SANCTIONING QUALIFIED-IMMUNITY APPEALS

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I. INTRODUCTION

Qualified immunity—which shields public officials from litigation unless they violated clearly established federal law[1]—stands as an immense, often insurmountable barrier to vindicating civil rights. But it's not just the substantive defense that is a problem. Qualified immunity comes with its own appellate-procedure rules that make litigating civil-rights suits complicated, expensive, and time consuming. At the core of these rules is defendants' right to appeal from the denial of qualified immunity.[2] And while the Supreme Court appeared to initially envision a relatively narrow right to appeal, the federal courts have steadily expanded the scope and availability of these appeals.[3]

There is, however, one seeming exception to the steady expansion of qualified-immunity appeals. When a district court denies immunity at summary judgment, the scope of the appeal is limited. *Johnson v. Jones* holds that, with rare and narrow exceptions, the courts of appeals lack jurisdiction to address whether the summary-judgment record supports the district court's determination of what a reasonable jury could find.[4] The court of appeals must instead take the factual basis for the immunity denial as a given and address the core qualified-immunity question: do those facts amount to a clearly established violation of federal law? In other words, appellate jurisdiction exists to review only the materiality of any fact disputes, not their genuineness.

Johnson was supposed to simplify and streamline qualified-immunity appeals, focusing appellate courts on the more abstract legal questions and eliminating appeals involving record review.[5] And *Johnson* has been the law for over 25 years. But far too many defendants act as though the case was never decided. Their appellate arguments rest partially or entirely on facts different than those

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1. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

2. *See* Mitchell v. Forsyth, 472 U.S. 511, 527–30 (1985).

3. *See* Bryan Lammon, *Making* Wilkie *Worse: Qualified-Immunity Appeals and the* Bivens *Question after* Ziglar *and* Hernandez, 7/24/2020 U. CHI. L. REV. ONLINE *1, *7–8.

4. 515 U.S. 304, 307 (1995); *see also* Behrens v. Pelletier, 516 U.S. 299, 313 (1996).

5. *See* 515 U.S. at 316–17.

that the district court thought a reasonable factfinder could find—flouting *Johnson*'s limit on the scope of qualified-immunity appeals. To be sure, courts normally see these appeals for what they are—attempted end runs around the limits of *Johnson*—and eventually dismiss or affirm.[6] But at that point the damage has been done. District court proceedings grind to a halt while the appeal is pending. The plaintiff spends time researching, briefing, and arguing the appeal. The court of appeals spends time deciding it. And resolution of the appeal often takes a year or longer. Whether ignorant of *Johnson* or hoping to obtain the stay and delay that normally comes with a qualified-immunity appeal, defendants can use these fact-based appeals to delay proceedings and add unnecessary complexity and expense to litigation.

Defendants have thus undermined one of the few limits on qualified-immunity appeals. And the courts of appeals have not done enough to deter these fact-based qualified-immunity appeals. The courts occasionally offer some harsh words for the defendant's counsel at oral argument or in an opinion. But that's about it.

What's left are sanctions. The courts of appeals appear to rarely sanction defendants who take qualified-immunity appeals. But sanctions might be what's needed to make defendants stop needlessly hindering the resolution of civil-rights claims. So when a defendant appeals from the denial of qualified immunity and (without invoking on of the narrow exceptions to *Johnson*) argues facts different than those the district court used, plaintiffs should seek sanctions. And the courts of appeals should start granting them.

