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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a petition for writ of certiorari should be granted where the Eighth Circuit accepted the factual findings of the District Court, where the Eighth Circuit conducted a *de novo* review of legal issues and correctly applied Supreme Court and Eighth Circuit precedent to the legal question of whether the use of deadly force was forbidden by clearly established law, where not one Eighth Circuit judge questioned its jurisdiction over the interlocutory appeal, where the same issue and arguments were presented to, and rejected by, this Court six months earlier, where the same issue has been decided by this Court multiple times, and where the Eighth Circuit's practice of maintaining jurisdiction over interlocutory appeals involving denials of qualified immunity does not deviate from its sister circuits?

STATEMENT OF RELATED PROCEEDINGS

There are no other court proceedings directly related to this case.

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INTRODUCTION

Sok Kong, Trustee for Next-of-Kin of Map Kong's ("Kong") Petition for Writ of Certiorari is based on the argument that the Eighth Circuit lacked jurisdiction over this interlocutory appeal by wrongfully conducting a *de novo* review of the alleged fact issue of whether decedent Map Kong ("Map") posed an immediate threat of death or great bodily harm. Specifically, Kong maintains the Eighth Circuit ignored and replaced the District Court's findings of fact by determining that Map did pose an immediate threat of death or great bodily harm. There are many problems with this argument.

First, the City of Burnsville Police Officers John Mott ("Mott"), Taylor Jacobs ("Jacobs") and Sergeant Maksim Yakovlev's ("Yakovlev") motion for summary judgment based on qualified immunity was denied by the District Court. Mott, Jacobs and Yakovlev filed an interlocutory appeal with the Eighth Circuit. Not one Eighth Circuit judge believed the Eighth Circuit lacked jurisdiction over the interlocutory appeal.

Second, whether Map posed an immediate threat of death or great bodily harm is a legal issue – not a fact issue. Thus, the Eighth Circuit has jurisdiction to conduct a *de novo* review of that legal issue.

Third, in making its decision to reverse the denial of qualified immunity, the Eighth Circuit accepted the factual findings of the District Court, conducted a *de novo* review of legal issues and correctly applied Supreme Court and Eighth Circuit precedent to the legal question of whether the use of deadly force was forbidden by clearly established law. Therefore,

whether Map posed an immediate threat of death or great bodily harm was immaterial to the Eighth Circuit's decision.

Finally, to support his Petition, Kong resorts to omitting and misstating essential factual and legal findings made by both the District Court and the Eighth Circuit; presenting the same issue and making the same arguments that were previously rejected by this Court six months earlier in *Hinson v. Bias*, 141 S.Ct. 233 (2020); presenting the same issue that has been decided by this Court in *Mitchell v. Forsyth,* 472 U.S. 511 (1985), *Johnson v. Jones,* 515 U.S. 304 (1995), *Behrens v. Pelletier,* 516 U.S. 299 (1996) and *Scott v. Harris,* 550 U.S. 372 (2007); and finally ignoring an Eighth Circuit case directly on point, raising the false narrative that the Eighth Circuit deviates from its sister circuits by conducting *de novo* reviews of a district court's factual findings.

Thus, the question presented by Kong's Petition is based solely upon a false assertion as to the ruling by the Eighth Circuit Court of Appeals. The question set forth in the Petition asks "whether…an appellate court may reject a district court's determination of a genuine issue of material fact…" (Pet. Writ Cert. *i*). The Eighth Circuit did not reject the District Court's determination of an issue of material fact. Rather, the Eighth Circuit, in complete accord with the District Court, determined that the issue of material fact determined by the District Court only related to the first prong (reasonableness of force), and did not relate to the second prong (whether clearly established law prohibited the Officers' conduct), of the qualified immunity analysis. Furthermore, the supposed issue of "material fact" was not an issue of fact but was rather an issue of law based on the undisputed facts.

As such, Kong's Petition for Writ of Certiorari must be denied because the Eighth Circuit did nothing inconsistent with the precedent of this Court or that deviates from its sister circuits.

