UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 02-16424

PETER EVANS, et al.,
Plaintiffs/Appellees,

vs.

CITY OF ZEBULON, et al.,
Defendants/Appellants.

EN BANC BRIEF
for Amici Curiae, American Civil Liberties Union of Florida, Inc., American Civil Liberties Union of Georgia, Inc. and American Civil Liberties Union of Alabama, Inc., in Support of Appellees and Affirming Denial of Summary Judgment

On appeal from the United States District Court
for the Northern District of Georgia

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 400,000 members dedicated to protecting the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Amici, American Civil Liberties Union of Florida, American Civil Liberties Union of Georgia, Inc., and American Civil Liberties Union of Alabama, Inc., are three of the dozens of statewide ACLU affiliates dedicated to protecting liberty and equality in their respective states. Amici are frequently involved in litigation against government officials in the Eleventh Circuit, and filed a brief with the Supreme Court in *Hope v. Pelzer*, 536 U.S. 730 (2002). The qualified immunity standard applied by the Eleventh Circuit directly affects Amici's programs.

Amici are authorized to file this Brief by Fed. R. App. Pro. 29(a). The parties consent to and do not oppose the filing of this Brief.

STATEMENT OF ISSUE

Whether the District Court properly denied Summary Judgment based on qualified immunity to a police officer who illegally and abusively strip-searched two pre-trial detainees?

SUMMARY OF ARGUMENT

The Supreme Court's recent decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), significantly changes the Eleventh Circuit's qualified immunity analysis. No longer need a previously decided, "materially similar" case exist. Instead, in order to defeat qualified immunity, it is enough if the government official is on "fair notice" that his conduct is wrong.

The Supreme Court's more recent decision in *Groh v. Ramirez*, 124 S. Ct. 1284 (2004), further demonstrates how far the Eleventh Circuit has strayed. *Groh* builds on *Hope* and establishes that governmental officials bear the burden of justifying an excuse from liability for unconstitutional conduct. Materially similar cases need not exist. Binding precedent is not necessary. Factual conclusions, moreover, should not be drawn on interlocutory appeal. In sum, the time has come for this Court to reexamine its qualified immunity jurisprudence.

The District Court properly concluded that the law surrounding strip-searches was clear at the time of the Appellant's wrong. It thus properly concluded that Appellees presented sufficient evidence to overcome Appellant's motion for summary judgment based on qualified immunity. The allegations and testimony, taken as true, present genuine issues of material fact surrounding Appellant's use of force against Appellees and preclude summary judgment.

ARGUMENT

I. The Supreme Court's Decision in *Hope v. Pelzer* Replaces this Court's "Materially Similar" Approach With a Fair Warning Standard.

In its June 2002 decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court handed an important victory to civil rights plaintiffs in America, and particularly in the Eleventh Circuit. The *Hope* Court held that a plaintiff need not point to a prior court ruling involving similar facts to overcome qualified immunity. Rather, government officers can be held liable as long as they had "fair warning" that their conduct was illegal or impermissible. Noted constitutional authorities, like Erwin Chemerinsky, have observed that the Supreme Court's opinion in *Hope* marked an important change in the law of qualified immunity, one that "promises to make it much easier for civil rights plaintiffs to obtain justice." Erwin Chemerinsky, *A Plaintiff-Friendly Standard for Civil Rights Cases*, Trial (September 2002). *See also* Erwin Chemerinsky, *Supreme Court Review*, 51 U. Kansas L. Rev. 269, 289 (2003) ("I think the case [*Hope*] is crucial in saying there doesn't have to be a case on point.").

Hope's resolution in the Eleventh Circuit and subsequent reversal by the Supreme Court bear witness to Professor Chemerinsky's praise. Hope, an inmate assigned to a chain gang at the Limestone Correctional Facility in Alabama in 1995,

was twice handcuffed to a "hitching post" as punishment for disruptive behavior. *Hope v. Pelzer*, 240 F.3d 975, 977 (11th Cir. 2001). "Hope was cuffed ... with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet." *Id.* at 978.

Hope sued his tormentors under the Eighth Amendment, only to have his case dismissed based on qualified immunity. *Id.* at 977. On appeal, the Eleventh Circuit concluded that while "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment," *id.* at 980, "a factfinder [could] conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious," *id.* at 978, and that the hitching post's illegality "could be inferred from [prior] opinions," *id.* at 981, the defendants were still entitled to qualified immunity. "Despite the unconstitutionality of the prison practice and, therefore, the guards' actions, there was no clear, bright-line test established in 1995 that would survive our circuit's qualified immunity analysis." *Id.* The Court explained that "it is important to analyze the facts in ... [prior] cases, and determine if they are 'materially similar' to the facts in the case in front of us." *Id.* "[A]nalogous" facts,

the Court concluded, are not enough. *Id.* Instead, the facts must be "'materially similar' to Hope's situation." *Id.*

In reversing, the Supreme Court disavowed the Eleventh Circuit's analysis: "the Court of Appeals required that the facts of previous cases be 'materially similar to Hope's situation'. This rigid gloss on the qualified immunity standard ... is not consistent with our cases." *See Hope,* 536 U.S. at 739 & n.9. It continued:

> officials can still be on notice that their conduct violates established law even in novel factual circumstances. ... Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. ... [T]he salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Id. at 741.