II. THE LIMITS ON FACT-BASED QUALIFIED-IMMUNITY APPEALS

Qualified immunity is a special defense in civil-rights suits that seek damages from individual government officials.[7] When plaintiffs allege that government officials violated their federal rights, qualified immunity requires that the rights at issue be "clearly established" for the officials to be liable.[8] But qualified immunity is not merely a defense to liability; it's also supposed to be an immunity from the burden, expense, and inconvenience of litigation itself.[9] If a case erroneously proceeds through pretrial and trial, that right to be free from the burdens of litigation will be irretrievably lost. The Supreme Court accordingly held in *Mitchell v. Forsyth* that defendants can immediately appeal from the denial of qualified immunity.[10]

Mitchell appeared to envision a relatively Spartan right to appeal.[11] The Supreme Court emphasized that the appeal needed to address only whether (un-

6. *See, e.g.*, Cady v. Walsh, 753 F.3d 348, 358–61 (1st Cir. 2014).
7. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
8. *See id.*
9. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
10. *Id.* at 527–29.
11. *See* Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199, 204 (2013).

der the plaintiff's allegations or evidence) the defendant violated clearly established law.[12] Other issues were off the table. This narrow focus could minimize the impact of qualified-immunity appeals on appellate workloads and district court proceedings.

But courts didn't stop there. They've instead steadily expanded both the scope and availability of qualified-immunity appeals.[13] They have used pendent appellate jurisdiction to allow other defendants to tag along with the appeal.[14] Courts have added other issues to the appeal, such as the plausibility of the pleadings and the availability of a remedy.[15] And they've created additional opportunities for defendants to appeal before the end of district court proceedings.[16]

There is, however, one seeming exception to this otherwise-steady expansion. In *Johnson v. Jones*, the Supreme Court held that when a district court denies immunity at the summary-judgment stage, only part of the district court's decision can be immediately reviewed.[17] Denying immunity at summary judgment requires determining both the genuineness and materiality of any fact disputes.[18] Like any other summary-judgment decision, the genuineness 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.[19] If the parties dispute this version of the facts and have evidence to back up that dispute, a genuine fact issue exists.[20]

The district court must then determine whether any 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, do those facts make out a violation of federal law?[21] And if they do, was the law clearly established at the time of the violation?[22] If the district court answers both of these questions affirmatively—that is, based on the most plaintiff-favorable version of the facts, a clearly established violation of federal law occurred—then the defendant would be liable under those facts, the genuine dispute over the facts is material, and the district court should deny immunity.

12. *Mitchell*, 472 U.S. at 528.

13. *See* Lammon, *supra* note 3, at *5–7; Bryan Lammon, *The Expansion of Qualified-Immunity Appeals*, FINAL DECISIONS (June 9, 2020), https://finaldecisions.org/the-expansion-of-qualified-immunity-appeals/ [https://perma.cc/RW97-8CHM].

14. *See, e.g.*, Novoselsky v. Brown, 822 F.3d 342, 357 (7th Cir. 2016); Moore v. City of Wynnewood, 57 F.3d 924, 928 (10th Cir. 1995).

15. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 674–75 (2009); Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007); *see also* Lammon, *supra* note 3, at *3–7.

16. *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299, 311 (1996); Benson v. Facemyer, 657 F. App'x 828, 831 (11th Cir. 2016) (per curiam); Zapata v. Melson, 750 F.3d 481, 485–86 (5th Cir. 2014).

17. *See* 515 U.S. 304, 307 (1995).

18. *See* FED. R. CIV. P. 56(a).

19. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Diebold, 369 U.S. 654, 655 (1962).

20. *See id.* at 248–49.

21. *See* Siegert v. Gilley, 500 U.S. 226, 232 (1991).

22. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Johnson held that jurisdiction in a qualified-immunity appeal exists to review only the latter inquiries: do the facts taken as true by the district court show a violation of federal law, and was that violation clearly established?[23] The court of appeals lacks jurisdiction to review what facts a reasonable factfinder could find.[24] So defendants cannot challenge—and courts of appeals lack 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.