STATEMENT OF THE CASE

I. Kong Omits and Misstates Facts and Findings by the District Court.

It is ironic that Kong accuses the Eighth Circuit of allegedly ignoring and replacing the District Court's factual findings, when Kong omits and misstates important facts and findings by the District Court, which were relied on by the Eighth Circuit. For example:

1. Kong fails to mention the District Court found that "This is a rare officer-involved shooting case in which the entire incident is captured on the four present officers' body cameras. As such, in describing the shooting, the court relies principally on video evidence." (Pet'r's App. Writ Cert. 33a–34a).

2. Kong cites the District Court (Pet'r's App. 34a–35a) for the proposition that a customer "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. (Pet. 3). Unfortunately, Kong leaves out key facts found by the District Court, specifically that the customer called 911 to report this man "had a 'knife in his hand' that 'he's been waiving back and forth'." (Pet'r's App. 34a–35a). Also, the customer "was not sure if somebody else was in the car." (Pet'r's App. 35a).

3. Kong cites the District Court (Pet'r's App. 40a) to argue, "Officer Jacobs announced to Officer Mott: 'If he gets out, I'll go lethal.'" (Pet. 3). This is misleading and wrongfully implies that Jacobs would automatically shoot Map if he got out of the car, because what Kong fails to mention is that directly following that quote the District Court further explained that "to police, 'go lethal' means having one's handgun out and ready to fire." (Pet'r's App. 40a).

4. Kong cites the District Court (Pet'r's App. 42a–43a) to state that shortly after Yakovlev arrived on scene, "the officers decided to break [Map's] passenger-side windows." (Pet. 3). Kong omits the important reasons cited by the District Court for why it was decided to break those windows. Specifically, the District Court found that Yakovlev:

> "suggested that the officers 'figure out if [Map is] by himself there first.' (citation omitted) After circling around toward the passenger side of [Map's] car (the side of the car farther away from Frontage Road), and finding the windows just as fogged up as the ones on the driver's side, Sergeant Yakovlev and Officer Mott instructed Officer Jacobs to 'bust out [Map's] back window' with his baton, while still 'watch[ing] the cross-fire."

(Pet'r's App. 42a–43a).

5. Kong omits that the District Court found the tasering of Map "did not cause him to either drop his knife or cease bouncing up and down" and as

Jacobs was about to fire the second taser round "[Map] swung his knife closer to the broken passenger-side window" where Jacobs was positioned. (Pet. 4); (Pet'r's App. 44a).

6. Although Kong cites the District Court (Pet'r's App. 45a) to state a McDonald's employee reported that Map looked "scared" as he ran from his vehicle with a long knife in his hand, Kong fails to disclose that the same employee, along with two other witness "feared for the safety of everyone around [Map]." (Pet'r's App. 48a).

7. Kong fails to mention the District Court concluded that Map's behavior "was certainly frightening and unpredictable, like the decedents in both *Hassan v. City of Minneapolis*, 489 F.3d 914 (8th Cir. 2007) and *Schneider v. City of Minneapolis*, 2006 WL 1851128 (D. Minn. June 30, 2006)." (Pet'r's App. 69a). And Kong fails to mention, in *Hassan* and *Schneider*, the police officers' use of deadly force was found to be reasonable.

8. Kong omits that the District Court found Mott, Jacobs and Yakovlev were "forced to make a split-second judgment in circumstances that were tense, uncertain, and rapidly evolving." (Pet'r's App. 74a). (quotation and citation omitted).

9. Kong fails to point out that the District Court acknowledged that whether Map committed a felony and whether Map posed an imminent threat of death or great bodily harm were part of the first prong (reasonableness of force) of the qualified immunity analysis, which are questions of law. (Pet'r's App. 56a)*; Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014); *Pace v. City of Des Moines*,

201 F.3d 1050, 1056 (8th Cir. 2000) (*quoting Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (*per curiam*)).

10. Kong fails to disclose that the District Court held, "Of course, even if material disputes of fact preclude the Court from deeming Defendants' use of deadly force objectively reasonable as a matter of law, the Court must still find in Defendants' favor if the constitutional right Defendants allegedly violated was not 'clearly established' on March 17, 2016." (Pet'r's App. 70a–71a).

Moreover, Kong's omissions and misstatements were not confined to the District Court's decision.

