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, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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March 18, 2021

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MOTION FOR WAIVER OF TIME AND LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT

Pursuant to Rule 37.2(a) and (b) of the rules of this Court, *amicus curiae* the National Police Accountability Project (NPAP) respectfully moves this Court for a waiver of the 10-day notice requirement and for leave to file the accompanying brief in support of the petition for a writ of certiorari. Counsel for Petitioner has provided NPAP a waiver of time and has consented to the filing of this brief; counsel for Respondents has refused to waive time and has opposed its filing. Counsel respectfully asks that this Court grant NPAP a waiver of the 10-day notice rule and leave to file the attached brief.

NPAP seeks leave to inform the Court about the ways in which the Eighth Circuit's expansion of *Scott v. Harris*'s exception to the normal limits on appellate jurisdiction will have a profound impact on the resolution of qualified-immunity appeals in the federal courts of appeals. In the proposed brief, NPAP offers distinct arguments not asserted by the petitioner. In particular, the proposed brief details how an expansion of *Scott*'s exception will impose a significant burden on appellate courts, undermine the final judgment rule and the collateral-order doctrine, and harm civil rights litigants, all with little corresponding benefit. This Court should have the benefit of these perspectives in deciding how to rule on the petition.

Accordingly, NPAP respectfully asks this Court for a waiver of the ten-day notice requirement and leave to file the attached amicus brief.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

The National Police Accountability Project (NPAP) was founded in 1999 to address misconduct by law enforcement and detention facility officers. NPAP has approximately 600 attorney-members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information, and resources for nonprofit organizations and community groups involved with victims of law-enforcement and detention facility misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as amicus curiae in cases of particular importance for its members' clients.

SUMMARY OF ARGUMENT

Consistent with the collateral-order doctrine, this Court has held that appellate jurisdiction does not permit review of a district court's decision denying qualified immunity at summary judgment on grounds that the record presents a material dispute of fact for trial. *Johnson v. Jones*, 515 U.S. 304 (1995). A narrow exception to the rule exists where the nonmovant's version of the facts accepted by the district court is blatantly contradicted by the summary judgment record. *Scott v. Harris*, 550 U.S. 372 (2007). This case asks whether a federal appellate court can exercise jurisdiction over an appeal from a denial of qualified immunity to review a district court's determination of evidentiary sufficiency without considering whether

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

the nonmovant's facts are blatantly contradicted. This Court should grant certiorari and hold that appellate jurisdiction does not extend so far.

First, interlocutory appellate jurisdiction over orders denying qualified immunity is extremely limited, consistent with the final judgment rule, the collateral-order doctrine, and this Court's decisions narrowly limiting what review of factual determinations an appellate court may undertake during such an appeal. The Eighth Circuit's decision here represents a considerable expansion of *Scott* that runs contrary to these carefully drawn rules. Second, an unduly expansive application of *Scott* in the federal circuit courts invites a large number of unmeritorious appeals that require appellate courts to conduct a searching review of the summary judgment record during interlocutory appeals in a great number of cases. Doing so significantly increases the burden on those courts, requiring them to perform labor-intensive factual review in a posture ill-suited for such analysis. Finally, a regime that invites multiple interlocutory appeals from defendants raising factual disputes during a single civil case imposes significant delays and prevents civil rights plaintiffs from obtaining justice.

An expansive reading of *Scott*'s narrow exception to this Court's prohibition on factual review during qualified-immunity appeals causes these problems with very little corresponding benefit. Rarely in such appeals can defendants show that legal errors by a district court require reversal of a denial of summary judgment, and it is even less usual for a litigant to show that a district court's view of the summary judgment record is blatantly contradicted. This Court should grant certiorari to ensure that *Scott*'s exception continues to be applied narrowly in the courts of appeals.

ARGUMENT

I. INTERLOCUTORY APPELLATE JURISDICTION TO REVIEW ORDERS DENYING QUALIFIED IMMUNITY IS EXTREMELY LIMITED

Appellate jurisdiction is generally limited to appeals of final judgments from district courts. 28 U.S.C. § 1291. Congress imposed this stringent restriction on the pretrial appellate review of district court orders to promote efficiency for circuit courts, docket control for district courts, and fairness to litigants. *See* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3907, at 270 & n.2, 273-74 (2d ed. 1991). This Court carved out a narrow exception to the final judgment rule with the collateral order doctrine, which permits interlocutory appeals in the "small class of decisions" where the district court decision (1) conclusively determines an issue, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable in an appeal after final judgment. *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).

