No. 20-____

IN THE
Supreme Court of the United States

SOK KONG, TRUSTEE FOR NEXT-OF-KIN OF MAP KONG, DECEDENT,

Petitioner,

v.

CITY OF BURNSVILLE, MAKSIM YAKOVLEV, JOHN MOTT, AND TAYLOR JACOBS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN J. MESHBESHER
RICHARD E. STUDENT
MESHBESHER & ASSOCIATES, P.A.
9800 Shelard Parkway
Suite 310
Minneapolis, MN 55441
(612) 332-2000

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1271
david.shapiro@law.northwestern.edu

Counsel for Petitioner

QUESTION PRESENTED

When a district court denies a government official's motion for summary judgment based on qualified immunity, the official often notices an interlocutory appeal. In such a case, the court of appeals generally has jurisdiction over legal questions only, and lacks jurisdiction to review a determination by the district court that "the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

That rule comes with an exception: if the district court's determination of a genuine issue of material fact is "blatantly contradicted by the record," the appellate court need not accept it. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

In this case, the Eighth Circuit rejected a district court's determination of a genuine issues of material fact *without* considering whether the record blatantly contradicted that determination. In doing so, the Eighth Circuit followed a rule adopted by the Eleventh Circuit but rejected by seven other circuits.

The question presented is:

> Whether, on interlocutory review of a denial of qualified immunity, an appellate court may reject a district court's determination of a genuine issue of material fact even if the record does not blatantly contradict that determination.

PARTIES TO THE PROCEEDING

Petitioner Sok Kong, trustee for Map Kong's next of kin, was the Appellee in the Eighth Circuit. Respondents City of Burnsville, Maksim Yakovlev, John Mott, and Taylor Jacobs were Appellants in the Eighth Circuit.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases

Statutes

IN THE
Supreme Court of the United States

SOK KONG, TRUSTEE OF MAP KONG,

Petitioner,

v.

CITY OF BURNSVILLE, MAKSIM YAKOVLEV, JOHN MOTT, AND TAYLOR JACOBS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sok Kong petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's panel opinion (Pet. App. 5a-30a) is published at 960 F.3d 985. The Eighth Circuit's denial of the petition for rehearing en banc (Pet. App. 1a-4a) is published at 966 F.3d 889. The district court's opinion (Pet. App. 31a-86a) is unpublished.

JURISDICTION

The Eighth Circuit issued its opinion on May 29, 2020 and denied Petitioner's petition for rehearing en banc on July 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory*** subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law***

STATEMENT OF THE CASE

1. Before sunrise on March 17, 2016, Map Kong ran away from police officers in a commercial-industrial area of Burnsville, Minnesota. Pet. App. 31a-32a, 45a. The officers opened fire, shot him 15 times, and killed him. *Id.* at 45a-46a.

The chain of events that led to his death had begun about fifteen minutes earlier, when a customer at a McDonald's called the city police department to calmly report that a man holding a knife was "jumpin' back and forth" in a car in the parking lot. *Id.* at 34a-35a. When Officers John Mott and Taylor Jacobs arrived, they saw thirty-eight-year-old Map Kong sitting in the driver's seat of a Pontiac hatchback "shaking erratically" and "slashing a large knife through the air in front of him, as if he was fighting an invisible person." *Id.* at 31a-32a, 38a-39a. Officer Jacobs thought that Kong looked to be "in some sort of distress." *Id.* at 39a. Cars sped along the adjacent Frontage Road and Highway 13 approximately 100 feet away from Kong's car. *Id.* at 8a-9a.

The officers pointed their guns at Kong through the car windows and ordered him to drop the knife, but Kong did not respond. *Id.* at 39a. Officer Jacobs announced to Officer Mott: "If he gets out, I'll go lethal." *Id.* at 40a. As the officers considered how best to surround Kong to tase him without risking crossfire, Officer Mott observed that "[t]his is going to go badly either way." *Id.*

Sergeant Maksim Yakovlev arrived. *Id.* at 42a. Shortly thereafter, the officers decided to break Kong's passenger-side windows. *Id.* at 42a-43a. Officer Jacobs swung his baton into Kong's car

windows while the other officers kept their guns trained on him. *Id.* As the windows shattered, Mott and another officer yelled "drop the knife!" while Officer Jacobs shouted "taser, taser" and fired his taser at Kong. Kong made "various high-pitched, distressed squealing noises." *Id.* at 43a-44a.