The Supreme Court cited *Lassiter v. Alabama A & M*, 3 F.3d 1482 (11th Cir. 1993), *overruled in part*, 28 F.3d 1146 (1994) (en banc), as an additional, draconian example. The plaintiff there, Lassiter, was discharged by Alabama A & M without being given a proper hearing. He sued the University and several officials in their individual capacities under the federal Due Process Clause, which generally requires prior hearings for public-sector employees with "legitimate claims of entitlement" to continued employment. *See Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972). Lassiter argued that a written contract and personnel manual

created his claim to "entitlement," which obligated the University to hold a hearing. The District Court dismissed Lassiter's claims against the officials based on qualified immunity. This Court initially reversed, concluding "the law was clear that an employee with a contractual expectation of continued employment had a property interest in that employment." 3 F.3d at 1486 (citing *Roth*, 408 U.S. at 577-78). "Because the law was clearly established," the panel explained, "the [defendants'] ... assertion that the contract is unclear is relevant only to Lassiter's ability to prove his claim. An uncertainty in the facts does not give rise to qualified immunity." 3 F.3d at 1486.

The en banc Court, however, overturned the panel's decision. Even though it found that "[n]o new rules need to be announced to decide this case," the Court still concluded that the defendants were entitled to immunity. 28 F.3d at 1149. "For the law to be clearly established ..., the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Id.* "Because it was not established as a matter of law in Alabama that either the contract's words or the manual's words or both would support aproperty right for Lassiter, the law was also not clearly established that Lassiter was, when defendants acted, due a hearing." *Id.* at 1151.

If there remained any question about the proper analysis following *Hope*, it was laid to rest by *Groh v. Ramirez*, 124 S. Ct. 1284 (2004). In *Groh*, an ATF agent (Groh) presented a detailed warrant application and affidavit to a Magistrate describing a local residence to be searched and guns to be seized. Unfortunately, the actual warrant signed by the Magistrate, and executed by Groh, failed to describe the items to be seized. The Supreme Court ruled not only that Groh's search violated the Fourth Amendment, but that he was not entitled to qualified immunity either. The rule against warrantless searches of homes, the Court explained, was clearly established over two decades ago in *Payton v. New York*, 445 U.S. 573 (1980). In the absence of precedent suggesting that reliance on a plainly defective warrant was excused or immunized, the Court concluded, Groh should have known that his conduct was unlawful. Importantly, the Court in *Groh* placed the burden on the defendant (Groh) to show specific cases that supported immunity: "Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet [expressed in *Payton*], [Groh] is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." 124 S. Ct. at 1294. *Groh* thus makes doubly clear that plaintiffs need not point to materially similar cases to defeat immunity. Given a clear general

rule, the burden is on the governmental defendant to point out specific cases justifying immunity.

The Eleventh Circuit's error in *Hope* (and before that, *Lassiter*) was twofold: first, its myopic focus on factual identity; second, its placing the burden on plaintiffs to uncover these factually identical cases. As made clear by the Supreme Court in *Hope*, factual similarity is not the touchstone of qualified immunity. The "salient question," instead, is "fair warning." Whether an official had fair warning is judged under the same standard applied to criminal defendants under the Due Process Clause. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583 (1998). As stated in *Hope*, 536 U.S. at 740 n. 10, "the qualified immunity test is simply the adaptation of the fair warning standard to give officials ... the same protection from civil liability ... that individuals have traditionally possessed in the face of vague criminal statutes." And as demonstrated by *Groh*, the burden of proving reasonable reliance is on the defense. It is not the plaintiff's burden to disprove reasonable reliance. There is no presumption in favor of qualified immunity.

This analysis is not overly formalistic or unduly burdensome. Like Due Process's vagueness doctrine, qualified immunity is designed to protect wrongdoers who could not have foreseen the unlawfulness of their conduct. Neither doctrine

presumes protection and neither is intended to generally shield aberrant behavior. How many criminals, after all, successfully invoke vagueness? It can hardly be said that most criminal defendants are immune because they lack fair warning. Armacost, *supra,* at 593. Even assuming that constitutional prohibitions, like the ban on racial discrimination, sexual harassment and police brutality, are ten (or even one-hundred) times less clear than criminal laws,[1] it is hard to understand why government officials so regularly escape liability in the Eleventh Circuit.

Before Hope, most government officials – almost all – were awarded qualified immunity by the Eleventh Circuit. Using its "materially similar" analysis, *see, e.g., Rowe v. Fort Lauderdale,* 279 F.3d 1271 (11th Cir. 2002), the Eleventh Circuit carefully sifted through the peculiar facts of one case in order to distinguish it from another. Even minor discrepancies justified distinctions, which in turn justified an award of immunity. *See, e.g., Marsh v. Butler County*, 268 F.3d 1014,

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[1] *See* Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 Cornell L. Rev. 1503, 1524-25 (1999) ("Constitutional law is no more indeterminate than any other legal field. It is sufficiently puzzling to make it interesting and is sometimes frustrating because of the patent and latent politics that infect opinions. Yet both the legal logic and politics of constitutional decision making are fairly predictable. ... Legal indeterminacy is unfortunate, but is an insoluble constant that plagues the American legal system. Excusing governmental violations may be wise policy for some other reason, but it does not flow from any unique concern over intractable constitutional decision making.").

1032 (11th Cir. 2001) (en banc) (observing that "minor variations in some facts ... might be very important"). Because § 1983 plaintiffs are seldom able to locate reported decisions with identical, or even "materially similar," facts, qualified immunity in the Eleventh Circuit by 2002 became "almost-absolute immunity."