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.[25] As to theory, *Johnson* noted that evidence-sufficiency issues overlap too much with the merits to be appealable via the collateral-order doctrine.[26]

But what *Johnson* especially emphasized was practicality. Appellate courts, *Johnson* noted, have no comparative advantage in determining the existence of genuine fact issues.[27] So there is less of a likelihood that an appellate court will spot an error—and thus less need for interlocutory review—in this context.[28] Further, record review can take substantial time.[29] This not only burdens the court of appeals but also adds to the delay in district court proceedings that qualified-immunity appeals already cause. And determining whether a genuine fact issue exists can overlap with issues raised later in trial.[30] Immediate appellate review thus risks duplicative, overlapping appeals of similar issues—once in the qualified-immunity appeal and again in an appeal after trial.[31]

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 review the record for itself.[32]

A second possible exception comes from the Supreme Court's decision in *Scott v. Harris*.[33] Several courts of appeals have read *Scott* to create a "blatant-contradiction" exception to *Johnson*: the court of appeals can review the genu-

23. 515 U.S. at 319–20.

24. *Id.*

25. *Id.* at 313 (discussing Mitchell v. Forsyth, 472 U.S. 511, 526–30 (1985)). The Court later noted that the genuineness of a fact dispute is itself a legal question, but it is one "that sits near the law-fact divide." Ashcroft v. Iqbal, 556 U.S. 662, 674 (2009).

26. 515 U.S. at 314.

27. *Id.* at 316.

28. *Id.*

29. *Id.*

30. *Id.* at 316–17.

31. *Id.*

32. *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 (3d Cir. 2002).

33. 550 U.S. 372 (2007).

ineness of fact disputes when something in the summary-judgment record blatantly contradicts the district court's assessment of that record.[34] The existence of this second exception is unsettled.[35] *Scott* did not mention appellate jurisdiction or *Johnson*. The Court has never squarely addressed how to reconcile *Johnson* and *Scott*.[36] And the blatant-contradiction exception itself is both unpragmatic and unnecessary.[37] But it's fairly well established in the courts of appeals.[38]

Absent one of these exceptions to *Johnson*, the courts of appeals must take as given the factual basis for the district court's immunity denial and cannot review the district court's determination of what facts a reasonable factfinder could find. *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' issue of fact for trial."[39] Indeed, *Johnson* repeatedly framed the issue as whether appellate courts can review the genuineness of fact disputes in qualified-immunity appeals:

- "The order in question resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial. We hold that the defendants cannot immediately appeal this kind of fact-related district court determination."[40]
- "[*Mitchell*] explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are 'genuine,' but the purely legal issue what law was 'clearly established.'"[41]
- "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."[42]
- "[T]he issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily."[43]

34. *See, e.g.*, Henderson v. Glanz, 813 F.3d 938, 950–51 (10th Cir. 2015); Blaylock v. City of Phila., 504 F.3d 405, 414 (3d Cir. 2007); *see also* Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. (forthcoming 2021) (manuscript at 34–37), https://ssrn.com/abstract=3428456 [https://perma.cc/GTT6-4GSU].

35. *See* Lammon, *supra* note 34, at 27–30, 50–61.

36. *See* Plumhoff v. Rickard, 572 U.S. 765, 772–73 (2014).

37. *See* Lammon, *supra* note 34, at 38–49.

38. *See id.* at 37.

39. Johnson v. Jones, 515 U.S. 304, 319–20 (1995).

40. *Id.* at 307.

41. *Id.* at 313.

42. *Id.* at 314.

43. *Id.* at 316.

- "[Q]uestions about whether or not a record demonstrates a 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time."[44]
- "We recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about pre-existing 'clearly established' law, or (b) a determination about 'genuine' issues of fact for trial, it still forces public officials to trial."[45]
- "[The defendants argue that] if appellate courts try to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine'), they will have great difficulty doing so."[46]

So unless a defendant invokes—and the court of appeals applies—an exception to *Johnson*, the court of appeals cannot review the genuineness of fact disputes as part of a qualified-immunity appeal.

III. DEFENDANTS' FLOUTING OF *JOHNSON*

Johnson thus stands as one of the few ways in which federal courts have limited qualified-immunity appeals. But the rule in *Johnson* seems to be lost on far too many defendants. They appeal from the denial of qualified immunity at summary judgment and base some or all of their arguments on facts different than those that the district court took to be true. The courts of appeals often rebuff these attempted appeals. But these appeals hinder the efficient resolution of civil-rights claims, adding wholly unnecessary complexity, expense, and delay to the litigation.