About ten seconds later, Officer Jacobs again shot Kong with his taser, causing Kong to fall back in his seat. *Id.* at 44a. Kong then "stumbled out of the driver-side door and fell onto the pavement." *Id.* at 45a. He quickly stood and, still holding the knife, began running away from the officers and away from the McDonald's, toward Frontage Road and Highway 13. *Id.*

At this time, "no pedestrians [were] visible in the [body camera] video[s]." *Id.* at 46a. The officers' body cameras showed one vehicle exiting the McDonald's parking lot approximately thirty feet northwest of Kong, a few cars on Frontage Road, and steady traffic on Highway 13. *Id.* Kong was "running in the direction of Frontage Road, and away from the officers tasing him"—not running towards customers in the McDonald's or towards any vehicles in the parking lot. *Id.* at 46a-47a. A McDonald's employee who saw the incident from inside the restaurant reported that Kong looked "scared" as he ran away. *Id.* at 45a.

With no further warning, Officers Mott, Jacobs, and Yakovlev fired at least twenty-three bullets at the fleeing Kong within a span of three seconds. *Id.* Fifteen bullets hit Kong's side and back, killing him instantly. *Id.*

2. Petitioner Sok Kong, the trustee of Map Kong, brought suit in the United States District Court for

the District of Minnesota under 42 U.S.C. § 1983 against the City of Burnsville and the three officers who shot Map Kong. *Id.* at 32a. Respondents moved for summary judgment on the basis of qualified immunity. *Id.* The district court granted summary judgment as to Petitoner's Fourteenth Amendment medical indifference claim against the officers but denied summary judgment as to Petitioner's Fourth Amendment and state law claims. *Id.* at 32a-33a.

In a detailed 55-page opinion, the district court closely analyzed all four body camera videos. *Id.* at 55a. The court recognized that it must "judge the reasonableness of an officer's use of deadly force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citation and internal quotation marks omitted).

The district court determined that the record presented two genuine issues of material fact as to the Fourth Amendment claim. *Id.* at 56a. First, the court found a genuine issue of material fact as to whether Kong committed a violent felony before the officers shot him. *Id.* at 56a-61a.

Second, the district court found a genuine issue of material fact as to "whether the fleeing Mr. Kong posed a significant and immediate threat of serious injury or death to the surrounding public, simply because he was holding a knife and running in the general direction of highway car traffic." *Id.* at 56a. Viewing the evidence in the light most favorable to Petitioner, the district court determined that Kong "was running *away* from pedestrians and the officers at the time of his death." Pet. App. 64a; *see also id.* at 70a. In addition, "to the extent Mr. Kong was approaching *moving vehicles* on Frontage Road or Highway 13 with a

knife in his hand," he was not "poised to 'either carjack a car or stab somebody.'" Pet. App. 64a. Thus, "a reasonable juror could find that. . . Mr. Kong did not pose a 'threat of serious physical harm' to either the pedestrians or officers he was running away from, or the moving vehicles he was running in the general direction of." Pet. App. 66a (quoting *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985)). The district court also concluded that reasonable jurors "might interpret [Kong's] behavior as scared and confused, rather than violent and confrontational." *Id.* at 64a.

With these genuine issues of material fact established, the district court reasoned that the Eighth Circuit's decision in *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995), defeated qualified immunity. Pet. App. 71a-73a. As the distict court explained, *Ludwig* "established that, without more, it is not constitutionally reasonable to use deadly force against" someone in Kong's position—"a fleeing, emotionally disturbed person armed with a knife, if that person had not previously attacked anybody, if that person is moving away from the officers and other nearby pedestrians, and if that person does not pose an imminent threat of death or grave bodily harm to others." Pet. App. 72a. The district court therefore denied summary judgment as to Petitioner's Fourth Amendment claim. *Id.* at 73a-74a.

3. Respondents filed an interlocutory appeal challenging the denial of qualified immunity. *Id.* at 5a-6a. The Eighth Circuit panel reversed the district court 2-1 in a published decision, holding that the officers were entitled to summary judgment on both the Fourth Amendment claim and the state law claim. *Id.*

The panel majority recognized that for summary judgment purposes, Kong "did not commit a violent felony." *Id.* at 13a-17a. But the panel did not even acknowledge other key factual determinations about the summary judgment record made by the district court: Kong was in no positon to harm anyone in moving vehicles, he appeared "scared and confused, rather than violent and confrontational," and therefore a reasonable juror could find that he did not pose a "'threat of serious physical harm'" to anyone. *Id.* at 64a, 66a. Instead, the Eighth Circuit stated that "Kong ran toward bystanders, including a woman driving only 30 feet away" and therefore "posed a threat to citizens." Pet. App. 14a.