II. Kong Omits and Misstates Findings by the Eighth Circuit.

Kong omits and misstates essential findings made by the Eighth Circuit. For example:

1. Kong fails to mention that the Eighth Circuit agreed with the District Court that "[a]lmost all of the facts here come from the body cameras of four officers." (Pet'r's App. 6a; Pet'r's App. 33a–34a).

2. Contrary to Kong's claim that "The Eighth Circuit rejected the District Court's factual analysis" (Pet. 10), the Eighth Circuit in its statement of facts cites only to the District Court's factual findings. (Pet'r's App. 6a–9a). Therefore, the Eighth Circuit did not reject the District Court's factual findings, nor did it need to make a finding that the District Court's factual findings were blatantly contradicted by the evidence, because the Eighth Circuit adopted the District Court's factual

findings that were based on the officers' body camera videos. *Id*.

3. Kong cites the Eighth Circuit (Pet'r's App. 8a–9a) claiming, "Cars sped along the adjacent Frontage Road and Highway 13 approximately 100 feet away from [Map's] car." (Pet. 3). This is pure fabrication. The Eighth Circuit stated, "During the shooting a few cars passed by along the frontage road, 100 feet away" and "Steady traffic continued on the highway beyond." (Pet'r's App. 8a–9a). In fact, the Eighth Circuit cited the District Court who found "steady traffic on Highway 13 is visible in the background, as are a few cars driving along Frontage Road." (Pet'r's App. 46a). There was no mention of cars speeding by either Court. *Id*.

4. Kong claims the Eighth Circuit conducted a *de novo* review of the alleged fact issue as to whether Map posed an imminent threat of death or great bodily harm. (Pet. 7). This is a misstatement of law because: 1) whether Map posed an imminent threat of death or great bodily harm is question of law. *Pace*, 201 F.3d at 1056; and 2) the Eighth Circuit correctly conducted a *de novo* review of the district court's legal conclusion that Map allegedly did not pose a threat of death or great bodily harm. *Brown v. Fortner*, 518 F.3d 552, 557 (8th Cir. 2008).

5. Kong omits that the Eighth Circuit relied solely on the second prong (clearly established) of the qualified immunity analysis for reversing the District Court's denial of summary judgment based on qualified immunity. (Pet'r's App. 11a–18a).

6. Kong fails to mention that in Judge Kelly's dissenting opinion, she never argued that the Eighth Circuit lacked jurisdiction or that the panel wrongfully conducted a *de novo* review of a fact issue. (Pet'r's App. 23a–30a).

7. Kong fails to mention that in Judge Kelly's dissenting opinion, she admits the panel's reversal of the District Court's decision was based on the second prong of the qualified immunity analysis. (Pet'r's App. 27a).

8. Kong omits that Judge Kelly, who authored the dissenting opinion of the panel's decision, did not join Judge Grasz's dissenting opinion of the Eighth Circuit's Order denying Kong's petition for rehearing en banc. (Pet'r's App. 1a).

9. Kong fails to mention that in Judge Grasz's dissenting opinion, Judge Grasz never argued that the Eighth Circuit lacked jurisdiction. (Pet'r's App. 1a–4a).

10. Finally, Kong fails to mention that in Judge Grasz's dissenting opinion, he admits the panel's reversal of the district court's decision was based solely on the second prong of the qualified immunity analysis. (Pet'r's App. 3a).

Thus, despite Kong's best efforts to reshape the legal history of this case, the Eighth Circuit's decision was based on the undisputed facts as found by the District Court.

III. Undisputed Facts.

The Eighth Circuit's decision was based on the following undisputed facts found by the District Court:

1. In the early morning hours of March 17, 2016, Officers Mott and Jacobs were dispatched to a McDonald's on a report of a "suspicious activity" in a McDonald's parking lot. (Pet'r's App. 6a (citing Pet'r's App. 35a)).

2. The dispatch stated that a man was "jumping up and down inside his car," "waiving a knife back and forth" and it was unknown if the man was alone in the car. *Id.*

3. The McDonald's "faced the frontage road and the four-lane highway; weekday traffic moved steadily, interrupted by stop signs on the frontage road and stoplights on the highway." (Pet'r's App. 7a (citing Pet'r's App. 37a–38a)).