A. The Frequency of Fact-Based Qualified-Immunity Appeals

Defendants flout *Johnson* with some frequency. They appeal from an immunity denial and—without invoking an exception to *Johnson*—base some or all of their arguments on facts different than those that the district court assumed to be true.[47] Consider two illustrative (but unexceptionable) examples from last year: the Sixth Circuit's decision in *Stojcevski v. Macomb County*,[48] and the Eleventh Circuit's decision in *Hall v. Flourney*.[49]

44. *Id.*

45. *Id.* at 317.

46. *Id.* at 319.

47. *See, e.g.*, Scott v. Gomez, 792 F. App'x 749, 751 (11th Cir. 2019) (per curiam); Betton v. Belue, 942 F.3d 184, 192 n.3 (4th Cir. 2019); Koh v. Ustich, 933 F.3d 836, 848 (7th Cir. 2019); King v. LeBlanc, 783 F. App'x 366, 368 (5th Cir. 2019) (per curiam); Saunders v. Cuyahoga Metro. Hous. Auth., 769 F. App'x 214, 218–19 (6th Cir. 2019); Barry v. O'Grady, 895 F.3d 440, 443–45 (6th Cir. 2018); McCue v. City of Bangor, 838 F.3d 55, 62–63 (1st Cir. 2016); Morales v. Chadbourne, 793 F.3d 208, 219 (1st Cir. 2015); Penn v. Escorio, 764 F.3d 102, 110–12 (1st Cir. 2014); Gutierrez v. Kermon, 722 F.3d 1003, 1011 (7th Cir. 2013); Bennett v. Krakowski, 671 F.3d 553, 559 (6th Cir. 2011).

48. 827 F. App'x 515 (6th Cir. 2020).

49. 975 F.3d 1269 (11th Cir. 2020).

Stojcevski stemmed from the death of an inmate who spent his last 51 hours of life suffering from severe drug withdrawal, naked and convulsing on the floor of his cell.[50] The defendants—employees of the jail—conceded the law: they needed to seek medical help for an inmate whose condition worsened.[51] The evidence showed that the defendants did not seek any medical help during these 51 hours.[52] And according to the district court, a reasonable jury could find that the decedent suffered "alarming changes" during that time.[53] The district court accordingly denied qualified immunity.[54]

The defendants nevertheless appealed. And in that appeal, they argued that the decedent's condition had not worsened during his last 51 hours.[55] This argument ran squarely into *Johnson*. As the Sixth Circuit noted, the defendants' appeal "merely quibble[d] with the district court's reading of the factual record."[56] The court of appeals accordingly lacked jurisdiction and dismissed the appeal.[57]

Hall involved a similarly flagrant flouting of *Johnson*. The plaintiff in *Hall* alleged that a deputy sheriff had planted drugs on his property.[58] And according to the district court, the plaintiff presented enough evidence for a reasonable jury to find that the deputy sheriff had planted the drugs.[59] The district court accordingly denied the deputy sheriff's request for qualified immunity.[60]

On appeal, the deputy sheriff conceded that planting drugs violates clearly established federal law.[61] She argued only that the district court erred in its assessment of the evidence—the evidence showed that she did not plant the drugs.[62] As the Eleventh Circuit recognized, the deputy sheriff asked the court of appeals to do "precisely what the Supreme Court has said [it] cannot do at this interlocutory stage."[63] The Eleventh Circuit accordingly dismissed the appeal for a lack of jurisdiction.[64]

Appeals like *Stojcevski* and *Hall* are a serious problem. And the problem is widespread. Last year saw at least 44 cases in which the court rejected a defendant's attempts to challenge the factual basis for an immunity denial.[65] (I say "at

