IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL ANN GEORGE, Plaintiffs/Appellees, vs. DEPUTY JARRETT MORRIS, et al., Defendants/Appellants.	No. 11-55956 U.S. District Court No. 2:09-cv-02258-CBM-AGR (Central District of California, Hon. Consuelo B. Marshall)

BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES EXCESS INSURANCE AUTHORITY IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

On Petition for Rehearing and Rehearing En Banc Of
Published Opinion Issued July 30, 2013
(O'Scannlain, Trott, and Clifton, Circuit Judges)

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INTRODUCTION

The panel in this case held that this Court cannot review district court summary judgment rulings denying qualified immunity, when the district court erroneously rules that the summary judgment record taken as a whole would permit a reasonable jury to find for the plaintiff. The panel's ruling here runs contrary to the purpose of qualified immunity. That purpose is to permit officials to perform their essential public duties, without having to endure pointless lawsuits or the specter of potential liability unless the law plainly prohibits their conduct. The panel's ruling here undermines the protections of qualified immunity, by barring appellate courts from conducting the de novo review of the summary judgment record that is necessary to ensure that an error by a single busy District Court judge will not wrongly deprive public servants of official immunity.

Indeed, the panel's ruling is inconsistent with Supreme Court precedent and other decisions of this Court, which correctly recognize that the Court of Appeals independently reviews the summary judgment record as part of applying the familiar de novo standard of review.

As appellants explained in their petition for rehearing, the panel's ruling conflicts with the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007) as well as this Court's decision in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), both of which mandate independent appellate review of the summary judgment record in interlocutory qualified immunity appeals. The panel's prohibitions on appellate review are irreconcilable with *Scott* and *Wilkinson*.

Rehearing should be granted for an additional reason – a reason that was not discussed in the petition. Namely, this Court has already addressed and resolved the same issue that split the majority and the dissenting judge here: the extent to which the Supreme Court's 1995 decision in *Johnson v. Jones*, 515 U.S. 304

(1995) constrains interlocutory review when the district court finds a factual conflict at summary judgment. In three lengthy decisions – *Cunningham v. City of Wenatchee*, 345 F.3d 802 (9th Cir. 2003), *Gausvik v. Perez*, 345 F.3d 813 (9th Cir. 2003), and *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001) – this Court already construed *Johnson* far more narrowly than the panel did here. Specifically, this Court held that *Johnson* limits appellate review only in a very narrow class of immunity appeals: those involving solely factual issues and *no* legal issue. So long as there was *any* legal issue, this Court held, *Johnson* does not bar review of a district court's ruling that a genuine factual dispute exists at summary judgment. Even though these past decisions are controlling here, neither the majority nor the dissenting judge addressed them. The panel's ruling here plainly conflicts with them. Rehearing should be granted to resolve this conflict in favor of review.

Finally, contrary to the panel's statements about this Court's recent jurisprudence, this Court has not hesitated to independently review the factual record in interlocutory immunity appeals. Indeed, the standard of review announced in *Cunningham, Gausvik,* and *Jeffers* is still alive and well in this circuit. Numerous recent qualified immunity decisions of this Court have cited and applied the standard of review outlined in these controlling decisions: this Court reviews a district court's denial of qualified immunity de novo – even when the district court concluded that a genuine factual conflict exists.

Amici respectfully urge this Court to grant rehearing or rehearing en banc. Regardless whether the outcome of this particular case changes, the Court should not adopt a rule that bars appellate review of erroneous qualified immunity rulings.

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC

sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. County residents suffer when the burdens of litigation and trial prevent county officials from performing essential public duties. County residents also bear the consequences when the threat of lawsuits deters public officials from taking decisive action to protect public safety and welfare. Moreover, under California law, counties fund the costs of defending county officials in lawsuits, as well as the costs of settlements or judgments for compensatory damages.

Amicus Curiae California State Association of Counties Excess Insurance Authority (CSAC EIA) is a California Joint Powers Authority organized pursuant to California Government Code § 6500 *et seq.* Membership in CSAC EIA includes 93% of the counties in California and nearly 61% of the cities, as well as numerous school districts, special districts, housing authorities, fire districts, and other Joint Powers Authorities. The CSAC EIA provides liability, property and other insurance coverage to its members and is one of the largest property/casualty public entity risk pools in the United States. CSAC EIA has an interest in this case due to the likelihood that limitations on appellate review of qualified immunity rulings will result in increased litigation costs as well as more costly settlements.

