Jones* should be read broadly. This view, however, does not make the *Scott v. Harris* and *Plumhoff v. Rickard* decisions any less relevant to the appealability standard. I argue that all of these decisions can be reconciled and, in fact, complement one another. To start, *Johnson* explicitly discussed that in certain circumstances, appellate courts have the jurisdiction to engage in a cumbersome review of the record.[77] If the district court does not state the facts upon which it relied in making its determination, the appellate court can, and should, review the record.[78] This proposition was reemphasized by the court in *Behrens*.[79] I believe that this statement creates an exception, in which courts of appeals can review facts in two situations: (1) when a district court does not state the facts upon which it relied, and (2) when the district court states the wrong facts. Under this interpretation of *Johnson*'s dicta and *Behrens*'s holding, appellate courts have jurisdiction in cases like *Scott* and *Plumhoff* to review the factual record because both cases represent those rare instances in which the district court relied upon a blatantly incorrect

76 *Id.* (explaining that regardless of whether *Scott v. Harris* is read narrowly or broadly, the appellate court will need to review record evidence "to assure itself that the district court did not blatantly contradict the record").

77 515 U.S. at 319.

78 *Id.*

79 Behrens, 516 U.S. at 313 (citing *Johnson*).

set of facts. The *Johnson* Court explained that allowing an occasional review of the record is, from a practical perspective, more workable than making an evidence-based review the required rule in every interlocutory review of a summary judgment order denying qualified immunity.[80] A limited appealability standard would thus ensure that most appeals were only decided on issues of law, keeping the standard close to the well-established precedent in *Johnson*, but including necessary exceptions for cases like *Scott* and *Plumhoff*.

The limited appealability standard described above would be easy to apply and still adhere to precedent. For example, if the *Romo* majority had applied the test I set forth above, they would have been able to set forth a simplified approach. Rather than presenting confusing precedent and picking and choosing when it applied, the court would start by asking three questions in order to determine whether the appellate court had jurisdiction. First, the court would ask whether the issue on review is a question of law. In *Romo*, the question on appeal was not a question of law—it did not ask about the content of clearly established law. Rather, the appeal was about a much more factual question: whether Officer Largen saw Romo driving or whether Officer Largen made the whole thing up. The second question the *Romo* appellate court would need to ask is whether the district court in *Romo* stated the facts on which it relied. As prescribed in *Behrens*, if the district court did not state its assumptions, then the appellate court would be able to review the record. Here, however, the *Romo* district court did lay out its analysis, stating that there was a genuine dispute as to whether Romo was indeed driving, and if he was not, no reasonable officer would be able to arrest a sleeping person in a car without violating clearly established law.[81] Third, the court would ask whether the district court relied on facts that are blatantly contradicted in the record, to clear the exceptions outlined in *Scott* and *Plumhoff*. This would not require an in-depth record review, because these contradictions would need to be *blatant* and easily identifiable by the court of appeals. In *Romo*, there is no indication that the facts adopted by the district dourt blatantly contradicted the record: there is a dispute based on what the facts were,

80 *Johnson*, 515 U.S. at 319 ("Regardless, this circumstance does not make a critical difference to our result, for a rule that occasionally requires a detailed evidence-based review of the record is still, from a practical point of view, more manageable than the rule that petitioners urge us to adopt. Petitioners' approach would make that task, not the exception, but the rule.").

81 *Romo*, 723 F.3d at 674–75 ("No reasonable office would believe that he could constitutionally arrest a person found sleeping . . . for drunk driving . . . .").

but the district dourt considered multiple possible scenarios based on the known facts.[82] Furthermore, there is no clear video evidence that makes any one of those scenarios impossible. Based on the answers to the three questions above, the court would not have jurisdiction to review the district court's denial of summary judgment and would need to affirm.

IV. COUNTERARGUMENTS TO MY APPROACH

My approach, however, has its shortcomings. First, under my approach, appellate courts will need to continue line drawing between questions of fact and questions of law in order to determine jurisdiction. According to Judge Sutton, this inquiry is cumbersome and difficult.[83] To be sure, some questions are relatively pure questions of law. For example, if there is no dispute about historical facts, but the dispute between parties turns on whether the relevant law was clearly established at the time the officer took action, the question can be considered one purely of law.[84] However, the qualified immunity question can be more mixed in qualified immunity cases, when the court must analyze whether it would have been clear to a reasonable officer under the circumstances that he was violating the law.[85] Such a question relies heavily on the specific facts of a case.[86]

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82 *Id.* at 673 ("The district court determined that there were 'at least three basic narratives possible from what's going on here.'").