The Eleventh Circuit's analysis generated dozens of questionable holdings – many of which would have come out differently under the Supreme Court's fair warning standard. *Lewis v. McDade*, 250 F.3d 1320, 1321 (11th Cir. 2001), which awarded qualified immunity to a prosecutor who "ran a DA's office rife with gender-discrimination," is one example. Despite horrendous facts, *see id.* at 1321 (Barkett, J., dissenting), the Court concluded that "qualified immunity protects [the defendant] from civil liability because there [was] no pre-existing case which would have put him on notice ...." *Id.*[2]

Prior to *Hope*, conduct that would not be immunized in any other Circuit was often protected in the Eleventh. A public employee claiming workplace retaliation based on protected speech, to use one example, was generally barred from recovering damages. *See Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir.

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[2]Less egregious facts have caused most other circuits to deny qualified immunity in the context of sexual harassment. *See, e.g., Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 800 n.2 (6th Cir. 2000); *Johnson v. Martin*, 195 F.3d 1208, 1220 (10th Cir. 1999); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997).

1994).[3] The same proved true for protestors (and lawyers) who used curse words in public. *See, e.g., Gold v. City of Miami*, 121 F.3d 1442, 1444 (11th Cir. 1997) (awarding qualified immunity to officer who arrested attorney for stating that "police don't do shit").[4]

Space constraints prevent Amici from detailing an exhaustive list of questionable precedents prior to *Hope*. Suffice it to say that the Eleventh Circuit, pre-*Hope*, found qualified immunity in literally every constitutional context imaginable. In addition to those cases discussed above, the Eleventh Circuit upheld qualified immunity defenses in racial discrimination cases,[5] those involving free

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[3]*Contrast Myers v. Hasara*, 226 F.3d 821 (7th Cir. 2000) (refusing to award qualified immunity in case involving retaliation based on speech). Amici recognize that on occasion the Eleventh Circuit denied immunity. *See, e.g., Cooper v. Smith*, 89 F.3d 761 (11th Cir. 1996) (refusing qualified immunity in *Pickering* context). This result, however, proved the exception in the Eleventh Circuit.

[4]Every other Circuit to consider this issue has found that arrests based on profanity or disagreeable speech violate clearly established First Amendment standards. *See, e.g., Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162 (5th Cir. 1997); *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997); *MacKinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995); *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994); *Gainor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992); *Enlow v. Tishomingo County*, 962 F.2d 501, 509-10 (5th Cir. 1992); *Buffkins v. City of Omaha*, 922 F.2d 465 (8th Cir. 1990); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990); *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987).

[5]*See, e.g., Mencer v. Hammonds*, 134 F.3d 1066, 1070-71(11th Cir. 1998); *see also Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997). *See* Stephen B. Bright, *Can Judicial Independence be Attained in the South?*

speech,[6] charges of deadly force,[7] illegal searches[8] and unlawful arrests,[9] claims of sexual abuse,[10] unsanitary prison conditions[11] and deliberate neglect[12] under the Eighth Amendment, and both procedural[13] and substantive[14] claims under the Due

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Overcoming History, Elections, and Misperceptions about the Role of the Judiciary, 14 Ga. St. L. Rev. 817, 841-42 (1998) ("The [Eleventh Circuit] has also frequently found those accused of racial discrimination or other constitutional violations to be immune from suit").

[6]*See, e.g., Denno v. School Bd. of Volusia County*, 182 F.3d 780 (11th Cir. 1999) (officials immune for suspending student who brought Confederate flag to school).

[7]*See, e.g., Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001) (officer immune from liability for using deadly force and shooting into moving vehicle).

[8]*See, e.g., Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001) (officers immune for strip searching detainee arrested for drunk driving).

[9]*See, e.g., Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998) (officers immune for arresting traveling minister for disorderly conduct).

[10]*See, e.g., Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994) (officials immune in connection with sexual abuse of youthful detainee by center employees).

[11]*See, e.g., Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998) (prison officials immune for poor prison conditions).

[12]*See, e.g., Sanders v. Howze*, 177 F.3d 1245 (11th Cir. 1999) (failure to prevent suicide by prisoner).

[13]*See, e.g., Harbert Intern, Inc. v. James*, 157 F.3d 1271 (11th Cir. 1998) (finding immunity from liability for Procedural Due Process and Fifth Amendment Takings violations).

[14]*See, e.g., Santamorena v. Georgia Military College*, 147 F.3d 1337 (11th

Process Clause. The Eleventh Circuit "has earned a reputation as being the circuit of 'unqualified immunity'." Jacob E. Daly, *Statutory Civil Rights*, 53 Mercer L. Rev. 1499, 1556 (2002).

Given the Eleventh Circuit's history and the Supreme Court's explicit language rejecting such a rigid approach, it is not difficult to understand how *Hope* changed things. Unfortunately, while the Eleventh Circuit has sometimes recognized *Hope*'s impact,[15] it has more often ignored it. Following *Hope*, the Supreme Court vacated and remanded three Eleventh Circuit opinions for reconsideration. In two of the three, the Court on remand, while offering lip-service to *Hope*, awarded the defendants qualified immunity. In *Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001), *vacated*, 536 U.S. 730 (2002), *affirmed on remand*, 321 F.3d 1299, 1300 (11th Cir. 2003), police officers shot an unarmed

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Cir. 1998) (officials immune from liability for rape of female student on college campus).