Amici are concerned about the effect of this ruling on the governmental entities that they represent and insure, local public officials who are entitled to the protections of qualified immunity, and the local residents who suffer when public officials are erroneously denied immunity and must participate in litigation instead of serving their constituents. The panel's ruling here, restricting courts from

correcting erroneous denials of qualified immunity, is not limited to deadly force cases. The panel's limitations on the scope of review in qualified immunity appeals would apply to all types of claims against all types of public officials. Enforcing the protections of qualified immunity, for law enforcement officers and every other public official, is an issue of great importance for the public and amici.[1]

DISCUSSION

I. THE PANEL'S DECISION CONFLICTS WITH *SCOTT V. HARRIS* AND *WILKINSON V. TORRES*

There is no doubt that appellate panels have the duty to review a district court's order denying qualified immunity. 28 U.S.C. § 1291. And in *Scott v. Harris*, the Supreme Court left no doubt that, to discharge that duty of appellate review, a Court of Appeals must independently ensure that the District Court's order denying qualified immunity is supported by the factual record:

> Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

Scott, 550 U.S. at 380-381. Thus, in *Scott* the Supreme Court *itself* conducted the necessary independent appellate review of the summary judgment record. In doing so, the Court simply applied the familiar Rule 56 standard on de novo review: "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Id.* at 380 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (internal quotation marks omitted). The Court was resigned to its duty to "slosh

[1] Counsel for amici curiae authored the brief in whole. No party or party's counsel or anyone other than amici curiae or its counsel contributed money to fund the preparation or submission of this brief.

our way through the factbound morass of 'reasonableness,'" *id.* at 383, and carefully reviewed the record en route to its ultimate legal ruling that qualified immunity applied. The panel's ruling here cannot be squared with *Scott*'s mandate that appellate courts review the factual record, rather than simply deferring to a single busy district court judge's impressions of that record.

Nor can the panel's ruling be squared with this Court's decision in *Wilkinson v. Torres*, which authoritatively interpreted *Scott*. In *Wilkinson*, this Court explained that *Scott* required appellate scrutiny of the summary judgment record to determine whether a factual dispute was genuine. This Court recognized that appellate scrutiny of the record is simply part of the de novo review that is required in qualified immunity appeals:

> We review a denial of qualified immunity de novo. *Porter v. Osborn*, 546 F.3d 1131, 1136 (9th Cir. 2008). In doing so, we must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the[summary judgment] motion.' " *Scott*, 550 U.S. at 378 (alteration in original) (citations omitted). However, when the facts, as alleged by the non-moving party, are unsupported by the record such that no reasonable jury could believe them, we need not rely on those facts for purposes of ruling on the summary judgment motion. *Id.* at 380.

Wilkinson, 610 F.3d at 550. Like the Supreme Court in *Scott*, this Court in *Wilkinson* went on to carefully review the summary judgment "record as a whole," and to reject the district court's finding that the record contained genuine factual disputes. *Id.* at 551-53.

Contrary to *Scott* and *Wilkinson*, the panel here declared it lacked authority to examine the record to determine whether a genuine factual dispute existed requiring a trial. The panel stated "we may not decide at this interlocutory stage if the district court properly performed" its duty under Rule 56 to determine whether genuine disputes of fact required a trial. Opn. 11. Similarly, the panel stated that it

could not "perform the same plenary review [of the record] as the district judge below." Opn. 12. These rulings are irreconcilable with *Scott* and *Wilkinson*.

II. THE PANEL'S DECISION ALSO CONFLICTS WITH THIS COURT'S PAST DECISIONS CONSTRUING *JOHNSON V. JONES*

When the panel held that it lacked authority to correct erroneous findings of factual disputes, it relied on the Supreme Court's 1995 decision in *Johnson v. Jones*. The panel, however, did not mention or discuss past decisions by this Court that already exhaustively analyzed *Johnson* – and reached the opposite conclusion. The Court should reconsider this case in light of these past Ninth Circuit decisions – most significantly, *Cunningham v. City of Wenatchee*, *Gausvik v. Perez*, and *Jeffers v. Gomez*.