50. 827 F. App'x at 518–19.
51. *Id.* at 522.
52. *Id.*
53. *Id.* at 523.
54. *Id.* at 519–20.
55. *Id.* at 523.
56. *Id.*
57. *Id.*
58. Hall v. Flourney, 975 F.3d 1269, 1273 (11th Cir. 2020).
59. *Id.*
60. *Id.*
61. *Id.* at 1277.
62. *Id.*
63. *Id.* at 1278.
64. *Id.* at 1279.
65. In addition to *Stojcevski* and *Hall*, *see* Penzaloza v. City of Rialto, 836 F. App'x 547, 549 (9th Cir. 2020); Peterson v. City of Yakima, 830 F. App'x 528, 528–29 (9th Cir. 2020) (mem.); Joseph *ex rel.* Est. of Joseph v. Bartlett, 981 F.3d 319, 343–44 (5th Cir. 2020); Rhoades v. Forsyth, 834 F. App'x 793, 796 (4th Cir. 2020); Fakhoury v. O'Reilly, 837 F. App'x 333, 338 (6th Cir. 2020); Gamel-Medler v. Almaguer, 835 F. App'x

least" because, as Merritt McAlister has shown, not all court of appeals decisions make it onto electronic databases.[66]) Only occasionally did the defendants appear to invoke an exception to *Johnson*. More frequently, defendants appeared to simply flout Johnson and present their own version of the facts on appeal.

B. The Harms of Fact-Based Qualified-Immunity Appeals

These fact-based qualified-immunity appeals cause substantial harms. To be sure, the courts of appeals normally see them for what they are and dismiss or affirm. But that recognition comes too late. At that point, the appeal has already created unnecessary work for courts and plaintiffs, added complexity and expense to litigation, and delayed the resolution of the case for no good reason.

Some of this harm comes from the uncertainty over appellate jurisdiction. At the outset of a qualified-immunity appeal, it might not be clear whether the court of appeals will have jurisdiction. That is because appellate jurisdiction turns on what the defendant argues. If the defendant's arguments stay within *Johnson*'s bounds, jurisdiction will exist. If not, it won't. But the court of appeals does not know what the defendant will argue until the defendant files its opening brief.

If a defendant disputes the factual basis for the immunity denial, the plaintiff then spends time researching, briefing, and arguing both appellate jurisdiction and (just to be safe) the merits of the district court's immunity denial. The

