No. 20-875

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

Motion for Leave to File a Brief as Amicus Curiae & Brief of Professor Bryan Lammon as Amicus Curiae Supporting Petitioner

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January 20, 2021

* *For affiliation purposes only.*

Motion for Leave to File a Brief as Amicus Curiae

In accordance with Rule 37.2(b), Bryan Lammon requests leave to submit a brief as amicus curiae in support of the petition for a writ of certiorari filed by Sok Kong. As required under Rule 37.2(a), amicus provided notice to all parties' counsel of amicus's intent to file this brief more than 10 days before its due date. Petitioner consented to the filing of this brief. Respondents opposed its filing, requiring the filing of this motion.

Amicus is a law professor who studies federal appellate jurisdiction. He has given particular attention to the issue in this case—the jurisdictional limits on appeals from the denial of qualified immunity—publishing two papers and several other writings on the topic.

As the Petition for a Writ of Certiorari explains, the Eighth Circuit in this case exceeded those jurisdictional limits. Amicus seeks leave to inform the court of a larger problem that underlies the Eighth Circuit's decision and requires this Court's attention: defendants' appeals from the denial of qualified immunity that challenge the factual basis for the district court's immunity denial. These appeals occur far too frequently, adding needless complexity, expense, and delay to litigation. The courts of appeals have done little to deter them. This case provides an excellent (and somewhat rare) opportunity for this Court to reiterate the limits on qualified-immunity appeals, which will hopefully halt (or encourage courts of appeals to halt) abuse of those appeals.

Amicus accordingly asks this Court for leave to

file this amicus brief.

Respectfully submitted,

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Interest of Amicus Curiae*

Bryan Lammon is a law professor who studies federal appellate jurisdiction, particularly if and when litigants can appeal. Through his scholarship and other writings, he works to bring clarity, consistency, and reform to the law in this area. He has given particular attention to the issue in this case—the scope of appeals from the denial of qualified immunity—publishing two papers on the subject:

- *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. (forthcoming 2021), *available at* https://ssrn.com/abstract=3428456.
- *Making* Wilkie *Worse: Qualified-Immunity Appeals and the* Bivens *Question After* Ziglar *and* Hernandez, 7/24/2020 U. CHI. L. REV. ONLINE 1, *available at* https://lawreviewblog.uchicago.edu/2020/07/24/making-wilkie-worse-lammon/.

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* In accordance with Rule 37, amicus timely notified counsel of record for all parties of amicus's intention to file this brief at least 10 days before the brief's due date. The Petitioner consented to the filing of this brief. But because the Respondents refused to consent to this brief's filing, amicus has moved for leave to file it. No part of this brief was authored by any party's counsel, and no person or entity other than amicus funded its preparation or submission.

Summary of the Argument

This case concerns the jurisdictional limits on the scope of qualified-immunity appeals (*i.e.*, immediate appeals from the denial of qualified immunity). As the Petition for a Writ of Certiorari shows, the Eighth Circuit exceeded its jurisdiction in reviewing the genuineness of fact disputes without applying an exception to *Johnson v. Jones*, 515 U.S. 304 (1995). The Petition also explains the conflict with other courts' decisions and the need for this Court's review. Amicus will not repeat those arguments.

Amicus instead writes to highlight a problem that underlies this and far too many other cases in the courts of appeals: defendants' flouting of *Johnson*, with the purpose or effect of delaying litigation. This Court needs to address this problem. And this case provides the opportunity to do so.

Defendants may immediately appeal from the denial of qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985). But when a district court denies immunity at summary judgment, the scope of the appeal is limited. The court of appeals lacks jurisdiction to address whether the summary-judgment record supports the district court's determination of what a reasonable jury could find. *Johnson*, 515 U.S. at 307; *see also Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). 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 has been the law for 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 that the district court thought a reasonable factfinder could find. The courts of appeals normally see these appeals for what they are—attempted end runs around the limits of *Johnson*—and eventually dismiss or affirm. But at that point, the damage has been done. District court proceedings grind to a halt while the appeal is pending. And resolution of the appeal often takes a year or longer. Defendants can thus use these fact-based appeals to delay proceedings and add unnecessary expense to litigation.

The courts of appeals have not done enough to deter these fact-based qualified-immunity appeals. The task thus falls to this Court. And this case presents an ideal (and somewhat rare) opportunity to accomplish that task. As the Petition explains, the Eighth Circuit reviewed the record for itself without applying one of *Johnson*'s narrow exceptions—just like it would in a normal, non-immediate appeal from a summary-judgment decision. *See* Pet. at 8. The Eighth Circuit thereby came to its own conclusion about what facts a reasonable factfinder could find. In doing so, the court of appeals exceeded its limited jurisdiction. This case is accordingly an excellent vehicle for this Court to reiterate the limits on the scope of qualified-immunity appeals and thereby put an end to defendants' fact-based qualified-immunity appeals.