[15]Three recent Eleventh Circuit panels recognized the import of *Hope*. In *Holloman v. Harland*, Nos. 01-13864 & 01-15094 (11th Cir., May 28, 2004), the Court ruled that school authorities who disciplined students for not joining in the Pledge of Allegiance were not entitled as a matter of law to qualified immunity. In *Vineyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002), the Court relied on *Hope* to reject qualified immunity in an excessive force context. And in *Holmes v. Kucynda*, 321 F.3d 1069 (11th Cir. 2003), the Court rejected qualified immunity for an unlawful arrest. Were it not for the Court's recent awards of immunity in the other cases discussed, Amici would be encouraged by these developments.

woman eight times. Rejecting the jury's findings that this force was unnecessary and excessive, as well as the conclusion of the District Court and a prior appellate panel that the police should have known better, the Court found that the officers were entitled to immunity.

In *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *affirmed on remand*, 323 F.3d 950 (11th Cir. 2003), schoolchildren were strip-searched in a vain quest for $26. Although the Court had "little trouble concluding" that the searches were unconstitutional, were "highly intrusive ... [and] clearly represent[ed] a 'serious intrusion upon the student's personal rights,'" 261 F.3d at 1168-69, it still awarded the officials immunity. It ignored a decade's worth of precedent[16] invalidating strip searches in the absence of particularized suspicion. *See also Jenkins v. Talladega City Bd. of Educ.*, 95 F.3d 1036 (11th Cir. 1996), *reversed*, 115 F.3d 821 (11th Cir. 1997) (en banc).

Only in *Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *affirmed on remand*, 316 F.3d 1210 (11th Cir.), *reversed sua sponte*,

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[16]Courts have ruled for well over a decade that strip searches in schools, absent particularized suspicion, violate the Fourth Amendment. *See Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp.2d 833 (N.D. Ill. 2001); *Konop v. Northwestern Sch. Dist.*, 26 F. Supp.2d 1189, 1205 (D.S.D. 1998); *Oliver v. McClung*, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995); *Burnham v. West*, 681 F. Supp. 1160, 1165 (E.D.Va 1987).

343 F.3d 1323 (11th Cir. 2003), did the Eleventh Circuit properly apply *Hope*. There, police shot into a truck without warning, seriously wounding the passenger, when the truck's driver failed to immediately stop. Even though a jury could have found that neither the victim nor driver were threats, and that deadly force was unnecessary and excessive, the Eleventh Circuit (before *Hope*) concluded that the officers were entitled to qualified immunity.

Following *vacatur* and remand from the Supreme Court, the Eleventh Circuit again concluded that the police officer was entitled to qualified immunity. 316 F.3d at 1213. Recognizing that excessive force claims have been clearly established for a number of years throughout the United States, and rejecting the Eleventh Circuit's ill-starred "materially similar" formula (per the Supreme Court's instruction) Judge Noonan dissented: "it is difficult to discern why, if police officers in Tennessee and Minnesota and Connecticut were on notice that the use of lethal force to restrain a suspect is unreasonable, Georgia police officers should be supposed slow to have learned." *Id.* at 1215 (Noonan, J., dissenting).

Not long after handing down its split decision in *Vaughan,* the Eleventh Circuit *sua sponte* granted rehearing and rightly changed its mind. The court observed that "the Supreme Court in *Hope* cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under

consideration. The 'salient question' the [Supreme] Court said, is whether the state of the law gave the defendants 'fair warning'." 343 F.3d at 1332. "Taking the facts as alleged by [the Appellee], an objectively reasonable officer ... could not have believed that he was entitled to use deadly force ...." *Id.*

All three cases, *Willingham*, *Thomas* and *Vaughan*, involved egregious violations that would have resulted in denials of qualified immunity in any other circuit. It is unfortunate that in two of those cases the wrongdoers were insulated from relief by the Eleventh Circuit's continuing use of its "materially similar" standard. It is equally unfortunate that the original panel in the present case sought to award qualified immunity to a government official who, if the Appellees' allegations are believed, clearly has no respect for human dignity or the rule of law. Nothing is served by summarily protecting government officials under these circumstances. Quite to the contrary, summary judgment under these circumstances sends the wrong message to police and prison guards. It tells them they can do whatever they want. This is not what the United States is about, domestically or abroad. *See* Bradley Graham and David Von Drehle, *Bush Apologizes for Abuse of Prisoners*, Wash. Post, May 7, 2004, at A1 (stating that President Bush apologized publicly for American military's abuse of Iraqi prisoners).

Numerous cases from other Circuits have employed *Hope*'s reasoning to

reject qualified immunity in the context of excessive force. In *Wall v. County of Orange,* 364 F.3d 1107 (9th Cir. 2004), for example, the Ninth Circuit reversed a District Court's award of qualified immunity in a case charging a police officer with excessive force. "If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This requirement does not mean that the very action at issue must have been held unlawful before qualified immunity is shed." *Id.* at 1111. Likwise, in *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003), where the estate of a motorist who was fatally shot by police brought suit for excessive force, the Second Circuit affirmed the District Court's denial of qualified immunity. "[W]hether it was reasonable for [the police officer] to believe that his life or person was in danger," the court concluded, was a question for the jury. The Third Circuit reached this same conclusion in *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004), another excessive force case. Following the District Court's denial of summary judgment based on qualified immunity, police charged with excessive force took an interlocutory appeal to the Third Circuit. The Third Circuit affirmed because a "reasonable jury could find from these facts that [the victim] did not present a threat to anyone's safety." *Id.* at 200.