354, 360–61 (10th Cir. 2020); Thomas v. Bauman, 835 F. App'x 5, 7–8 (6th Cir. 2020); Estate of Matthews *ex rel.* Matthews v. City of Dearborn, 826 F. App'x 543, 547 (6th Cir. 2020); Franco v. Gunsalus, 972 F.3d 170, 175–76 (2d Cir. 2020); Reynolds v. Municipality of Norristown, 816 F. App'x 740, 740–41 (3d Cir. 2020); Lennox v. Miller, 968 F.3d 150, 154 n.2 (2d Cir. 2020); Reavis *ex rel.* Estate of Coale v. Frost, 967 F.3d 978, 987–88 (10th Cir. 2020); Shannon v. Jones, 812 F. App'x 501, 502–03 (9th Cir. 2020) (mem.); Sevy v. Barach, 815 F. App'x 58, 62 (6th Cir. 2020), *cert. denied*, No. 20-600, 2021 WL 78162 (U.S. Jan. 11, 2021); Harris v. Janes, 820 F. App'x 677, 679–80 (10th Cir. 2020); Sawyers v. Norton, 962 F.3d 1270, 1284–86 (10th Cir. 2020); Le v. Molina, 810 F. App'x 550, 551 (9th Cir. 2020) (mem.); M.A.B. v. Mason, 960 F.3d 1112, 1114 (8th Cir. 2020) (per curiam); White v. Mesa, 817 F. App'x 739, 741–42 (11th Cir. 2020) (per curiam); Sanford v. City of Detroit, 815 F. App'x 856, 858–59 (6th Cir. 2020); Lumbard v. Lillywhite, 815 F. App'x 826, 833–34 (6th Cir. 2020); Swain v. Town of Wappinger, 805 F. App'x 61, 62–63 (2d Cir. 2020) (mem.); Bullock v. City of Detroit, 814 F. App'x 945, 952 (6th Cir. 2020); Goode v. Baggett, 811 F. App'x 227, 232, 235 (5th Cir. 2020); Scott v. White, 810 F. App'x 297, 300–01 (5th Cir. 2020) (per curiam); Fuller v. Metro. Atlanta Rapid Transit Auth., 810 F. App'x 781, 783–84 (11th Cir. 2020); Franklin v. City of Southfield, 808 F. App'x 366, 370 (6th Cir. 2020); NeSmith v. Olsen, 808 F. App'x 442, 444 (9th Cir. 2020) (mem.); K.J.P. v. County of San Diego, 800 F. App'x 545, 546 (9th Cir. 2020) (mem.); Norton v. Rodrigues, 955 F.3d 176, 187 (1st Cir. 2020); Nelson v. Thurston County., 799 F. App'x 555, 556–57 (9th Cir. 2020) (mem.); Banas v. Hagbom, 806 F. App'x 439, 442–43 (6th Cir. 2020); Ellington v. Whiting, 807 F. App'x 67, 69–70 (2d Cir. 2020) (summary order); Valdez v. Motyka, 804 F. App'x 991, 995 (10th Cir. 2020); Amador v. Vasquez, 961 F.3d 721, 728–29 (5th Cir. 2020), *cert. denied*, No. 20-585, 2021 WL 850625 (U.S. Mar. 8, 2021); Butler v. Pennington, 803 F. App'x 694, 696 (4th Cir. 2020) (per curiam), *cert. denied*, No. 20-346, 2020 WL 6037258 (U.S. Oct. 13, 2020); Canada v. Beitler, 796 F. App'x 435, 436 (9th Cir. 2020) (mem.); Livingston v. Kehagias, 803 F. App'x 673, 676, 682, 688 (4th Cir. 2020); Gallmon v. Cooper, 801 F. App'x 112, 115–16 (4th Cir. 2020) (per curiam); Martin v. Wentz, 794 F. App'x 548, 549–50 (7th Cir. 2020) (order); Robinson v. Miller, 802 F. App'x 741, 748–49 (4th Cir. 2020); Orn v. City of Tacoma, 949 F.3d 1167, 1177–79, 1181 (9th Cir. 2020).

66. *See* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. (forthcoming 2021) (manuscript at 30–37), https://ssrn.com/abstract=3652566 [https://perma.cc/LGC9-M858].

court of appeals must then determine its jurisdiction, which can require more effort.

All of that work is unnecessary. And while the appeal is pending, district court proceedings have normally stalled. Qualified immunity is supposed to shield defendants from the burdens of litigation, such as discovery. So district courts often stay proceedings pending the appeal. Little or no progress is made while the case is on appeal. When the court of appeals eventually dismisses a fact-based qualified-immunity appeal, it puts the parties right back where they were when the district court denied qualified immunity, with nothing to show for all the time spent on appeal.

These delays can be substantial. Even when an appeal involves nothing but a challenge to the factual basis for the immunity denial, it can take a year or longer to resolve. Last year's cases illustrate as much. According to the district court dockets in the 44 cases cited above, the time between the notice of appeal and the appellate decision averaged over 440 days.

IV. SANCTIONING QUALIFIED-IMMUNITY APPEALS

It is not clear why defendants so frequently flout *Johnson*. Perhaps they are unaware of *Johnson*. Or perhaps they just want the delay—and often the stay of discovery—that comes from the appeal. Delay benefits defendants in these cases.[67] And defendants can use these appeals to wear down plaintiffs.[68]

Whatever the reason, fact-based qualified-immunity appeals serve no legitimate purpose. They should be discouraged. Perhaps the Supreme Court could take an appropriate case and reiterate the narrow scope of qualified-immunity appeals.[69] Or perhaps statutory or rule-based reforms could do the trick.[70] These reforms could do away with qualified-immunity appeals entirely or make them discretionary, thereby disarming them as a tool for delay.