District court orders denying qualified immunity to government officials fall within the "collateral order" exception when they turn on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Beherns v. Pelletier*, 516 U.S. 229 (1996); *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014). Legal questions for interlocutory review at summary judgment fall within two general categories: (1) challenges to a district court's legal determination that the defendant's rights were clearly established, *Mitchell*, 472 U.S. at 530; and (2) challenges to a legal aspect of the district court's

factual determinations, such as whether the district court properly assessed the incontrovertible record evidence, *Plumhoff*, 572 U.S. at 772. However, this Court has instructed courts of appeals that this latter category does not include district court determinations of evidence sufficiency, which are beyond the purview of appellate jurisdiction. *Johnson v. Jones*, 515 U.S. 304, 314-15 (1995); *Plumhoff*, 572 U.S. at 772. Circuit courts have repeatedly cited the jurisdictional bar articulated in *Johnson* in finding they lack jurisdiction to revisit fact issues in appeals of denials of qualified immunity at summary judgment. *Norton v. Rodrigues*, 955 F.3d 176, 184 (1st Cir. 2020); *Franco v. Gunsalus*, 972 F.3d 170, 174 (2d Cir. 2020); *Bey v. Falk*, 946 F.3d 304, 312 (6th Cir. 2019); *Stinson v. Gauger*, 868 F.3d 516, 523-4 (7th Cir. 2015); *Estate of Anderson v. Marsh*, 985 F.3d 726 (9th Cir. 2021). The rule prohibiting review of a district court's assumed facts or determination of evidence sufficiency preserves the final-judgment rule and ensures that the collateral order doctrine is narrowly confined.

In *Scott v. Harris*, this Court identified one narrow exception to this rule, holding that appellate jurisdiction is secure where a plaintiff's version of the facts are "blatantly contradicted by the record, so that no reasonable jury could believe it[.]" 550 U.S. 372, 380 (2007). Absent a finding that the nonmovant's version of the events is "so utterly discredited by the record" that a district court legally could not rely on it, *Johnson*'s normal rule applies and bars appellate courts from reviewing fact-related questions during an interlocutory appeal from a district court order denying qualified immunity at summary judgment.

II. AN EXPANSIVE READING OF *SCOTT*'S EXCEPTION IS INCONSISTENT WITH ESTABLISHED DOCTRINE, BURDENS APPELLATE COURTS, AND INVITES MERITLESS APPEALS

Consistent with *Scott*, some appellate courts have characterized the "blatant contradiction" rule as a narrow exception to the jurisdictional limits created by *Johnson*. *See*, *e.g., Gant v. Hartman*, 924 F.3d 445, 449 (7th Cir. 2019) (describing *Scott* as "a narrow, pragmatic exception allowing appellants to contest the district court's determination that material facts are genuinely disputed."); *see also, Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007). Like the Eighth Circuit in this case, however, other courts of appeals have not confined *Scott* narrowly, and these decisions render *Scott*'s exception difficult to reconcile with collateral order doctrine jurisprudence, expand the scope of appellate review in qualified immunity cases and require circuit courts to engage in deeper analyses of the discovery record, and provide defendants with a new mechanism for invoking jurisdiction to take unmeritorious appeals.

A. An Expanded Reading of *Scott* Is Inconsistent with the Final Judgment Rule and the Collateral Order Doctrine's Objectives and Limitations

Expanded readings of *Scott* like that adopted by the Eighth Circuit here are untethered from the collateral-order doctrine and this Court's jurisprudence governing qualified-immunity appeals. Though jurisdictional questions were not explored in *Scott*, some courts have worked to reconcile *Scott* with *Johnson*, holding that *Johnson* continues to ensure that qualified-immunity appeals do not escape the

bounds of the collateral-order doctrine. *See*, *e.g.*, *Stinson*, 868 F.3d at 523 (noting that "the Supreme Court's decision in [*Scott v.*] *Harris* does not mention *Johnson*, so it was not overruling *Johnson*").