Although the panel majority recited that it must accept the district court's factual analysis "unless blatantly contradicted by the record," it did not even mention the district court's determinations about these critical summary judgment facts—much less inquire whether the record blatantly contradicted those findings. *Id.* at 10a. Instead, the panel majority simply ignored the district court's factual conclusions and supplied its own *de novo* determination that Kong "posed a threat to citizens." *Id.* at 14a.

That conclusion decided the case. *Id.* The panel determined that the officers "would reasonably believe the law allowed them to shoot [Kong] if he posed an immediate and significant threat." *Id.* at 15a. The panel reversed the denial of summary judgment and granted the officers qualified immunity because it believed "the threat [Kong] posed justified lethal force." *Id.* at 16a-18a.

Judge Kelly dissented. *See id.* at 23a. In contrast to the majority, Judge Kelly would have followed the

district court's determinations about the facts viewed in the light most favorable to Kong: he "ran *away* from the officers and bystanders near the restaurant" and therefore "was unlikely to confront, much less harm, any other person."*Id.* at. 25a-26a. Judge Kelly also would have followed the district court's conclusion that "[Kong] was running away from the officers and other pedestrians when he was shot." And she would have adopted the district court's determination that "a jury could find the officers were unreasonable in their belief that Kong posed 'a significant and immediate threat of serious injury or death to an officer or others.'" *Id. at* 26a (quoting *Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015)). Judge Kelly therefore would have affirmed the denial of summary judgment as to Fourth Amendment claim and the state law claim.

4. The court of appeals denied rehearing en banc. *Id.* at 1a. Five judges noted their disagreement with that decision. *Id.* Judge Grasz filed a dissenting opinion, joined by Judge Erickson, arguing that the panel majority impermissibly failed to determine that the district court's factual findings were blatantly contradicted by the record before rejecting those findings. *Id.* at 1a-3a (Grasz, J., dissenting from denial of en banc review). Though the panel majority claimed that Kong posed a threat to citizens, Judge Grasz questioned the basis for this finding, asking: "[f]rom where was this fact derived? Not from the district court, which found a genuine dispute of material fact. . . Did the record blatantly contradict the district court's finding? The opinion does not say[.]" *Id.* at 2a (internal citations omitted). Moreover, Judge Grasz concluded that "the evidence of Mr. Kong's

frightened flight "*away* from pedestrians and the officers cuts against" any rejection of the district court's factual findings as blatantly contradicted by the record. *Id.* Because the panel majority failed to determine that the district court's factual findings were blatantly contradicted, Judge Grasz contended that it had no authority to substitute its own factual findings. *Id.*at 2a-3a.

Chief Judge Smith and Judges Shepherd and Kelly noted that they would have also granted the petition for rehearing en banc. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision follows the Eleventh Circuit's approach but splits with seven other circuits on a question of exceptional importance: whether an appellate court conducting interlocutory review of a denial of qualified immunity may reverse a district court's determination of a genuine issue of material fact—even when the record does not blatantly contradict that determination.

In this case, the district court explicitly found a genuine issue of material fact as to whether Kong posed a threat when police opened fire on him. Pet. App. 56a. As Judge Grasz's dissent stated, the Eighth Circuit rejected that determination without considering whether the record blatantly contradicted it. *Id.* at 2a-3a (Grasz, J., dissenting from denial of en banc review).

The Eleventh Circuit follows the same approach that the Eighth Circuit did here. In contrast, the First, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits will not disturb a district court's determination of a genuine issue of material fact

unless the record blatantly contradicts that determination.

This exceptionally important case warrants this Court's review. Interlocutory appeals are "the exception, not the rule"—and with good reason. *Johnson v. Jones*, 515 U.S. 304, 309 (1995). Such appeals "threaten [trial court] proceedings with delay, adding costs and diminishing coherence" and risk adding "unnecessary . . . work . . . when [they] present[] appellate courts with less developed records." *Id.* In this case, the panel turned the exception into the rule by reviewing the district court's factual conclusions *de novo*. That incorrect approach would license interlocutory review every time a government official disagrees with a district court's denial of qualified immunity. The Court should grant *certiorari*.