4. Map was found sitting in the driver's seat of a vehicle, with his windows rolled up, rocking back and forth and slashing a large knife in front of him. (citing Pet'r's App. 38a).

5. Mott and Jacobs pointed their flashlights and firearms at Map and repeatedly ordered him to "drop the knife" and "let me see your hands." Map repeatedly refused those orders. *Id.* (citing Pet'r's App. 39a).

6. Jacobs told Map he was under arrest. *Id.* (citing Pet'r's App. 39a).

7. Because the Officers could not see through the fogged-up back windows of Map's vehicle, Jacobs questioned if anyone was "laying down or hurt or injured in the back" of Map's car. Jacobs stated, "I'm just afraid he's got a gun in the car." (Pet'r's App. 7a (citing Pet'r's App. 40a–43a)).

8. "McDonald's customers continued to drive through, immediately behind [Map's] car" and thirteen vehicles moved through the parking lot during the Officers encounter with Map. *Id.* (citing Pet'r's App. 37a–38a).

9. Mott radioed that any additional units responding to the scene should block off traffic from entering the McDonald's parking lot. *Id.* (citing Pet'r's App. 41a–42a).

10. Sergeant Yakovlev arrived on scene and parked his vehicle at the frontage road entrance to the McDonald's parking lot. (Pet'r's App. 8a (citing Pet'r's App. 42a)).

11. Jacobs informed Yakovlev that Map was "contained," however, they should consider breaking a car window and tasing Map in case "he hops out of that car." *Id.*

12. Instead, Yakovlev wanted the Officers to "figure out if he's by himself there first." *Id.*

13. Jacobs broke the passenger side back window, and then the passenger side front window of Map's vehicle. *Id.* (citing Pet'r's App. 43a).

14. After breaking the front passenger-side car window, the Officer repeatedly ordered Map to

drop the knife. Map did not drop the knife and continued to bounce up and down in his seat. (Pet'r's App. 8a (citing Pet'r's App. 43a–44a)).

15. Jacobs yelled "Taser, taser" and fired his taser at Map. Map did not drop the knife. *Id.* (citing Pet'r's App. 44a).

16. Map swung his large knife closer to the broken passenger side front car window where Jacobs was standing. *Id.*

17. Jacobs deployed his taser for a second time. *Id.*

18. Map opened the driver's side door and stumbled to the ground. Map immediately got up, with the large knife in his hand, and ran across the parking lot toward the frontage road and highway, away from the Officers and McDonald's. (Pet'r's App. 8a (citing Pet'r's App. 45a)).

19. A customer's vehicle was 30 feet away from Map, and Map ran in the general direction of that vehicle. *Id.* (citing Pet'r's App. 46a–47a).

20. Also, a few cars passed by along the frontage road, 100 feet away, and there was steady traffic on the highway beyond the frontage road. (Pet'r's App. 8a–9a (citing Pet'r's App. 46a)).

21. Within seconds, Mott, Jacobs and Yakovlev fired their guns and killed Map. *Id.* (citing Pet'r's App. 45a).

These undisputed facts were the basis for the Eighth Circuit's legal determination that there was no clearly established law prohibiting the use of deadly force

under these circumstances. (Pet'r's App. 11a–18a). As the Eighth Circuit correctly held, "Even if the facts showed that the officers had violated [Map's] Fourth Amendment right, the law at the time of the shooting – March 17, 2016 – did not clearly establish the right." (Pet'r's App. 11a).

REASONS TO DENY THE WRIT

I. The Same Issue and Arguments were Recently Presented to the Court for Review and Denied on October 5, 2020 in *Hinson v. Bias*, 141 S.Ct. 233 (2020).

The reason cited for Kong's Petition for Writ of Certiorari is:

> 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.

(Pet. 9).

According to Kong, the Eighth Circuit allegedly turned this interlocutory appeal from a jurisdictional exception to the rule "by reviewing the district court's factual conclusions *de novo*." (Pet. 10). This is the same issue and arguments recently submitted to the Court for review and denied on October 5, 2020 in *Hinson v. Bias*, 141 S.Ct. 233 (2020).