The final judgment rule has always informed the development of the collateral-order doctrine, resulting in continual limitation of the set of orders that is immediately appealable. *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) ("[W]e have also repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule."); *Mitchell*, 457 U.S. at 543-44 (1985) (Brennan, J. dissenting) ("We have always read the *Cohen* collateral order doctrine narrowly, in part because of the strong policies supporting the §1291 final judgment rule").

This Court has correspondingly narrowed the availability of interlocutory appeals of qualified-immunity denials to lessen the negative impact these appeals have on trial and appellate courts. Imposing jurisdictional limitations in *Johnson*, this Court explained that "an interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence." 515 U.S. at 319. The *Johnson* Court also explained that "appellate courts have 'no comparative expertise' over trial courts in making such determinations and that forcing appellate courts to entertain appeals from such orders would impose an undue burden." *Id.* Additionally, it noted that determining whether a genuine fact issue exists usually overlaps with issues that are raised later at trial, creating a risk of duplicative, overlapping appeals of similar issues. *Johnson*, 515 U.S. at 316.

Of particular concern here, questions of whether the summary judgment record blatantly contradicts a nonmovant's facts accepted by a district court can quickly transform from the legal question contemplated in *Scott* to a fact-based analysis indistinguishable from the merits of the case, which is outside of the collateral-order doctrine. *Id.* at 310 (citing *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy Inc.*, 506 U.S. 139, 144 (1993)). That is what happened here in the Eighth Circuit, and the resulting decision is an example of the very outcome that the collateral order doctrine aims to avoid.

B. A Broad Reading of *Scott*'s Exception Would Force Appellate Courts to Undertake Repeated and Independent Reviews of the Evidentiary Record During Qualified Immunity Appeals

A broad reading of *Scott*'s exception also means that appellate courts would often be forced to engage in multiple rounds of searching review of the evidentiary record and district court decisions during appeals from denials of qualified immunity at summary judgment. In all such appeals, appellate courts must initially determine if they have jurisdiction to consider the case, and if so, they must consider the record a second time to evaluate whether the district court's decision should be reversed. Deciding jurisdiction at a minimum entails a close inspection of the district court's order to determine whether the defendant is genuinely crediting the district court's view of the summary judgment record and plaintiff's version of the facts. Even in cases where the defendant claims to base its appeal on the district court's assumed facts, a close review of the summary judgment order is necessary to ensure it is not "a back-door effort to contest the facts." *Jones v.*

Clark, 630 F.3d 677, 680 (7th Cir. 2011); *Moldowan v. City of Warren*, 573 F.3d 309, 327-8 (6th Cir. 2009) (distinguishing factual disputes raised on appeal from the issues the court has jurisdiction to hear).

Once the appellate court is satisfied that it may properly exercise appellate jurisdiction, it must analyze the record to determine whether the district court's decision should be reversed as a matter of law. Determining whether the law was clearly established in light of assumed facts is a labor-intensive undertaking, particularly in Fourth Amendment excessive force cases where the totality of the circumstances often must be considered. *Mullinex v. Luna*, 136 S. Ct. 305, 308 (2015) (finding specificity is "especially important in the Fourth Amendment context" because it is "sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts."); *Scott*, 550 U.S. at 383 (explaining that determinations of officer reasonableness require "sloshing . . . through [a] factbound morass"); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("[E]xcessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case," and "there will almost never be a previously published opinion involving exactly the same circumstances.").

Scott added additional work to this burdensome process, but that additional work was to be limited to asking whether there was a blatant contradiction of the nonmovant's case evidence in the record. By reading *Scott*'s narrow exception broadly, courts like the Eighth Circuit open a new, entirely fact-based avenue of appellate jurisdiction for defendants to invoke. In these courts, a defendant can invoke *Scott*'s