In the alternative, summary reversal would also be appropriate to correct the Eighth Circuit's deviation from the settled law of this Court. *Johnson v. Jones* clearly holds that a federal appellate court lacks interlocutory jurisdiction in a qualified immunity appeal to review a determination by a district court that "the pretrial record sets forth a 'genuine' issue of fact for trial." *See id.* at 319-20. *Scott v. Harris* recognizes at most a narrow exception that permits interlocutory review where the district court's determination is "blatantly contradicted by the record." *See* 550 U.S. 372, 380 (2007). In this case, the Eighth Circuit rejected the district court's factual analysis without applying the proper standard—a manifest deviation from settled law.

I. The Circuits Are Split On The Question Presented.

Had this case been decided in the First, Third, Fourth, Sixth, Seventh, Ninth, or Tenth Circuits, the result would have been different. These courts uniformly hold that on interlocutory appeal of a denial of qualified immunity, a court does not have appellate jurisdiction to review and reverse the district court's determination of a genuine issue of material fact unless the record blatantly contradicts that determination. But the Elventh Circuit takes the same approach as the panel here—considering the summary judgment record *de novo*, just as in an appeal from a final order granting summary judgment.

Breaking with the standard of review applied in the vast majority of circuits, the Eighth Circuit in this case disregarded the district court's determination that Kong did not present a threat for summary judgment purposes and adopted the exact opposite conclusion—all without considering whether the record blatantly contradicted the district court's determination. *See* Pet. App. 2a (Grasz, J., dissenting from the denial of rehearing en banc).

1. Under the clear majority rule, a court of appeals will defer to a district court's finding of a genuine issue of material fact, absent record evidence blatantly contradicting that determination.

a. In interlocutory appeals regarding the denial of qualified immunity, the **First Circuit** disclaims jurisdiction to review a district court's determination of a genuine issue of material fact where "[d]efendants nowhere argue the district court's factual

determinations [] are blatantly contradicted by the record and our review of the record reveals no blatant contradictions." *Penn v. Escorsio*, 764 F.3d 102, 105 n.2 (1st Cir. 2014).

b. In interlocutory appeals regarding the denial of qualified immunity, the **Third Circuit** recognizes that it "lack[s] jurisdiction to review the District Court's determination of which facts are subject to genuine dispute," except "where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false." *Blaylock v. City of Phila.*, 504 F.3d 405, 411, 414 (3d Cir. 2007). *See also Eberhardinger v. City of N.Y.*, 782 F. App'x 180, 184 (3d Cir. 2019) ("It is true that video evidence sometimes enables an appellate court to disregard a district court's construction of the facts on interlocutory appeal . . . . But that is only the case where a videotape 'blatantly contradict[s]' the District Court's account.")

c. In interlocutory appeals regarding the denial of qualified immunity, the **Fourth Circuit** will not review a district court's determination that "the pretrial record sets forth a 'genuine' issue of fact for trial" where video evidence "does not 'clearly' or 'blatantly' contradict" that finding. *Witt v. W. Va. State Police*, 633 F.3d 272, 275, 277 (4th Cir. 2011). Where documentary evidence "provides little assistance in resolving the parties' dispute as to the facts" and thus does not "utterly discredit[]" the district court's finding that a genuine factual issue remains, an "attempt to 'rehash the factual disputes []' provides no basis for interlocutory appeal of the district court's order denying summary judgment on qualified immunity grounds," and the appellate court

"must dismiss the appeal for lack of jurisdiction." *Id.* at 277-78.

d. In interlocutory appeals regarding the denial of qualified immunity, the **Sixth Circuit** will review a district court's determination that a genuine issue of material fact exists only "[i]n exceptional circumstances . . . where evidence in the record establishes that the determination is 'blatantly and demonstrably false.'" *Austin v. Redford Twp. Police Dep't*, 690 F.3d 490, 496 (6th Cir. 2012).

e. In interlocutory appeals regarding the denial of qualified immunity, the **Seventh Circuit** holds that the blatantly contradicted standard is a "narrow, pragmatic exception" that "applies only in the rare case" where the record "utterly discredit[s]" the district court's determination that material facts are genuinely disputed. *Grant v. Hartman*, 924 F.3d 445, 449-50 (7th Cir. 2019). Accordingly, "[a]bsent irrefutable evidence, [an appellate court] may not use an interlocutory appeal to second-guess the district court's conclusion that material facts are disputed." *Id.* at 450.