Argument

A. *Johnson v. Jones* holds that—with limited exceptions—the courts of appeals cannot review the genuineness of fact disputes in qualified-immunity appeals.

Defendants have a right to immediately appeal from the denial of qualified immunity. *Mitchell*, 472 U.S. at 527–30. But when a district court denies immunity at summary judgment, only some aspects of the district court's decision are within the scope of review.

In denying immunity at summary judgment, the district court determines both the genuineness of any fact disputes and their materiality. *See* FED. R. CIV. P. 56(a). 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. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the parties dispute this version of the facts and have evidence to back up that dispute, a genuine fact issue exists.

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, the district court determines whether those facts make out a violation of federal law. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991). If they do, the district court then determines whether that law was clearly established at the time of the violation. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If the district court answers both of these questions affirmatively—that is, based on the

most plaintiff-favorable version of the facts, a violation of clearly established 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.

In *Johnson*, this Court 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? 515 U.S. at 319–20. The courts of appeal lacks jurisdiction to review what facts a reasonable factfinder could find. *Id.* So defendants cannot challenge—and the court of appeals lacks 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. *Id.* at 313 (discussing *Mitchell*, 472 U.S. at 526–30). (This 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).) As a matter of theory, *Johnson* noted that evidence-sufficiency issues overlap too much with the merits to be appealable via the collateral-order doctrine. 515 U.S. at 314.

But what *Johnson* especially emphasized was practicality. Appellate courts, *Johnson* noted, have no comparative advantage in determining the existence of genuine fact issues. *Id.* at 316. So there is less of a likelihood for error—and thus less need for immediate error correction—in this context. *Id.*

Further, record review can take substantial time. *Id.* This review 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. *Id.* Immediate appellate review thus risks duplicative, overlapping appeals of similar issues—once in the qualified-immunity appeal and again in an appeal after trial. *Id.* at 316–17.

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. *Id.* at 319. (Alternatively, the court of appeals can remand for the district court to specify the genuinely disputed material facts. *See Forbes v. Township of Lower Merion*, 313 F.3d 144, 146 & 148–50 (3d Cir. 2002).)

A second possible exception comes from this Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007). Several courts of appeals have read *Scott* to create a "blatant-contradiction" exception to *Johnson*: the court of appeals can review the genuineness of fact disputes when something in the summary-judgment record "blatantly contradicts" the district court's assessment of that record. *See, e.g.*, *Henderson v. Glanz*, 813 F.3d 938, 950–51 (10th Cir. 2015); *Blaylock v. City of Philadelphia*, 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. (draft at 34–37) (forthcoming 2021), *draft available at* https://ssrn.com/abstract=3428456.

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." 515 U.S. at 319–20. 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." *Id.* at 307.
- "[*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.'" *Id.* at 313 (citation omitted).
- "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." *Id.* at 314.

- "[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." *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." *Id.*
- "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." *Id.* at 317.
- "[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." *Id.* at 319.

So unless the court of appeals applies an exception to *Johnson*, it lacks jurisdiction to review the genuineness of fact disputes as part of a qualified-immunity appeal.

B. Defendants' noncompliance with *Johnson* is a serious problem in the courts of appeals.

Despite *Johnson*'s limit on the scope of qualified-immunity appeals, defendants flout it with some regularity. 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. *See, e.g.*, *Betton v. Belue*, 942 F.3d 184, 192 n.3 (4th Cir. 2019); *Koh v.*

Ustich, 933 F.3d 836, 844–48 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 935 (2020); *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). 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. And the courts of appeals have not done enough to discourage them.

1. *Defendants regularly flout* Johnson*'s limits on the scope of qualified-immunity appeals.*

With some frequency, defendants in civil-rights actions appeal from the denial of qualified immunity and—without invoking one of the exceptions to *Johnson*—base their arguments on a version of the facts different than that taken as true by the district court. For example, consider two unexceptionable cases decided on the same day this past September: *Stojcevski v. Macomb County*, 827 F. App'x 515 (6th Cir. 2020), and *Hall v. Flournoy*, 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. 827 F. App'x at 523. The defendants—employees of the jail—conceded the law: they needed to seek medical help for an inmate whose condition worsened. *Id.* at 522. The evidence showed that the defendants did not seek any medical help during these 51 hours. *Id.* And according to the district court, a reasonable jury could find that the decedent suffered "alarming changes" during that

time. *Id.* at 523. The district court accordingly denied qualified immunity. *Id.* at 519–20.