"blatantly contradicted" language in name only, and the court of appeals will undertake a *de novo* review of the district court record. In an excessive force case, for instance, challenged conduct captured on video might be pointed to while *Scott* is invoked, but the reasonableness of an officer's actions often has to be considered in the broader context of the incident, and the court of appeals will proceed with a full reexamination of the summary judgment record during an interlocutory appeal. *See*, *e.g. McCue v. City of Bangor*, 838 F.3d 55, 59-60 (1st Cir. 2016) (analyzing multiple videos, expert witness testimony in qualified-immunity appeal); *Darden v. City of Ft. Worth*, 880 F.3d 722, 729-731 (5th Cir. 2018) (reviewing video evidence in conjunction with eyewitness testimony in qualified-immunity appeal); *Martin v. City of Taylor*, 509 F.3d 234 (6th Cir. 2007) (video footage, blood alcohol level, and deposition transcripts assessed in qualified-immunity appeal); *Michael v. Trevena*, 899 F.3d 528, 532 (8th Cir. 2018); *Thomas v. Durastanti*, 607 F.3d 655 (10th Cir. 2010) (evaluating conduct prior to use of force in qualified-immunity appeal).

Conducting such a factual review requires circuit courts to engage in evidence sufficiency evaluations that "consume inordinate amounts of appellate time" for which "appellate judges enjoy no comparative expertise." *Johnson*, 515 U.S. at 316. In requiring searching review of the summary judgment record and the district court's findings following a denial of summary judgment, an impermissibly broad reading of *Scott*'s exception invites appellate review of summary-judgment orders that is, in many respects, more expansive than the review of a grant of summary judgment that results in a final judgment. Making matters worse, all of that expansive appellate review

is indistinguishable from the merits of the case. This regime undermines the final judgment rule, the collateral-order doctrine, and the policy justifications supporting the limitations on qualified-immunity appeals imposed by *Johnson*. As a practical matter, it adds considerable work to an already burdened appellate docket in the courts of appeals.

C. A Broad Reading of *Scott*'s Exception Invites Meritless Appeals, Increasing the Already Large Volume of Interlocutory Appeals

In addition to eroding the doctrinal underpinnings of the collateral-order doctrine and expanding the burden faced by federal appellate courts, a broad reading of *Scott*'s exception to normal limitations on interlocutory appellate jurisdiction also invites meritless appeals. And it does all of this with very little benefit to the legal system as a whole.

Defendants appeal a significant number of orders denying summary judgment on qualified immunity grounds. *See* Joanna Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 40 (2017) (finding that more than 20% of summary judgment orders denying qualified immunity are appealed). Moreover, a denial of qualified immunity at the motion to dismiss stage is also subject to interlocutory review, and a defendant can pursue appeals at both the motion to dismiss and summary judgment stages of the case. *Behrens v. Pelletier*, 516 U.S. at 307.

Even though orders denying qualified immunity are frequently appealed, they are rarely reversed. Only 12.2% of interlocutory qualified immunity appeals were reversed in whole and 7.3% reversed in part. *Schwartz*, 127 Yale L.J. at 40. Defendants pursue

interlocutory appeals notwithstanding the low likelihood of success due to the tactical advantages that inure from delay. *See* Karen Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1891-92 n.23 (2018).

A meritless interlocutory appeal essentially functions as a continuance, affording a defendant the opportunity to avoid trial, delay paying a verdict, or gain disproportionate leverage in settlement negotiations. *Id.*; Joanna Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101, 1121 (2020) (describing attorney observations about strategic use of interlocutory appeals of qualified immunity denials); *Stewart v. Donges*, 915 F.2d 572, 576-78 (10th Cir. 1990) (analogizing the interlocutory appeal to a unilateral continuance).

The new jurisdictional avenue created by an expansive reading of *Scott* provides defendants with a unique opportunity to force their version of the facts into appellate review, under the guise of challenging a "blatant contradiction." Regardless of whether a blatant contradiction actually exists, a broad reading of *Scott* allows the circuit court to review the record and consider the defendant's conflicting evidence. In this environment, defendants frequently assert a *Scott* claim on appeal even when the district court's determination is not blatantly contradicted by the evidence. Between 2007 and 2019, appellate courts found that approximately four out of five appeals invoking *Scott* were losing appeals. 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. A survey of these cases reveals that defendants frequently present run-of-the-mill conflicting facts

as "blatantly contradictory." *See e.g.*, *Harris v. Pittman*, 927 F.3d 266, 276-79 (4th Cir. 2019); *Adams v. Blount Cty.*, 846 F.3d 940, 950 (6th Cir. 2020); *Walton v. Dawson*, 752 F.3d 1109, 1124 (8th Cir. 2014).