83 *Id.* at 681 ("At first glance, the reader might think that separating authority to review law-based appeals from authority to review fact-based appeals is easy. It is not.").

84 *Mitchell*, 472 U.S. at 528 & n.9.

85 Most circuits do not provide model jury instructions for qualified immunity determinations, assuming that the judge, not the jury, should make the qualified immunity decision. *See, e.g.*, PATTERN JURY INSTRUCTIONS FOR CASES OF EXCESSIVE FORCE IN VIOLATION OF THE FOURTH, EIGHTH AND FOURTEENTH AMENDMENTS FOR THE DISTRICT COURTS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT § 1.1, at 7 n.8 (CHAMBERS OF JUDGE HORBY, Draft 2011), http://www.rid.uscourts.gov; NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS: CIVIL § 9.26 cmt. (NINTH CIRCUIT JURY INSTRUCTIONS COMMITTEE 2006), http://www.akd.uscourts.gov/docs/general/model_jury_civil.pdf; CIVIL PATTERN JURY INSTRUCTIONS § 5.1 annots. and cmts. (ELEVENTH CIRCUIT COMMITTEE 2013), http://www.gasd.uscourts.gov/pdf/2013PatternJuryInstructions(Civil).pdf.

Several other circuits suggest that rather than having juries decide on whether qualified immunity should be granted, courts should submit interrogatories to juries on questions of historical fact to help the judge then decide the qualified immunity question. *See, e.g.*, INSTRUCTIONS FOR CIVIL RIGHTS CLAIMS UNDER SECTION 1983 § 4.7.2 (THIRD CIRCUIT 2014), http://www.ca3.uscourts.gov/model-civil-jury-table-contents-and-instructions; FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 7.18 cmts. (COMMITTEE ON PATTERN CIVIL JURY INSTRUCTION OF THE SEVENTH CIRCUIT 2009), http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf). The Fifth Circuit has a model jury instruction on qualified immunity, but in comments it acknowledges that in-

Judge Sutton noted that trial judges do not usually explicitly differentiate between facts and inferences, and that the majority's approach would require appellate courts to make "will-o'-the-wisp distinction[s]" between unreviewable factual inferences and reviewable legal conclusions.[87] Aside from its one exception, Judge Sutton's interpretation would presume appealability, removing the fact-law dichotomy from the appealability standard. As Judge Sutton has explained, his interpretation is advantageous because "it should not go unmentioned that additional litigation over appealability, an inevitable outcome of any uncertainty over the scope of it, adds to appellate work loads."[88] Judge Sutton argues that interlocutory review can also conclude the case earlier, lead to settlement, and prevent a later appeal.[89] In turn, Judge Sutton concluded that appellate courts should presume jurisdiction to review summary judgment qualified immunity denials and only do not retain this jurisdiction in the narrow instance when the defendant refuses to accept the truth of the plaintiff's allegations.[90] Therefore, Judge Sutton preferred to avoid line drawing and advocated a broad appealability standard, so that qualified immunity summary judgment denials are, on a categorical basis, appealable. [91]

A similar counterargument that Judge Sutton raised relates to the ability of courts of appeals to invoke pendent appellate jurisdiction. Judge Sutton argued that because of pendent appellate jurisdiction, non-appealable questions will appear before the appellate panel anyway, making a limited appealability standard useless.[92] Judge Sutton argued that because qualified immunity questions often rely on mixed questions of law and fact, the issues are almost always "inextri-

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structing the jury of qualified immunity is not the favored mechanism. JURY INSTRUCTIONS (CIVIL CASES) § 10.3, at 92 n.1 (COMMITTEE ON PATTERN JURY INSTRUCTIONS DISTRICT JUDGES ASSOCIATION: FIFTH CIRCUIT 2014), http://www.lb5.uscourts.gov/juryinstructions/fifth/2014civil.pdf.

86 *See* Ashcroft v. Iqbal, 556 U.S. 662, 674 (2009) ("Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide . . . .").

87 *Romo*, 723 F.3d at 685 (Sutton, J., concurring in part and in the judgment).

88 *Id.* at 686.

89 *Id.* at 683.

90 *Id.* at 681–82.

91 *Id.* at 683.