The defendants nevertheless appealed. And in that appeal, they argued that the decedent's condition *had not* worsened during his last 51 hours. *Id.* at 523. 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." *Id.* (quotation marks omitted). The court of appeals accordingly lacked jurisdiction and dismissed the appeal. *Id.*

Hall involved a similarly flagrant flouting of *Johnson*. The plaintiff in *Hall* alleged that a deputy sheriff had planted drugs on his property. 975 F.3d at 1273. 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. *Id.* The district court accordingly denied the deputy sheriff's request for qualified immunity. *Id.*

On appeal, the deputy sheriff conceded that planting drugs violates clearly established federal law. *Id.* at 1277. She argued only that the district court erred in its assessment of the evidence—the evidence showed that she *did not* plant the drugs. *Id.* 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." *Id.* at 1278. The Eleventh Circuit (which, as the Petitioner points out, is less than perfect in adhering to *Johnson*, *see* Pet. at 14–15) accordingly dismissed the appeal for a lack of jurisdiction. *Id.* at 1279.

Appeals like *Stojcevski* and *Hall* are a serious problem. Last year produced at least 44 qualified-immunity appeals in which the court rejected a defendant's attempts to challenge the factual basis

for an immunity denial.[1] Only occasionally did the

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[1] In addition to *Stojcevski* and *Hall,* see *Penzaloza v. City of Rialto*, No. 20-55164, ___ F. App'x ____, 2020 WL 7206904, at *1–2 (9th Cir. Dec. 7, 2020); *Peterson v. City of Yakima*, 830 F. App'x 528, 528–29 (9th Cir. 2020) (mem.); *Joseph ex rel. Estate of Joseph v. Bartlett*, 981 F.3d 319, 344 (5th Cir. 2020); *Rhoades v. Forsyth*, No. 20-1223, ___ F. App'x ____, 2020 WL 6781730, at *2 (4th Cir. Nov. 18, 2020); *Fakhoury v. O'Reilly*, No. 19-1571, ___ F. App'x ____, 2020 WL 6781236, at *4 (6th Cir. Nov. 18, 2020); *Gamel-Medler v. Almaguer*, No. 19-6129, ___ F. App'x ____, 2020 WL 6537391, at *4–5 (10th Cir. Nov. 6, 2020); *Thomas v. Bauman*, No. 20-1182, ___ F. App'x ____, 2020 WL 6441163, at *2–3 (6th Cir. Nov. 3, 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), *petition for cert. filed*, No. 20-600 (Oct. 30, 2020); *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 Trans. 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,

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.

2. These appeals add wholly unnecessary complexity, expense, and delay to litigation.

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.

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

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187 (1st Cir. 2020); *Nelson v. Thurston Cty.*, 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) (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), *petition for cert. filed*, No. 20-585 (Oct. 29, 2020); *Butler v. Pennington*, 803 F. App'x 694, 696 (4th Cir. 2020) (per curiam), *cert. denied*, No. 20-346 ___ S. Ct. ____, 2020 WL 6037258 (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).

the defendant's arguments stay within *Johnson*'s bounds, jurisdiction will exist. If not, jurisdiction will not exist. 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 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 in footnote 1, the time between the notice of appeal and the appellate decision averaged over 440 days.

3. The courts of appeals are not sufficiently discouraging fact-based 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. *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1890 n.23 (2019); *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"). And defendants can use these appeals to wear down plaintiffs. *See* Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1121 (2020).

Improper fact-based qualified-immunity appeals thus serve no legitimate purpose. They should be discouraged. But defendants seem to have little reason to not take these appeals. The courts of appeals have done little to deter this abuse of qualified-immunity appeals. Sanctions appear to be rare. Amicus's research found only three instances in which the courts of appeals sanctioned defendants for violating *Johnson*. *See Aquino v. Cty. of Monterey Sheriff's Dep't*, 698 F. App'x 901 (9th Cir. 2017) (per curiam); *McDonald v. Flake*, 814 F.3d 804, 817 (6th Cir. 2016); *Ruffino v. Sheahan*, 218 F.3d 697, 701 (7th Cir. 2000). All that is left are courts' offering the occasional harsh words at oral argument or in an opinion. *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 Recording in *Betton v. Belue*, 942 F.3d 184 (4th Cir. 2019), at 14:14–14:50 & 39:30–41:30, *available at* http://www.ca4.uscourts.gov/OAarchive/mp3/18-1974-20190918.mp3.