These cases, and numerous others in various constitutional settings, *see, e.g.,*

Suboh v. District Attorneys Office of Suffolk District, 298 F.3d 81 (1st Cir. 2002) (denying qualified immunity where custody was unlawfully transferred to grandparents who fled with child); *Loria v. Gorman*, 306 F.3d 1271 (2d Cir. 2002) (denying qualified immunity in fourth amendment context); *Atkinson v. Taylor*, 316 F.3d 257 (3d Cir. 2003) (denying qualified immunity to prison guards who subjected prisoner to environmental tobacco smoke); *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002) (denying qualified immunity where suspect detained in police car for three hours with closed windows in ninety degree heat); *Bell v. Johnson*, 308 F.3d 594 (6th Cir. 2002) (denying qualified immunity where guard seized prisoners legal papers and medical dietary material); *Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003) (denying qualified immunity where sheriff pointed loaded gun at deputies); *Roska v. Peterson*, 304 F.3d 982 (10th Cir. 2002) (denying qualified immunity where police summarily seized child), prove that *Hope* is more than a restatement of the Eleventh Circuit's prior, "rigid" approach. *Hope* changes everything in the Eleventh Circuit.

II. A Consensus of Cases Clearly Establish that Suspicionless Strip-Searches of Suspected Misdemeanants Violate the Fourth Amendment.

Clearly established law, according to the Eleventh Circuit, can only be found in the published decisions of the Supreme Court, Eleventh Circuit, and the supreme

court of the state where the action arose. *See Hamilton v. Cannon,* 80 F.3d 1525, 1531-32 n.7 (11th Cir. 1996); *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995); *Jenkins v. Talladega City Bd. of Educ.,* 115 F.3d 821 (11th Cir. 1997) (en banc). Persuasive precedent is irrelevant in the Eleventh Circuit.

Hope, and the Supreme Court's ruling in *Wilson v. Layne,* 526 U.S. 603, 617 (1999), prove that this practice is wrong. *Hope* makes clear that case-law is not even needed to overcome immunity. The question is one of fair warning, notice and common sense. In *Wilson*, the Supreme Court addressed for the first time whether search warrants authorize media access to individuals' homes. It concluded they do not. In awarding qualified immunity to the responsible officers, it looked not only to binding precedent, but also to persuasive precedent. The question, according to the Supreme Court in *Wilson*, is whether a "consensus of persuasive authority" put the wrongdoers on notice. Because of *Wilson* and *Hope*, this Court's contrary practice, *see, e.g., Marsh v. Butler County*, 268 F.3d at 1032 n.10, is clearly misguided.

Every other Circuit to address the matter since *Wilson v. Layne* has reached this conclusion. *See, e.g., Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001); *Jacobs v. Chicago*, 215 F.3d 758, 767 (7th Cir. 2000); *Vaughn v. Ruoff*, 253 F.3d 1124, 1130

(8th Cir. 2001); *Virgili v. Gilbert*, 272 F.3d 391, 393 (6th Cir. 2001); *Doe v. Delio*, 257 F.3d 309, 332 (3d Cir. 2001) (Nygaard, J., concurring and dissenting). Indeed, even before *Wilson* most courts concluded that persuasive authority was relevant to the question of clearly established law. *See Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988); *Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988); *Biergegu v. Reno*, 59 F.3d 1445, 1459 (3rd Cir. 1995); *Capoeman v. Reed*, 754 F.2d 1512, 1514-15 (9th Cir. 1985). This Court's contrary approach should be discarded.[17] It is a remnant of bygone days that, in light of *Hope*, cannot be maintained.

Lower court cases from across the country have condemned suspicionless strip-searches of pre-trial detainees charged with misdemeanors for two decades. *Hills v. Bogan*, 735 F.2d 391, 394-95 (10th Cir. 1984); *Giles v. Ackerman*, 746 F.2d 614, 618-19 (9th Cir. 1984); *Weber v. Dell*, 804 F.2d 796, 804 (2d Cir. 1986); *Watt v. Richardson Police Department*, 849 F.2d 195, 196 (5th Cir. 1988); *Swain v. Spinney*, 117 F.3d 1, 9 (1st Cir. 1997). The majority in the present case erred by not looking to this consensus of persuasive precedent for guidance. *See Evans*, 351

[17] Amicus is not arguing that a consensus of persuasive cases always overcomes immunity. Nor is Amicus suggesting that a consensus of persuasive cases can displace Eleventh Circuit precedent. Amicus's argument is that persuasive authority can prove relevant to the qualified immunity inquiry.

F.3d at 494 n.15 ("Only decisions of the Supreme Court, the Eleventh Circuit, and the highest court of the relevant state clearly establish law for purposes of qualified immunity."). Had the panel properly looked to persuasive precedent, per the Supreme Court's directions in *Wilson* and *Hope,* it would have found that suspicionless strip-searches are clearly illegal.

This unanimity was recently recognized in *Savard v. Rhode Island*, 338 F.3d 23 (1st Cir. 2003) (en banc). There, pre-trial detainees who were accused of non-violent and non-drug-related crimes were, pursuant to state policy, often commingled with convicted prisoners. Before entering the prison, all detainees were required to undergo strip-searches. The District Court concluded that the prison guards who conducted the searches were entitled to qualified immunity. On appeal, the First Circuit initially reversed. *See Savard v. Rhode Island*, 320 F.3d 34 (1st Cir. 2003). Like all other courts to address the issue, it concluded that strip-searches of pre-trial detainees are unconstitutional unless supported by reasonable suspicion. Because this rule was established no later than 1996 in the First Circuit, the guards should have been denied immunity.