92 *Id.* at 682 ("But in our circuit and, best I can tell, in most circuits, the test for pendent appellate jurisdiction—whether the two issues are 'inextricably intertwined,'—will not be demanding in the context of a qualified immunity appeal and thus will not require gamesmanship to put all issues in front of the appellate court." (citations omitted)).

cably intertwined" so that pendent appellate jurisdiction can be used.[93]

In addition, Judge Sutton's approach would fit qualified immunity appeals more clearly within the collateral order doctrine. The Supreme Court has held, since *Mitchell*, that qualified immunity appeals are among the classes of cases that fit within the collateral order doctrine, yet the majority's interpretation of appealability decisions seems to depend on a case-by-case determination of whether the appeal poses questions of law or calls for an examination of the record.[94] Judge Sutton's interpretation would allow qualified immunity summary judgment denials to be appealed as a category, consistent with the *Cohen v. Beneficial Industrial Corp.* formulation for collateral orders to consist of a "small category of cases," rather than a case-by-case analysis. Judge Sutton explained:

> "Making appealability depend upon . . . factor[s] particular to the case at hand[] would violate the principle . . . that appealability determinations are made for classes of decisions not individual orders in specific cases." By making jurisdiction turn on the facts in every case, every case will become a class of an appealable or a non-appealable decision unto itself.[95]

Thus, he argues that if the entire class of cases were reviewable, the standard of appealability would be uniform. Additionally, if the class of cases were always reviewable, courts would encourage an additional judicial look at the constitutional question in a case, which, if nothing else, can help ensure accuracy.

V. RESPONSES TO THESE COUNTERARGUMENTS

Despite the coherence that Judge Sutton's approach would provide to the appealability standard, the disadvantages of his interpretation outweigh its advantages. First, I respond to Judge Sutton's argument that the limited appealability standard is useless because of pendent appellate jurisdiction. Next, I argue that Judge Sutton's broad appealability standard would lead to an increased appellate

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93 *Id.* at 682–83.

94 *See Johnson*, 515 U.S. at 307, 315–16 ("We of course decide appealability for categories of orders rather than individual orders. Thus, we do not now in each individual case engage in ad hoc balancing to decide issues of appealability. But, that does not mean that, in delineating appealable categories, we should not look to 'the competing considerations underlying all questions of finality—"the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."' And, those considerations, which we discussed above . . . argue against extending *Mitchell* to encompass orders of the kind before us." (citations omitted)).

95 *Romo*, 723 F.3d at 683 (Sutton, J., concurring in part and in the judgment) (alterations in original) (citation omitted) (quoting Behrens v. Pelletier, 516 U.S. 299, 312 (1996)).

docket, litigation delays, and a waste of appellate resources. Additionally, his approach would constrain plaintiffs' abilities to recover from constitutional violations and make it more difficult for plaintiffs to appear before juries.

First, Judge Sutton's prediction that pendent appellate jurisdiction will allow a court of appeals to review the entire record is a misapplication of the precedent laid out in *Swint v. Chambers Commission Committee*[96] and *Johnson*. In *Swint*, the Court, in dicta, stated that pendent appellate jurisdiction could be exercised if the non-appealable question is "inextricably intertwined" with the appealable question, meaning that the "former decision was necessary to ensure meaningful review of the latter."[97] Courts were instructed to use pendent appellate jurisdiction only when consideration of the non-appealable question is "essential."[98] In *Johnson*, therefore, the Court explained that courts of appeals are not likely to invoke pendent appellate jurisdiction in reviewing qualified immunity summary judgment denials because pendent appellate jurisdiction should only apply in "compelling" or "exceptional" circumstances.[99] Although courts of appeals continue to use the pendent appellate jurisdiction doctrine explicitly and implicitly,[100] legal scholars criticize the use of pendent appellate jurisdiction in the qualified immunity context.[101] The use of pendent appellate jurisdiction has a number of disadvantages: it raises costs to the appellate system as a whole; it poses a risk that appellate courts will meddle with trial court jurisdiction; it raises the prospect of wasteful review if the issue disappears by the end of the proceeding; it places an extra burden on the parties to argue the appeal; and it allows for the review of issues that should not be individually appeala-

96 Swint v. Chambers Comm'n Comm., 514 U.S. 35 (1995).

97 *Id.* at 51.