The *Cunningham* decision involved an interlocutory appeal from a district court's denial of qualified immunity at summary judgment, where the plaintiff claimed the defendant police detective conducted an overly coercive interrogation. This Court exhaustively discussed the question of jurisdiction to hear the appeal, and analyzed the Supreme Court's 1995 *Johnson* decision, as well as its decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996), which limited *Johnson*. *Cunningham*, 345 F.3d 802, 806-09. After a careful review of those decisions, this Court concluded that *Johnson*'s restriction on appellate jurisdiction applied only to interlocutory appeals in which the *only* issues concerned the factual record, and there were no claims about what legal conclusions to be drawn from the record. This Court summarized the following principles of appellate review:

> We do not have jurisdiction over interlocutory appeals from district court orders that decide only whether there exists sufficient evidence to sustain the material facts shown by plaintiff. However, we are instructed that we do have jurisdiction from district court orders that decide not only that material facts are in dispute, but also that the defendant's alleged conduct violated the plaintiff's clearly established constitutional rights. When exercising jurisdiction over the latter type of order, we resolve all factual disputes in favor of

> the plaintiff and look at the purely legal question of whether the defendant's alleged conduct violated the plaintiff's clearly established constitutional rights.

Cunningham, 345 F.3d at 807. Notably, this Court did not state that it would defer to the district court's conclusions about factual disputes – it stated that "*we* resolve all factual disputes in favor of the plaintiff." *Id.* (emphasis added). This Court left little doubt that this standard involves an appellate court applying the same de novo standard of review to the entire district court ruling, without a special exception for aspects of the district court's order that found factual disputes – because independently reviewing the record is precisely what this Court did, reversing the district court. *Id.* at 810 ("Here, we hold Perez's interrogation as demonstrated by the pretrial record did not undermine Cunningham's free will."). Thus, under *Cunningham*, the rule is that so long as there is a legal issue implicated in the appeal, this Court can and must apply the familiar de novo standard of review to all aspects of the district court's ruling, including conclusions about the factual record.

Indeed, in a companion case to *Cunningham* decided by the same panel, and involving coercion claims against the same police detective, the panel likewise conducted an independent review of the record and reversed a denial of qualified immunity. In *Gausvik v. Perez*, 345 F.3d 813 (9th Cir. 2003), this Court expressly relied on its analysis of jurisdiction in *Cunningham*, and held it could review the District Court's order even where "the district court found 'there is a genuine issue of material fact whether Perez used investigative techniques that were so coercive and abusive that he knew or should have known those techniques would yield false information....'" *Id.* at 816 (quoting district court order, ellipsis in original). This Court reversed the district court, again conducting an independent review of the record and making different rulings about what the summary judgment record showed. *E.g.*, *id.* at 817 ("He [Gausvik] has not pointed to any facts showing

Perez knew he was innocent. In fact, the record proves otherwise."); *id.* at 818 ("[Gausvik's] evidence does not prove bad faith.").

In *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001) (per curiam), this Court conducted a similarly exhaustive analysis of the Supreme Court's decisions in *Johnson* and *Behrens* – and reached the same conclusion as in *Cunningham* and *Gausvik*: independent review of the summary judgment record is part of the Court's duty on appeal, even where the district court found a factual dispute. *Jeffers* involved a claim that prison officials violated the Eighth Amendment when they used rifle fire to quell a prison yard riot, and a non-rioting prisoner was wounded. This Court acknowledged that its jurisdiction was not "immediately obvious" regarding two of the officials' appeals, where "the district court denied them qualified immunity on the basis that there remained issues of material fact regarding their motives." *Id.* at 903. Nevertheless, after "a careful review of our cases and those of the Supreme Court," the Court found it had jurisdiction over all of the appeals. *Id.* at 903-906. And – specifically with regard to reviewing a district court's finding of a genuine factual dispute – this Court "conclude[d] we have jurisdiction to consider whether the district court erred in holding that there is a genuine issue of material fact regarding the motives of defendants Bess and Yerby." *Id.* at 910; *see also id.* at 906-910 (full analysis). The Court then fully reviewed the record evidence that the district court relied on to find a genuine factual dispute, and found it insufficient to support a finding of a constitutional violation. *Id.* at 911-914. Thus, this decision likewise left no doubt that district court findings about the factual record are not insulated from de novo review in immunity appeals.

Each of these three decisions was based on an extensive analysis of the Supreme Court's 1995 *Johnson* decision. These decisions correctly construed

Johnson's jurisdictional limitation to apply only to interlocutory appeals involving no legal issues at all, and only factual issues. Even though these decisions pre-dated *Scott v. Harris*, they correctly anticipated *Scott* in recognizing that independent review of the summary judgment record is part and parcel of de novo review in an immunity appeal – even when the district court has found that the record contains a genuine factual dispute.