On rehearing en banc, an evenly divided First Circuit affirmed the District Court's award of qualified immunity. Four of the judges found that because the pre-trial detainees were commingled with those convicted of violent crimes and

held in a maximum-security prison, application of the otherwise clear rule prohibiting strip-searches was murky. All eight judges agreed that if the detainees had been held separately, and not commingled with convicted prisoners, the strip searches would have been clearly illegal. "We declared [in *Swain v. Spinney*, 117 F.3d 1, 9 (1st Cir. 1997)] the strip search unconstitutional, holding that strip-searching an arrestee ordinarily requires at least reasonable suspicion that the person arrested is concealing contraband or weapons." 338 F.3d at 29 (Selya, J., speaking for four members of the court). Only because "[t]here are important differences between detaining an arrestee in virtual isolation and introducing an arrestee into the general population of a maximum security prison" did Judge Selya conclude the prohibition was not clear. *Id.* at 29. Judge Bownes, writing for the other four judges, stated: "*Swain* states unequivocally that reasonable suspicion is required to strip search arrestees and that this requirement was clearly established as early a 1993, well before the dates in question here. These rulings were in conformity with circuits across the country." *Id.* at 37 (Bownes, J., speaking for four members of the court). It was thus clear long before 1999 that strip-searching those arrested for minor crimes without suspicion violated the Fourth Amendment. *See also Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000) (holding that prison policy requiring strip searches of all those being detained did not comport with

Fourth Amendment).

III. Interlocutory Appellate Factfinding Is Improper.

The Eleventh Circuit, unlike its sister Circuits, has an unfortunate history of engaging in interlocutory appellate factfinding. In *Mencer v. Hammonds*, 134 F.3d 1066 (11th Cir. 1998), for example, the plaintiff (Mencer) sued under § 1983 claiming a racially motivated discharge. The District Court denied summary judgment based on qualified immunity, finding that Mencer had "produced sufficient evidence of conduct violative of the equal protection clause on the part of [the defendant to] ... violate[] clearly established law." *Id.* at 1068. Qualified immunity was, in Amici's opinion, properly denied. *See Holmes v. Kucynda*, 321 F.3d 1069 (11th Cir. 2003).

On interlocutory appeal, this Court concluded that it was authorized to "review the district court's preliminary [factual] determination as a means of reaching the issue of clearly established law." 134 F.3d at 1070. It explained that a "denial of qualified immunity at summary judgment necessarily involves two determinations: 1) that on the facts before the court, taken in the light most favorable to the plaintiff, a reasonable jury could find that the defendant engaged in certain conduct, and 2) that the conduct violated 'clearly established law' ...." *Id.*

Even though it recognized that the first determination was not appealable, *id.* (citing *Johnson v. Jones*, 515 U.S. 304 (1995)), the Court concluded that because a "determination of whether the evidence supports finding that a defendant engaged in certain conduct ... is necessary to reach a determination of whether that conduct violated clearly established law," *id.*, it could review the District Court's factual analysis. Contrary to the District Court's finding, the Eleventh Circuit found insufficient evidence of discrimination and awarded the defendant qualified immunity. *Id.* at 1071. *See also Stanley v. City of Dalton*, 219 F.3d 1280 (11th Cir. 2000) (finding insufficient evidence on interlocutory appeal).

Mencer ably demonstrates how far astray the Eleventh Circuit has gone. Some rights, like the right to be free from invidious racial discrimination, have been so thoroughly litigated that their contours are crystal clear. *See, e.g., Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997); *Tang v. State of Rhode Island, Dep't of Elderly Affairs*, 120 F.3d 325, 327 (1st Cir. 1997). *See generally* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 Yale L. J. 259, 277 (2000) ("Someone who purposely discriminates against racial minorities cannot claim that he or she reasonably thought such action to be lawful."); Armacost, *supra,* at 591 ("Today, discrimination against someone because she is African-American or Hispanic is viewed as inherently and obviously 'bad' behavior, obviating the need

for qualified immunity").

The law's clarity is thus not at issue in racial discrimination cases. Fact – the defendant's intent – is the only question. As made clear in *Johnson v. Jones*, 515 U.S. 304 (1995), appellate courts should not review the sufficiency of the plaintiff's evidence under guise of qualified immunity on interlocutory appeal. Interlocutory jurisdiction over qualified immunity is confined to questions of law.[18] The *Mencer* Court was thus clearly wrong when it addressed the sufficiency of the plaintiff's proof.[19]

Following *Johnson*, every Circuit – except the Eleventh – has expressly and

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[18]It was argued in *Johnson* that factual issues sometimes append themselves to legal ones, and thus technically fall under an appellate court's pendent appellate jurisdiction. The Supreme Court responded: "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 ...." *Id.* "[T]he court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id.* at 319. Should the lower court fail to make findings or state its assumptions, the Court of Appeals need only review the record to determine "what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Id.* The Supreme Court did not seriously entertain the notion that appellate courts might engage in their own form of fact-finding.