98 *Id.*

99 *Id.* at 318 ("Even assuming, for the sake of argument, that it may sometimes be appropriate to exercise 'pendent appellate jurisdiction' over such a matter, it seems unlikely that courts of appeals would do so in a case where the appealable issue appears simply a means to lead the court to review the underlying factual matter." (citations omitted)). The *Johnson* Court cited other cases in support of this proposition, such as *Natale v. Ridgefield*, 927 F.2d 101, 104 (2d Cir. 1991) (explaining that pendent appellate jurisdiction should only be invoked in "exceptional circumstances") and *United States ex. rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co.*, 909 F.2d 259, 262 (7th Cir. 1990) (holding that courts should use pendent appellate jurisdiction only when there are "compelling reasons" to do so). *Johnson*, 515 U.S. at 318.

100 *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3937 (3d ed. 2012) (stating that courts continue to use the pendent appellate jurisdiction doctrine).

101 *See, e.g.*, Rudovsky, *supra* note 1, at 71 (arguing that pendent appellate jurisdiction is likely to "entangle the appellate courts in unjustified and unnecessary appeals.").

ble.[102] Because appellate courts recognize these costs associated with pendent appellate jurisdiction, it should be invoked rarely. Thus, the doctrine should not pose as big a threat to the limited appealability standard as Judge Sutton contends. Courts of appeals will easily detect when such arguments are meritless and inserted just for the purpose of making the order reviewable. Appellate Rule 38 will also deter defendants from making this argument when it is frivolous.[103]

Next, Judge Sutton's approach would cause the appellate court system to become overburdened. Although one could argue that appellate review of all qualified immunity denials may increase the chances of accurate judicial decision-making, Professor Mark Brown suggests that the potential accuracy gain "is rarely worth all the costs."[104] Brown analogizes the final judgment rule to an instant replay in sports:

> If [the accuracy] were [worth the costs], referees and umpires would always be staring at instant replays. Coaches would be given unlimited "challenge" flags. Games would never end. Whether in sports or law, society recognizes that accuracy must be balanced against temporal costs, the price of additional personnel, and the benefit of orderly processes. . . . Like it or not, interlocutory appeal is frowned upon because it is disruptive, time-consuming and costly. Interlocutory fact-finding, as recognized in *Johnson v. Jones*, is even more so.[105]

As Brown mentions, the *Johnson* Court recognized that appellate review of the factual record "can consume inordinate amounts of appellate time" and that the appellate court "may well be faced with approximately the same factual issue again, after trial."[106] Judge Sutton's recommendation that the appellate court engage in a repetitive factual analysis for each case, therefore, leads to delay.

Additionally, Judge Sutton's approach would lead to a wasteful use of appellate resources because his approach ignores the fact that district courts are better positioned to make factual determinations on qualified immunity summary judgment decisions. District judges are more experienced than appellate judges at determining whether a genuine issue of fact exists for purposes of summary judgment be-

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102 16 WRIGHT ET AL., *supra* note 100, § 3937 (arguing that the use of pendent appellate jurisdiction increases the costs to the appellate system).

103 *See* FED. R. APP. P. 38 (stating that the court of appeals may award costs to the appellee under certain conditions if the court has determined that the appeal is frivolous).

104 Brown, *supra* note 4, at 1330 (arguing that the potential improvements to the accuracy of judicial decision making are rarely worth the costs of appellate review of all qualified immunity denials).

105 *Id.*

106 *Johnson*, 515 U.S. at 316–17.

cause district court judges make such decisions all the time.[107] As the *Johnson* Court explained, "the 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. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters."[108] As Supreme Court Justice John Paul Stevens articulated in his *Scott* dissent, it is likely that a genuine issue of material fact exists if the appellate court disagrees with the district court, and thus, the matter should be left to the jury anyway.[109]

Next, Judge Sutton's interpretation makes it extremely difficult for litigants to recover when bringing constitutional tort claims under § 1983, straying from the original purpose of § 1983 to hold officials liable for constitutional violations.[110] Qualified immunity, although meant to protect officials, must also take into account "society's and a constitutionally injured plaintiff's interest in seeking redress for violations of clearly established law."[111] Scholars argue that courts often lose sight of this backdrop.[112] Professor Erwin Chemerinsky, in analyzing the Supreme Court's October 2013 term, which included the *Plumhoff v. Rickard* decision, argues that recent decisions "show a Court that is very protective of government officials who are sued for money damages, and that has made it very difficult for victims of con-

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107 *See Appealability—Summary Judgment Order—Qualified Immunity Defense*, 10 Fed. Litig. 154, 155 (1995) (stating that district judges confront such issues almost daily).