In the meantime, defendants seem to have little to fear from flouting *Johnson*. The courts of appeals have done little to deter this abuse of the right to appeal from the denial of qualified immunity. The courts of appeals occasionally offer some harsh words at oral argument or in an opinion.[71] And sanctions appear to

67. *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1890 n.23 (2018); *see also* 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").

68. *See* Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1121 (2020).

69. *See* Lammon, *supra* note 34, at 61.

70. *See id.* at 65–69; Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169, 183 (2019).

71. *See, e.g.*, Sanford v. City of Detroit, 815 F. App'x 856, 858–59 (6th Cir. 2020) ("[The defendants] brazenly seek to have us revisit the district court's assessment of the relevant evidence, which in this interlocutory appeal we will not do."); Oral Argument at 14:14–14:50, 39:30–41:30, Betton v. Belue, 942 F.3d 184 (4th Cir. 2019) (No. 18-1974), http://www.ca4.uscourts.gov/OAarchive/mp3/18-1974-20190918.mp3.

be rare. I could find only four instances in which the courts of appeals sanctioned defendants for violating *Johnson*.[72]

Sanctions, however, seem appropriate. Under Federal Rule of Appellate Procedure 38, a court of appeals can impose sanctions for a frivolous appeal: "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."[73] An appeal is frivolous if it has no chance of success.[74] And a defendant who challenges the factual basis for an immunity denial without invoking an exception to *Johnson* should have zero chance of success. That's been the law for 25 years. The only explanation for these appeals is an ignorance of *Johnson* or an effort to delay the litigation and harass the plaintiff. Rule 38 sanctions are appropriate to deter these sorts of abusive appeals that are brought to delay the resolution of litigation.[75]

So it's high time for plaintiffs to seek—and courts of appeals to order—sanctions for fact-based qualified-immunity appeals. Identifying these appeals can be as easy as comparing the defendant's opening brief on appeal to the district court's opinion on the immunity denial. If the defendant presents facts different than those taken as true by the district court, the plaintiff can then file a motion for sanctions.

Further, if *all* of the defendant's arguments rest on facts different than those that the district court took as true, the plaintiff has additional options. In addition to seeking sanctions, an aggressive plaintiff might ask the court of appeals to suspend briefing—the plaintiff should not have to respond with a full brief when the court lacks jurisdiction over the appeal—and seek summary affirmance. An especially aggressive plaintiff might also consider asking the district court to declare the appeal frivolous, which would allow the district court to proceed with the action despite the qualified-immunity appeal.

Even if plaintiffs don't ask for sanctions, the courts of appeals should consider issuing them on the court's own initiative. These appeals don't harm only the plaintiffs. They also harm the court of appeals and other litigants—the fact-based qualified-immunity appeal distracts the court from other parties who took proper appeals. And plaintiffs might understandably hesitate to seek sanctions, concerned that litigation over the sanctions would only further delay any progress in the underlying case. In such a case, the court of appeals can order a defendant to show cause why the defendant should not be sanctioned.

72. *See* Howlett v. City of Warren, No. 19-2460, 2021 WL 1149694, at *2–3 (6th Cir. Mar. 25, 2021); Aquino v. Cnty. of Monterey Sheriff's Dep't, 698 F. App'x 901, 901 (9th Cir. 2017) (mem.); McDonald v. Flake, 814 F.3d 804, 810 (6th Cir. 2016); Ruffino v. Sheahan, 218 F.3d 697, 701 (7th Cir. 2000).

73. FED. R. APP. P. 38.

74. *See, e.g.*, Wachovia Sec., LLC v. Loop Corp., 726 F.3d 899, 909–10 (7th Cir. 2013).

75. *See id.*

V. CONCLUSION

Johnson's prohibition on reviewing the genuineness of fact disputes is the one seeming exception to the expansion of qualified-immunity appeals. Those appeals are an immense procedural hurdle in civil-rights litigation. *Johnson* was supposed to keep that hurdle from being too high. But defendants have ignored *Johnson* and, in the process, added cost and delay to civil-rights litigation. The flouting of *Johnson* needs to stop. And sanctions might be the only reliable tool for doing so.