Lower courts have acknowledged the temptation for defendants to pursue weak or wholly meritless appeals under *Scott*. See*, e.g.*, *Romo v. Largen*, 723 F.3d 670, 679-680 (6th Cir. 2013) (concurring, Sutton, J.) ("even if it turns out to be only the occasional case that meets the *Scott* standard, I doubt it will be only the occasional lawyer who argues that the district court badly misread the record"); *Sanford v. Stewart*, 597 Fed. Appx. 321, 326 (6th Cir. 2015) (identifying defendant's "attempt to justify an improper interlocutory appeal" by "invok[ing] the language of the 'one limited exception' by which we might consider their version of the facts on an interlocutory appeal.").

A broad reading of the *Scott* exception, like the Eighth Circuit's below, will significantly add to the already high number of qualified immunity appeals. While the *Scott* standard is a narrow exception in theory, its practical application by the lower courts has facilitated defendant abuse of the interlocutory appellate process, resulting in increased work for appellate courts.

III. MERITLESS INTERLOCUTORY APPEALS OF QUALIFIED IMMUNITY ORDERS FRUSTRATE TRIAL COURT PROCCEEDINGS AND DELAY JUSTICE IN CIVIL RIGHTS CASES

The expansion of interlocutory appeals by courts reading *Scott* too broadly can result in serious prejudice to legitimate claims. Interlocutory appeals make litigation more difficult and expensive for each court and

litigant involved, and they are particularly prejudicial to civil rights plaintiffs, who bear the brunt of the harm caused by meritless appeals. Joanna Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 362 (2020). Specifically, the delays created by interlocutory appeals are uniquely damaging to a plaintiff's case. Generally, district courts stay proceedings while appeals are pending. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Accordingly, an appeal will halt the progression of a plaintiff's case until the circuit court reads the parties' briefs, hears oral argument, issues a decision, and remands the case to the district court. That process can take a year or more. Joanna Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101, 1122 (2020). While the appeal is pending, time degrades the plaintiff's evidence. In particular, plaintiff's "witnesses' memories fade or disappear." Alphonse Gerhardstein, *Making a Buck While Making A Difference*, 21 Mich. J. Race & L. 251, 264 (2016). The plaintiff's attorneys also lose command over the details of the case and become less prepared for trial while appeals are pending. 114 Nw. U.L. Rev. at 1122.

In addition to the practical problems that additional interlocutory appeals create for a plaintiff's case, appeal-created delays have a direct impact on the plaintiffs themselves. First, delaying trial court proceedings extends the period that victims of government misconduct must wait to be compensated for their injuries. Section 1983 plaintiffs who sue for damages have specific, tangible harm they are seeking to remedy. Specifically, individuals suing to challenge police misconduct may have medical costs, be forced to miss work, or be injured so severely that their earning potential is permanently reduced. In tragic situations like the present case where unconstitutional conduct

results in a loss of life, family members may be seeking damages for pain and suffering or loss of income from their loved one's departure. Delaying a plaintiff's ability to recover for months or years can have a lasting, negative impact on their physical, mental, and financial well-being.

The early resolution of qualified immunity issues provides an important safeguard against the "excessive disruption of government and [permits] the resolution of many insubstantial claims on summary judgment." *Mitchell*, 457 U.S. at 818. But district courts are well-equipped to ensure that those interests are protected in the first instance, and the expansion of interlocutory appellate jurisdiction to fact issues in qualified immunity cases has an equally disruptive effect on our legal system, the rights of plaintiffs, and the administration of justice. This case presents an opportunity for this Court to ensure that lower courts continue to apply *Scott*'s exception in a narrowly limited fashion that is consistent with the final judgment rule, the collateral-order doctrine, and this Court's cases.

CONCLUSION

For the foregoing reasons, NPAP urges this Court grant certiorari to ensure that *Scott*'s exception continues to be applied narrowly in the courts of appeals.

Respectfully submitted,

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