108 *Johnson*, 515 U.S. at 316. Because appeals of summary judgment orders are seen as presenting questions of law, the standard of appellate review is de novo. *See generally* 10A CHARLES ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. CIV. § 2716 (3d ed. 2012). Nevertheless, the *Johnson* Court correctly pointed out that district judges are more experienced than appellate judges at determining whether a genuine issue of fact exists for purposes of qualified immunity summary judgment orders. *Johnson*, 515 U.S. at 316. The idea that review of qualified immunity decisions is de novo, therefore, seems like a waste of appellate resources. The problem lies in the fact that courts view qualified immunity decisions as pure questions of law, when this often remains a fiction. While questions about the content of clearly established law may be purely legal, there are other questions that require courts to review more of a mixed question, such as whether under the circumstances, it would have been clear to a reasonable officer that his actions violated the law. When such a mixed question exists, scholars have argued that "it would be anomalous to let a defendant force both a district court and an appeals court to pore over a complex record to decide whether the evidence is sufficient to go to a jury, when the practical solution in hard cases is simply to hold the jury trial." Rudovsky, *supra* note 1, at 71.

109 *Scott*, 550 U.S. at 397 (Stevens, J., dissenting).

110 *See* Rudovsky, *supra* note 1, at 23 n.2 (discussing purpose of § 1983).

111 Urbonya, *supra* note 27, at 11.

112 *See, e.g.*, Rudovsky, *supra* note 1, at 78 ("The Court increasingly perceives the issue from the side of the official-perpetrator.").

stitutional violations to recover."[113] If appellate jurisdiction were as available as Judge Sutton suggests, officials would get a second chance to be granted qualified immunity almost every time it was denied, making it more challenging for a plaintiff to succeed.

Broadening the appealability standard provides officials with a second chance to succeed on summary judgment and makes it less likely, by definition, that plaintiffs will have the opportunity to appear before a jury. Professor Jeffrey Stempel criticizes cases that make summary judgment easier to obtain and argues that these cases undermine core values, including "the infusion of community standards into litigation; promoting public confidence in the judicial system and fairness of litigation results; maintaining democratic values of participation; and citizen access to the system."[114] Expanding appealability of summary judgment denials of qualified immunity orders may, therefore, threaten the legitimacy of the judicial system.[115]

Furthermore, if the judge decides a case on summary judgment, juries will never get to decide questions of historical fact. Judge Sutton's approach highlights a problem that Justice Stevens recognized in his dissent in *Scott v. Harris*. Justice Stevens suggested that if the interpretation of facts is controversial, it should be left to a jury, not an appellate court, to look at the factual record and determine whether the official acted reasonably.[116] He also added that the Court in *Scott* "usurped the jury's fact-finding function" and explained that, "[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."[117] Judge Sutton's approach would allow four federal judges to review the facts underlying the plaintiff's complaint, making it very difficult for plaintiffs' claims to reach a jury even when factual disputes exist.

Moreover, the ability of a defendant to appeal a qualified immunity summary judgment denial stacks the deck for the defendants, and is therefore unfair to plaintiffs. Although plaintiffs can appeal summary judgment orders based on qualified immunity just as defendants can (because the district court decision then becomes a final or-

113 Erwin Chemerinsky, *Appearances Can Be Deceiving: October Term 2013 Moved the Law to the Right*, 17 GREEN BAG 2D 389, 403 (2014).

114 Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Value of Adjudication*, 49 OHIO ST. L.J. 95, 166 (1988).

115 *Id.*

116 *Scott*, 550 U.S. at 396 (Stevens, J., dissenting).

117 *Id.* at 395–96.

der), plaintiffs have a higher burden to begin with in § 1983 cases. First, § 1983 claims have been "sharply curtailed by . . . a redefinition of some constitutional deprivations, injection of notions of 'culpability' beyond those normally imposed by tort law, and a back-door exhaustion requirement . . . ."[118] Next, because the plaintiff is usually paying a contingent fee for representation, and has often been injured because of the claim he is asserting, the delays of litigation usually cause much more harm to the plaintiff than to the defendant.[119] Thus, if a plaintiff succeeds in clearing the difficult hurdles in the initial summary judgment stage, it becomes detrimental when defendants are able to appeal the summary judgment denial based on qualified immunity.