f. In interlocutory appeals regarding the denial of qualified immunity, the **Ninth Circuit** refrains from scrutinizing the record and reevaluating the district court's factual findings unless "videotape, audio recording, or similarly *dispositive* evidence . . . 'blatantly contradict[s]' or 'utterly discredit[s]' [plaintiff's] side of the story." *George v. Morris*, 736 F.3d 829, 835–36 (9th Cir. 2013) (emphasis added).

g. In interlocutory appeals regarding the denial of qualified immunity, the **Tenth Circuit** also recognizes that "we must scrupulously avoid second-

guessing the district court's determinations regarding whether [appellee] has presented *evidence* sufficient to survive summary judgment." *Sawyers v. Norton*, 962 F.3d 1270, 1281 (10th Cir. 2020) (quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013)). This holds true "even if our own *de novo* review of the record might suggest otherwise as a matter of law." *Id.* (quoting *Estate of Booker v. Gomez*, 745 F.3d 405, 409-10 (10th Cir. 2014)). The appellate court may reject the district court's factual determinations only if "'the version of events the district court holds a reasonable jury could credit is blatantly contradicted by the record.'" *Id.* at 1281 n.10 (quoting *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010)).

2. In contrast with these seven circuits, but consistent with the panel opinion here, the Eleventh Circuit "review[s] the district court's evidentiary sufficiency determinations *de novo*" in interlocutory appeals regarding qualified immunity. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996). In *Cottrell*, the Eleventh Circuit acknowledged that "[t]he Supreme Court's [*Johnson v. Jones*] decision raised some doubt about the correctness of that approach." *Id.* Nonetheless, the court stated that it would continue to assess *de novo* "those evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues." *Id.* The Eleventh Circuit has decided that "[i]n exercising our interlocutory review jurisdiction in qualified immunity cases, . . . we have discretion to accept the district court's findings" but "we are not required to accept them." *Id.*

Consistent with *Cottrell*, the Eleventh Circuit recently reviewed "*de novo*" a district court's determinations of genuine issues of material fact in

Hinson v. Bias, 927 F.3d 1103, 1115 (11th Cir. 2019). Specifically, the district court determined that the summary judgment record reflected genuine issues of material fact as to the following points, among others: "(1) whether Plaintiff disobeyed the officers' orders or resisted arrest, including being handcuffed; [and] (2) whether Plaintiff fully submitted to the officer[']s commands." Order at 11, *Hinson v. Bias*, No. 3:14-cv-1217-J-25MCR (M.D. Fla. May 24, 2016), ECF No. 71.[1]

The Eleventh Circuit's *de novo* review yielded a sharply contrasting interpretation of the summary judgment evidence: the plaintiff "repeatedly ignored [officers'] instructions to put his hands up, to keep his hands up, to leave his truck, to stop moving towards the officer behind him after he got out of his truck, and to release his hands from underneath him so an officer could restrain them in handcuffs." *Hinson*, 927 F.3d at 1119. The appellate court further concluded that the officers "direct[ed] [the plaintiff] in the manner they claim[ed]" and that the plaintiff "fail[ed] to comply." *Id*.

The split among circuit courts of appeal calls for clarification from this Court to resolve the question presented and ensure consistent rules for interlocutory appeals in qualified immunity cases. Those rules should not turn on the jurisdiction in which which a government official happens to violate a civilian's constitutional rights.

---

[1] Petitioner's appendix in *Bias v. Hinson*, No. 19-872, reproduces the unpublished district court order. The Court denied *certiorari* in *Bias v. Hinson* after requesting and receiving the record.

II. This Exceptionally Important Case Warrants Review.

The Court should grant *certiorari* not only to resolve the circuit split but also to foreclose a dramatic and unnecessary expansion of interlocutory review, to prevent freewheeling policy choices by lower courts that improperly extend qualified immunity, and to safeguard the role of the jury in resolving factual issues found material and genuine by trial courts.