III. CONTRARY TO THE PANEL'S STATEMENTS, AFTER *SCOTT* THIS COURT DOES INDEPENDENTLY REVIEW THE FACTUAL RECORD IN QUALIFIED IMMUNITY APPEALS

The panel was not correct to state that this Court has, since *Scott v. Harris*, "consistently held that our court lacks the power to reassess facts on interlocutory review." Opn. at 12 n.9. To the contrary, after *Scott*, this Court has continued to recognize – and fulfill – its responsibility to independently review the summary judgment record in interlocutory appeals, even where a district court has ruled that a factual dispute requires a trial. This Court's 2010 *Wilkinson* decision is not an outlier in that regard. *See, e.g.*, *Mattos v. Agarano*, 661 F.3d 433, 439 & n.2 (2011) (en banc) (citing *Scott v. Harris* in describing the standard of review, and reversing denial of qualified immunity, even though "the district court found that there were unresolved material issues of fact"); *Ammons v. Washington Dep't of Soc. & Health Servs.*, 648 F.3d 1020, 1025-26, 1035-36 (9th Cir. 2011) (citing *Jeffers* standard, reviewing record, and reversing denial of qualified immunity, notwithstanding district court's ruling that "issues of material fact remained unresolved").

This Court's jurisprudence remains clear: on interlocutory appeal of the denial of qualified immunity at summary judgment, this Court simply applies de novo the same Rule 56 standard as a district court. *This Court* reviews the factual record do novo and *this Court* resolves all factual disputes in favor of the plaintiff

in determining as a matter of law whether a trial is required. *See, e.g.*, *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010) ("The district court's denial of qualified immunity is reviewed de novo. *Blanford v. Sacramento County*, 406 F.3d 1110, 1114 (9th Cir. 2005). Where disputed issues of material fact exist, we assume the version of the material facts asserted by the non-moving party. *See KRL v. Estate of Moore*, 512 F.3d 1184, 1188-89 (9th Cir. 2008)."); *Community House, Inc. v. City of Boise*, 623 F.3d 945, 968 (9th Cir. 2010) ("[W]e have power to consider qualified immunity even where facts are disputed, so long as we 'assum[e] that the version of the material facts asserted by the non-moving party is correct.' *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) (per curiam). We have made such an assumption and thus have jurisdiction to consider the second prong of *Saucier*'s test."); *Rodis v. City and County of San Francisco*, 558 F.3d 964, 968 (9th Cir. 2009) ("'We review de novo a district court's decision denying summary judgment on the ground of qualified immunity.' *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 945 (9th Cir. 2003). 'On appeal, the court of appeals ... must resolve any factual disputes in favor of the plaintiff and decide the legal question as to whether the official's alleged conduct violated clearly established law.' *Cunningham v. City of Wenatchee*, 345 F.3d 802, 807 (9th Cir. 2003).") (alterations in original).

The panel cited several cases to support its position that, even after *Scott*, independent review of the factual record is not permitted where the district court states it has found a factual dispute. Opn. 9-10, 12 n.9. But these cases are not controlling or persuasive. All but one of the cited decisions failed to cite, mention, or discuss *Scott*. *See Karl v. City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012); *Conner v. Heiman*, 672 F.3d 1126 (9th Cir. 2012); *Alston v. Read*, 663 F.3d 1094 (9th Cir. 2011); *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009). And the cited

decision that did mention *Scott – CarePartners, LLC v. Lashway*, 545 F.3d 867, 875 n.3 (9th Cir. 2008) – acknowledged that *Scott* permitted review of the record in an interlocutory appeal, but noted *Scott* was not "germane" to its decision because the parties there did not dispute the factual record. In any case, none of these decisions contained a sustained discussion of *Johnson* and *Behrens* comparable to this Court's exhaustive analyses in *Cunningham* and *Jeffers*.

CONCLUSION

For the reasons stated in this brief and the petition for rehearing, amici curiae respectfully ask this Court to grant the petition for rehearing and accept the suggestion for rehearing en banc.

Dated: August 23, 2013

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 3,343 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 23, 2013.

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CERTIFICATE OF SERVICE

I, SOPHIA GARCIA, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 23, 2013.

BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES EXCESS INSURANCE AUTHORITY IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed August 23, 2013, at San Francisco, California.

/s/ SOPHIA GARCIA
SOPHIA GARCIA