Scholars have argued that even if defendants denied qualified immunity on summary judgment were unable to appeal, they would simply move for judgment as a matter of law after presenting their case or after the jury decision. In turn, these scholars argue, appellate courts would end up applying the same test as on summary judgment,[120] but after resources have been wasted in trial.[121] Nevertheless, other scholars have responded by explaining there is a large difference in context when judges decide summary judgment orders

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118 Rudovsky, *supra* note 1, at 26 (citations omitted).

119 *Id.* at 70 ("[D]elays and costs involved are usually a far more significant burden for the plaintiff.").

120 *Compare* FED. R. CIV. P. 50(a) ("(a) JUDGMENT AS A MATTER OF LAW. (1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.") *with* FED R. CIV. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

121 *See also* 15A WRIGHT ET AL., supra note 25, at § 3905.1 ("An order denying summary judgment is reviewable on appeal from summary judgment for the opposing party, but ordinarily should not be reviewable if a trial has been had. Once a trial has been held, the question on appeal should be the sufficiency of the evidence adduced at trial. Even if it had been wrong to deny summary judgment, summary judgment procedure is not designed to confer a prize on the party who is correct as a matter of the pretrial record. A factually supported judgment of judge or jury must be sustained, even if it proves wrong the prediction that should have been made at the time of a pretrial motion for summary judgment. Review of the summary judgment issue might possibly be appropriate if the trial evidence was not sufficient to support a judgment but some procedural error foreclosed direct review of the sufficiency issue, but if there is any significant difference between the summary judgment record and the trial record it may be more orderly to remand for renewed consideration of summary judgment based on the trial record." (footnotes omitted)).

and motions for judgment as a matter of law.[122] Professor Arthur Miller explains that there is a fundamental difference between a paper record and a trial record because "in the former context[] the judge decides what is fact, law, or the application of fact to law without the benefit of hearing fully developed testimonial evidence in a trial setting."[123] Although judges are not supposed to evaluate the credibility of witnesses or weigh contradicting evidence when deciding a motion for judgment as a matter of law,[124] the trial can provide clarity on whether there are genuine issues of fact and realistically, the judge will not be able to completely decide the motion without considering what was stated on the trial record. Furthermore, if the motion for judgment as a matter of law is brought after a jury trial, there is likely to be more deference to the jury decision. Even Judge Sutton acknowledged this in his *Romo* opinion, stating that: "[W]hile the summary judgment record and the jury record often will differ, they normally will differ in ways that make it more difficult for an officer to win on appeal, as the appellate court will be asked to second guess not just inferences that could be drawn from a paper record but inferences that may be drawn from eyeballing the witnesses as well."[125]

Thus, although my approach has shortcomings, namely that appellate courts will need to continue line drawing between questions of fact and questions of law and will need to apply a more cumbersome test than Judge Sutton's broad appealability standard, the alternative approach has too many disadvantages. Granting jurisdiction to almost all qualified immunity summary judgment denials, as Judge Sutton advocates, will result in a crowded the appellate docket, litigation delays, and a limited ability of plaintiffs to have their constitutional tort claims heard by a jury. A limited appealability standard, on the other hand, would lend greater respect to the district court's qualified immunity determinations, lead to a wiser use of appellate

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122 *See,* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1061 (2003) (asserting that there are different systemic implications when summary judgment is relied upon versus when judges decide motions for judgment as a matter of law).

123 *Id.*

124 *Id.* at 1057–58 ("Three basic restrictive rules that judges traditionally have followed on the motion are that the evidence is to be viewed in the light most favorable to the nonmovant, the credibility of witnesses is not to be evaluated, and contradicting evidence is not to be weighed." (footnotes omitted)).

125 *Romo*, 723 F.3d at 683 (Sutton, J., concurring in part and in the judgment) (emphasis omitted).

resources, and foster legitimacy by not dismissing all constitutional claims on summary judgment grounds.

CONCLUSION

While the recent Supreme Court decisions following *Scott v. Harris* seem to contradict the appealability standard in *Johnson v. Jones*, the case law can be reconciled. Although some lower appellate courts have dealt with the case law by expanding the appealability of qualified immunity summary judgment orders, I argue that a limited reading is more appropriate. A limited appellate standard is the best way to balance the competing policies implicated by qualified immunity appeals, such as the ability of victims of constitutional violations to recover, the final decision principle, and the government interest in protecting only officials who act reasonably. As pressure mounts to monitor and limit police misconduct, one way to start is by limiting the number of chances officials get to achieve immunity through the judicial process.