[19]*But see Koch v. Rugg*, 221 F.3d 1283, 1297 (11th Cir. 2000) ("When discriminatory intent is a predicate factual element of the underlying constitutional tort, we have recognized that sufficiency of discriminatory-intent evidence generally is not part of the core qualified immunity analysis" and thus is not subject to interlocutory review).

unequivocally rejected interlocutory review of factual sufficiency in the context of qualified immunity. In *Hulen v. Yates*, 322 F.3d 1229 (10th Cir. 2003), for example, the District Court denied summary judgment to a defendant who allegedly violated the First Amendment by transferring a public-sector employee. On interlocutory appeal, the Tenth Circuit stated that it could "not resolve Defendants' claims that [the plaintiff] cannot show any personal participation by these Defendants in the alleged retaliatory transfer because of his motivation. This is an issue of evidentiary sufficiency, over which we lack jurisdiction in a qualified immunity interlocutory appeal." *Id.* at 1240. Similarly, in *Hamilton v. Leavy*, 322 F.3d 776, 782 (3d Cir. 2002), a case involving deliberate indifference to a prisoner's Eighth Amendment rights, the Third Circuit refused to review "the District Court's 'identification of the facts that are subject to genuine dispute,' but instead ... review[ed] the legal issues in light of the facts that the District Court determined had sufficient evidentiary support for summary judgment purposes." *See also Cavalieri v. Shepard*, 321 F.3d 616, 618 (7th Cir. 2003) ("we have no appellate jurisdiction to the extent disputed facts are central to the case"); *Atkinson v. Taylor*, 316 F.3d 257, 261 (3d Cir. 2003) (same).

Every other Circuit to address the problem agrees that interlocutory appellate review is not the proper time for drawing conclusions about the reasonableness of a

police officer's force. In *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003), for example, the estate of a motorist who was fatally shot by police brought suit for excessive force. The police officer unsuccessfully moved for qualified immunity in the District Court and then took an interlocutory appeal to the Second Circuit. Finding that qualified immunity – "whether it was reasonable for [the police officer] to believe that his life or person was in danger" – constituted the "very question upon which [it and the District Court] found there are genuine issues of material fact," *id.* at 764, the Second Circuit affirmed. Although it had jurisdiction to address the interlocutory appeal, it had no authority to revisit the District Court's assessment of the facts.

The Third Circuit reached this same conclusion in *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004), another excessive force case. Following the District Court's denial of summary judgment based on qualified immunity, police charged with excessive force took an interlocutory appeal to the Third Circuit. The court stated that "if a defendant in a constitutional tort case moves for summary judgment based on qualified immunity and the district court denies the motion, we lack jurisdiction to consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove ...." *Id.* at 192 (quoting *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 61 (3d Cir. 2002)). Because a

"reasonable jury could find from these facts that [the victim] did not present a threat to anyone's safety," *id.* at 200, the Third Circuit affirmed the lower court's denial of summary judgment. *See also Beier v. City of Lewiston*, 354 F.3d 1058 (9th Cir. 2004) (suggesting that interlocutory appeal does not even lie in excessive force case). *See also Kent v. Katz*, 312 F.3d 568 (2d Cir. 2002) (Second Circuit affirms District Court's refusal to award summary judgment and refuses to resolve the factual issues that surrounded lawfulness of arrest); *Gray Hopkins v. Prince George's County*, 309 F.3d 224, 229 (4th Cir. 2002) (Fourth Circuit refuses to assess reasonableness of police officer's force on interlocutory review); *Treats v. Morgan*, 308 F.3d 868, 874 (8th Cir. 2002); *Kinney v. Weaver*, 301 F.3d 253, 261 (5th Cir. 2002).

Concluding that a police officer might have reasonably felt threatened is just the sort of factual conclusion that is left for resolution in the District Court. When the District Court concludes that the factual issue is genuinely disputed, and not ripe for summary judgment, this Court has no authority on interlocutory appeal to disagree.

To be sure, this does not mean that a District Court must deny summary judgment in every case where there exists a genuine issue of material fact. Sometimes the law is simply not clear and summary judgment is in order. Even

when the law is clear, an official might still reasonably (though mistakenly) believe that his actions are lawful, even though the ultimate factual conclusion (reasonableness) is genuinely at issue. The Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001), explained this latter possibility in the context of excessive force. There, in the course of removing a demonstrator from a military base, the officer allegedly delivered the demonstrator a "gratuitously violent shove." Because the ultimate reasonableness of this shove was genuinely at issue, the District Court denied the officer's motion for summary judgment based on qualified immunity. The Supreme Court reversed, concluding that even if the officer had shoved the demonstrator in this fashion, he could have reasonably believed it to be necessary. Even though a jury would have sufficient evidence to return a verdict for the plaintiff, the District Court could still award the officer qualified immunity. This is a far cry, however, from holding that appellate courts have interlocutory jurisdiction to revisit a District Court's assessment of a plaintiff's facts, or to independently judge the sufficiency of a plaintiff's case. *Saucier* means only that the qualified immunity standard applied by a District Court is not necessarily identical to the genuine issue standard generally employed to defeat summary judgment. Although small, there is some room between the two standards. *See Kopec v. Tate*, 361 F.3d 772 (3d Cir. 2004) (reversing District Court's award of qualified immunity to police

officer accused of excessive force because Fourth Amendment principles were clearly established); *Wall v. County of Orange*, 364 F.3d 1107 (9th Cir. 2004) (reversing District Court's award of qualified immunity to police officer charged with excessive force because on plaintiff's "version of the facts, [the officer] used excessive force"). Assuming the District Court applies the proper standards under *Saucier*, a reviewing court's jurisdiction on interlocutory appeal is limited to pure matters of law; it does not include assessing the sufficiency of the plaintiff's evidence, and certainly does not include drawing ultimate factual conclusions – like whether an officer's motivation was racial, *see, e.g., Mencer*, or whether he reasonably feared for his life or safety (as here).[20]