C. This case is an ideal vehicle to reiterate the limits on the scope of qualified-immunity appeals.

Defendants thus need a reminder from this Court of the limits on the scope of qualified-immunity appeals. But opportunities to do so are rare. When the courts of appeals reject a defendant's attempt to challenge the factual basis for an immunity denial, there is little for this Court to add. Having prevailed in the court of appeals, plaintiffs cannot ask this Court for anything. And having had its appeal definitively rejected on jurisdictional grounds, defendants are not terribly likely to seek this Court's review or be successful if they do.

What is required is a case like this one. The defendants disputed the factual basis for the district court's immunity denial. But rather than reject that effort, the Eighth Circuit indulged it.

As much can be seen from the factual dispute over whether Map Kong was moving towards anyone—and thus might have posed a threat of harm that justified the use of deadly force—when he was shot. The plaintiff contended that "Kong did not run toward any bystanders and did not attempt to turn to face [the] officers." Pet. App. 63a (quotation marks omitted). The district court recognized that it "must credit that version of events"—that "Kong was

running *away* from pedestrians and the officers at the time of his death"—for purposes of summary judgment. *Id.* at 64a. At most, Kong ran in the "general direction" of moving vehicles. *Id.* at 66a. So "a reasonable juror could find that, even with a knife, [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." *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985)).

Absent an exception to *Johnson*, the defendants and the Eighth Circuit had to take as given the district court's assessment of the summary-judgment record. But in their briefing on appeal, the defendants repeatedly argued that Kong "was running toward and closing in on [a bystander] at the time the first shot was fired." Appellants' Brief, *Kong v. City of Burnsville*, 960 F.3d 985 (8th Cir. 2020), *available at* 2019 WL 1208939, at *33.[2] And if "Kong

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[2] *See also id.* at *35 (stating that Kong was "rapidly approaching people in their vehicles" and "rapidly approaching . . . bystanders"); *id.* at *37–38 (stating that Kong was "sprinting toward" bystanders); *id.* at *49 ("Simple mathematics confirms that Kong was running toward and getting closer to [a bystander] with a knife in his hand when the first shot was fired."); *id.* at *51 (stating that Kong was "sprinting with a large knife toward people inside a vehicle"); *id.* (stating that Kong "was fleeing from the police and rapidly approaching . . . innocent civilians with a large knife in his hand") *id.* at *53 ("Kong sprinted toward, and was getting closer to, bystanders in vehicles while brandishing a knife . . . ."); *id.* at *56 ("Like [the decedent in another case], Kong moved toward people in their vehicles when he quickly exited his vehicle and sprinted toward them while fleeing from the police and wielding a long knife."); *see also* Appellants' Reply Brief, *Kong v. City of Burnsville*, 960 F.3d 985 (8th Cir. 2020), *available at* 2019 WL 2125412, at *5 ("Kong [was] fleeing

was clearly advancing toward [that bystander] and other nearby bystanders at the time of the shooting," then "a reasonable officer could believe that Kong posed an immediate threat" that justified the use of deadly force. *Id.* at *49. The Eighth Circuit then adopted the defendants'—not the district court's—version of events, stating that "Kong ran toward bystanders, including a woman driving only 30 feet away." Pet. App. 13a. And that meant "Kong posed a threat to citizens." *Id.* at 14a.

As Judge Grasz's dissent from the denial of rehearing en banc notes, the Eighth Circuit panel exceeded its limited jurisdiction. *See* Pet. App. 2a–3a. The panel did not invoke an exception to *Johnson*. *Id.* It nevertheless rejected the district court's factual basis for the immunity denial.

This case is thus a perfect vehicle for this Court to reiterate the limits on qualified-immunity appeals—to make unmistakably clear to defendants what they can, and cannot, argue when they appeal from the denial of qualified immunity. Should these abusive qualified-immunity appeals continue, the courts of appeals will then be well equipped to sanction the violators.

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from the police and sprinting toward [one particular bystander] and the numerous innocent bystanders in the parking lot, on the frontage road and Highway 13.").

Conclusion

This Court should not have to tell litigants that it means what it says. But the holding of *Johnson* appears to be lost on far too many. And ignorance of *Johnson* has added significant costs and delays to litigation. This Court should grant the petition for certiorari—or perhaps even summarily reverse—to make the scope of qualified-immunity appeals unmistakably clear: unless the court of appeals applies an exception to *Johnson*, it lacks jurisdiction to review the genuineness of fact disputes and must take as given the factual basis for the district court's denial of qualified immunity.

Respectfully submitted,

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