The proper jurisdictional rule limits appellate review to final judgments. Two narrow exceptions allow interlocutory review of a denial of summary judgment in qualified immunity cases where: (1) the government official accepts the district court's factual determinations but challenges its legal conclusions, or (2) the government official demonstrates that the district court's factual determinations are blatantly contradicted by the record. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 530 (1985); *Scott v. Harris*, 550 U.S. 372, 378-80 (2007).

The panel opinion dramatically expands the second category to allow plenary review of any factual determination made by a district court in denying summary judgment in a qualified immunity case. That outcome renders interlocutory review equivalent in scope to review of final judgments and thereby harms the fair and efficient administration of justice.

1. Generally speaking, appellate courts lack jurisdiction over a case until the trial court renders a final judgment. 28 U.S.C. § 1291. Interlocutory appeals, are "the exception, not the rule" because they "threaten [trial court] proceedings with delay, adding costs and diminishing coherence" and risk adding

"unnecessary . . . work . . . when [they] present[] appellate courts with less developed records." *Johnson v. Jones*, 515 U.S. 304, 309 (1995).

This Court has recognized two exceptions to the final judgment rule in qualified immunity cases. First, in *Mitchell v. Forsyth*, this Court held that appellate courts may review the denial of summary judgment on qualified immunity grounds in appeals that turn on a pure issue of law. 472 U.S. at 526, 530. The appellate court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions[.]" *Id.* at 528. The collateral order doctrine authorizes an interlocutory appeal in such circumstances because the legal issues can be separated from the rights asserted in the action. *Id.*

In contrast, a determination that the record presents a genuine issue of material fact intertwines inseparably with plaintiffs' claims on the merits and thus does not fall into the "small class" of interlocutory orders separate from and collateral to the rights asserted in the action. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). When considering whether the law is "clearly established" for the purposes of qualified immunity, courts of appeals must "simply take, as given, the facts that the district court assumed when it denied summary judgment" in order to limit review to purely legal questions. *Johnson*, 515 U.S. at 319. In other words, "a defendant . . . may not appeal a . . . summary judgment order insofar as that order determines whether or not the

pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319–20. This limitation makes sense because, unlike district court judges, "institutionally speaking, appellate judges enjoy no comparative expertise" in determining "the existence, or nonexistence, of a triable issue of fact." *Id.* at 316.

But *Johnson*'s rule forbidding interlocutory review of a determination of a genuine issue of material fact is not absolute. In *Scott v. Harris*, this Court recognized a second exception to the final judgment rule in qualified immunity cases: On the rare occasion when a district court's factual conclusions in denying summary judgment are so "blatantly contradicted by the record" that "no reasonable jury could have believed [them]," appellate courts must not accept "such visible fiction" and should instead view the facts in the light depicted by the record. 550 U.S. at 380-81. As a result of *Scott*, "there are the cases where the district court's assessment of the facts is 'blatantly contradicted' by the record—or someone alleges it is—and we must again sort out the dispute by asking whether there is a 'blatant' contradiction and, if so, what a reasonable jury could find given the record at hand." *Walton v. Powell*, 821 F.3d 1204, 1208 (10th Cir. 2016) (Gorsuch, J.).

2. The Eighth Circuit's replacement of the "blatantly contradicted by the record" standard with a *de novo* reconsideration of the factual record threatens to encourage a common problem that burdens the courts. *See Scott v. Gomez*, 792 F. App'x 749, 753 (11th Cir. 2019) (criticizing appellants for abusing the blatant contradiction exception to "attempt to manufacture appellate jurisdiction where it does not exist"). The Eighth Circuit's approach in this case

would provide still further incentive to abuse appellate courts' limited interlocutory jurisdiction. It would burden appellate courts and litigants with interlocutory appeals that unnecessarily cause delay and consume resources.

3. The panel's unwarranted extension of interlocutory review also amounts to a "freewheeling policy choice" to expand qualified immunity by awarding government officials with an early and extra bite at the appellate apple. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring). That windfall gives government officials extra chances to take factual questions away from juries and thereby to avoid accountability for unconstitutional misconduct.

Members of this Court have observed that qualified immunity doctrine already resembles an "absolute shield for law enforcement officers," *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting), and bears little connection to the text and common law background of Section 1983. *Baxter v. Bracey,* 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of cert.). This case warrants review because the Eighth Circuit's decision takes this already dubious doctrine into new and uncharted territory by undermining the jury's role in resolving factual disputes and eroding the final judgment rule—the most fundamental precept of appellate jurisdiction.