The Eleventh Circuit's tendency to engage in interlocutory factfinding, moreover, is exacerbated by its use of a "heightened pleading" standard for § 1983 cases. In *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003), for example, the plaintiffs alleged that federal agents, at the personal direction of the Attorney General (Reno) and other supervisory officials, used excessive force to enter and search their home. The District Court denied these defendants motions for

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[20]Amici are not arguing that the Eleventh Circuit cannot consider the sufficiency of the evidence following final judgment in favor of the plaintiff. Amici speak to the propriety of this practice only in the context of interlocutory appeals, which are governed by *Johnson*.

summary judgment based on qualified immunity. On interlocutory appeal, this Court reversed and awarded qualified immunity because of the plaintiffs' failure to satisfy the Eleventh Circuit's heightened pleading standard and its unwillingness to draw reasonable inferences in favor of § 1983 plaintiffs. "Given the presumption of legitimacy accorded to official conduct, it would be unreasonable to draw from the alleged facts the inference that the supervisory defendants directed the agents on the scene to engage in the unconstitutional activity ...." *Id.* at 1235. But this is exactly what the Supreme Court's decisions in *Johnson* and *Groh* require. *Johnson* holds that factual issues are not properly considered on interlocutory appeal. The appellate court must give the benefit of any reasonable doubt to the plaintiff. *Groh* holds that the burden is on the defense to establish immunity. There simply is no presumption of legitimacy once the plaintiff has properly stated a constitutional violation.

The Supreme Court in *Crawford-El v. Britton,* 523 U.S. 574 (1998), moreover, expressly rejected a heightened evidentiary standard for § 1983 plaintiffs, and by clear implication any heightened pleading standard. Since that decision, every Circuit to address the matter except the Eleventh, *See, e.g., GJR Investments, Inc. v. County of Escambia,* 132 F.3d 1359, 1367 (11th Cir.1998), and Fifth, *see, e.g.,* Nunez v. Simms, 341 F.3d 385 (5th Cir. 2003), has abandoned

heightened pleading requirements. *See Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1125 (9th Cir.2002); *Harbury v. Deutch,* 233 F.3d 596, 611 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury,* 536 U.S. 403 (2002); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir.); *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir.1998); *Goad v. Mitchell,* 297 F.3d 497 (6th Cir.2002); *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001). *See also Black v. Coughlin*, 76 F.3d 72, 75 (2d Cir.1996) (rejecting heightened pleading before *Britton*). *Contrast Judge v. City of Lowell*, 160 F.3d 67, 72-75 (1st Cir.1998) (retaining heightened pleading standard for some § 1983 claims), *with Greenier v. Pace, Local No. 1188*, 201 F.Supp.2d 172, 177 (D. Me. 2002) (holding that *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) overturns First Circuit's approach).

Although the original panel in the present case properly respected many of the District Court's factual assumptions and inferences, on one important occasion it reached out to draw its own factual conclusion. The record below shows that when Stephens ordered Jordan to remove his clothes, Jordan turned to protest. "A reasonable officer in these circumstances could have interpreted this as resistance to the search, and could have reasonably believed that the application of some force, including a choke hold, to facilitate the search would not violate the Constitution." 351 F.3d at 495. This sort of interlocutory factfinding is impermissible under

Johnson. Appellate courts exercising interlocutory jurisdiction must accept all factual allegations as true. All reasonable inferences and conclusions must be drawn in favor of the plaintiff (the non-moving party). Although a reasonable police officer in Stephens' situation might have felt threatened, a reasonable officer could have just as easily felt secure. Resolution of this ultimate factual conclusion is left to the District Court. It should not be addressed anew by an appellate court exercising interlocutory appellate jurisdiction.

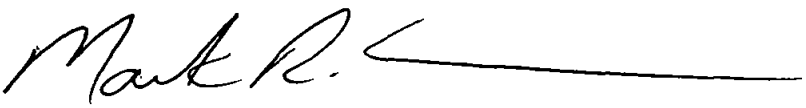
CONCLUSION

Amici do not wish to appear overly pessimistic about the Eleventh Circuit's approach to qualified immunity. Indeed, on occasion this Court has refused to award qualified immunity to public officials. *See, e.g., Holloman v. Harland,* Nos. 01-13864 & 01-15094 (11th Cir., May 28, 2004); *Vinyard v. Wilson,* 311 F.3d 1340 (11th Cir. 2002); *Holmes v. Kucynda*, 321 F.3d 1069 (11th Cir. 2003). The Eleventh Circuit's overwhelming tendency, however, is to stray far from the mainstream of qualified immunity jurisprudence. *See* Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 Cornell L. Rev. 1503, 1508-10 & n.52 (1999). *Hope* and *Groh* make this clear. The result is that governmental officials – especially police – prove immune from liability in the Eleventh Circuit in almost every case. This unfortunate result not only encourages

official lawlessness, it upsets the delicate system of checks and balances upon which our civilized society is based. See Steven Pinker, The Blank Slate: The Modern Denial of Human Nature 332 (2002) ("civil libertarians concern about abusive police practices is an indispensable counterweight to the monopoly on violence we grant the state"); Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 Tulane L. Rev. 149, 155 (2001) ("governmental bullies can and should be punished through monetary damages, both for their own good and for the good of the governed.")

The Eleventh Circuit stands alone in its focus on factual identity, its interlocutory eagerness to review factual sufficiency, its rejection of persuasive precedent, and its predisposition toward immunity. *Hope* and *Groh* are clear calls for moderation and change. Amici respectfully requests that this Court heed those calls.

Respectfully submitted,



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I certify that this Brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B). This Brief contains 6977 words.

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