The Court should grant certiorari, reject the Eighth Circuit's approach, and affirm that of the majority of courts instead.

III. This Case Provides an Ideal Vehicle To Resolve the Question Presented.

This case offers an ideal vehicle to consider whether an appellate court performing interlocutory review in a qualified immunity case may reject a district court's determination of a genuine issue of material fact while declining to apply the "blatantly contradicted by the record" standard. The issue is outcome determinative, and the Court would have the benefit of several published and reasoned opinions: a district court opinion that clearly identifies the question of an immediate threat as a genuine issue of material fact, a published panel opinion and panel dissent, and a dissent from denial of rehearing en banc.

The Eighth Circuit's deviation from the "blatantly contradicted by the record" standard controlled the outcome of the case. The panel did not point to anything in the record that incontrovertibly showed that Kong posed an immediate threat, nor could it have. Pet. App. 8a-9a, 13a-14a, If the panel had applied the correct standard, it could not have rejected the district court's determination that Kong posed no threat because nothing blatantly contradicted that conclusion. *Id.* at 63a-64a. Instead, the majority simply ignored the district court's determination that "a genuine dispute of material fact exists as to whether [Petitioner] 'pose[d] a significant and immediate threat of serious injury or death' to the surrounding public at the moment Defendants opened fire," conducting *de novo* review of the record and substituting its own factual finding that Petitioner did "pose[] a threat to citizens."*Id.* at 8a-9a, 13a-15a, 63a-64a.

The outcome of the case indisputably turned on the panel's finding that Kong posed a threat. The panel cited no other basis for granting qualified immunity to the officers, nor could it have. Both Eighth Circuit precedent and this Court's precedent clearly establish that an officer may not use lethal force on a fleeing suspect unless the suspect poses a risk of harm. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Moore v. Indehar*, 514 F.3d 756, 763 (8th Cir. 2008) (use of deadly force against a subject who was "simply fleeing" violated the Fourth Amendment); *Ellison v. Lesher*, 796 F.3d 910, 916 (8th Cir. 2002) ("But where a person poses no immediate threat to the officer and no threat to others, deadly force is not justified.") (cleaned up); *Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015). Indeed, in *Ludwig v. Anderson*, the subject fled from police officers on foot while holding a knife—just as in this case. 54 F.3d 465, 473-74 (8th Cir. 1995). Without a factual determination that the subject posed an immediate threat to bystanders or the officers, the Eighth Circuit held the deadly force was unconstitutional. *Id.*

When the court of appeals assessed the clearly established prong of qualified immunity in this case, it relied exclusively on cases where there was a determination of immediate threat. *See, e.g.*, *Hayek v. City of St. Paul*, 488 F.3d 1049, 1055 (8th Cir. 2007) (subject posed an immediate threat when he stabbed police officer with a samurai sword); *Hassan v. City of Minneapolis*, 489 F.3d 914, 919 (8th Cir. 2007) (subject posed an immediate threat because he "aggressively brandished a machete and a tire iron while approaching officers in a threatening manner.")

But these precedents are inapposite to this case if Kong did not pose an immediate threat of death or serious bodily injury. The Eighth Circuit is clear: if there is no immediate threat, use of deadly force is unreasonable and unconstitutional. The court's single, flawed assumption that Kong posed an immediate threat was pivotal to its analysis, and if it had correctly analyzed the facts under the blatant contradiction exception, it would have reached the opposite holding.

IV. The Court Should Consider Summary Reversal.

Given the Eighth Circuit's clear deviation from the rules established in *Jones* and *Scott*, the Court may also wish to consider summary reversal as an alternative to *certiorari*. It is wholly implausible to interpet *Jones* and *Scott* to permit an appellate court conducting interlocutory review to throw out a district court's determination of a genuine issue of material fact without the rigor demanded by the blatant contradiction standard. *See supra* at 17-18. The lopsided split on the issue makes the Eighth Circuit's deviation from this Court's established law all the more manifest—and summary reversal all the more appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted or the decision below summarily reversed.

Respectfully submitted,

STEVEN J. MESHBESHER
RICHARD E. STUDENT
MESHBESHER & ASSOCIATES, P.A.
9800 Shelard Parkway, Suite 310
Minneapolis, MN 55441
(612) 332-2000

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1271
david.shapiro@law.northwestern.edu

Counsel for Petitioner

December 2020