Like Kong, Hinson claimed the Eleventh Circuit exceeded its jurisdictional authority by conducting a *de novo* review of the facts found by the district court and then substituting its own factual findings. (Hinson Pet. Writ. Cert. 11, 17, Jan. 10, 2020). This argument failed. Like the Eleventh Circuit in *Hinson*, the Eighth Circuit in *Kong* did not deviate from this Court's precedent, or its own, by wrongfully conducting a *de novo* review of the District Court's factual findings. (Pet'r's App. 6a–9a, 33a–34a).

Like Kong, Hinson argued the Eleventh Circuit's view on interlocutory jurisdiction is split from other circuits, because "the Eleventh Circuit claims discretion to undertake a *de novo* review to 'decide for [itself] what the facts are at this stage.'" (Hinson Pet. 17) (quoting *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996)). This argument failed, but unlike Kong, Hinson cited the Eighth Circuit's decision in *Thompson v. Dill*, 930 F.3d 1008, 1012 (8th Cir. 2019) to show that the Eighth Circuit does not conduct *de novo* reviews of fact issues. (Hinson Pet. 18). It must be pointed out that Kong never addresses the *Thompson v. Dill* decision. (Pet. 1–23).

Like Kong, Hinson claimed the Eleventh Circuit's alleged *de novo* review of fact issues was a recurring and exceptionally important issue because it expands the permissible interlocutory jurisdiction beyond the legal-question-centered limits of the collateral order doctrine. (Hinson Pet. 21–23). Again, this argument failed. But, unlike Kong, Hinson correctly pointed out that both prongs of the qualified immunity analysis are legal questions:

> A district court's denial of summary judgment in a qualified-immunity case is an appealable collateral order – but only as to the two core *legal* issues in the district court's qualified-immunity analysis: (1) whether the facts alleged amount to a constitutional violation and, if so, (2) whether the law rendering the conduct a constitutional violation was clearly established and so put the officers on notice that their actions would be subject to liability.

(Hinson Pet. 2).

In *Hinson*, the Eleventh Circuit's decision to reverse the denial of summary judgment based on qualified immunity was based solely on the first prong (reasonableness of force) of the qualified immunity analysis. *Hinson v. Bias*, 927 F.3d 1103, 1121 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 233, 208 L. Ed. 2d 14 (2020). In *Kong*, the Eighth Circuit's decision to reverse the denial of qualified immunity was based solely on the second prong (clearly established) of the qualified immunity analysis. (Pet'r's App. 11a–18a).

Finally, *Hinson* correctly stated that appellate courts' limited jurisdiction to review denials of summary judgment does not allow the review of a district court's determination of genuine issues of material fact under the collateral order doctrine. (Hinson Pet. 2–3). As we will discuss later in this brief, a major flaw in Kong's argument and Judge Grasz's dissent, is their misguided belief that the first prong of the qualified immunity analysis, along with its determining factors, are predicate facts.

In short, six months ago this Court determined that the same issue and arguments currently being presented by Kong were not worthy of review in *Hinson v. Bias*, 141 S.Ct. 233 (2020). As such, Kong's Petition for Writ of Certiorari should also be rejected, not only because essentially the same Petition was denied six months ago, but also because the same issue has been previously decided by this Court on at least four separate occasions.

II. This Issue has been Decided by the Court Multiple Times.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court confronted the issue of whether a denial of summary judgment based on qualified immunity is immediately appealable. *Id*. at 519. In deciding that such a denial was immediately appealable, the *Mitchell* Court held:

> An appellate court reviewing the denial of the defendant's claim of immunity 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 or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took. To be sure, the resolution of these legal issues will entail consideration of the

> factual allegations that make up the plaintiff's claim for relief …
>
> Accordingly, we hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.

Mitchell, 472 U.S. at 527–530 (footnote omitted).

Thus, the *Mitchell* Court was clear that an appellate court, when faced with a denial of qualified immunity, does have jurisdiction to decide legal issues but not the facts presented by a plaintiff. *Id.*

The case of *Johnson v. Jones*, 515 U.S. 304 (1995) involved an interlocutory appeal of a denial of summary judgment based on qualified immunity, where the Seventh Circuit dismissed the appeal based on a lack of jurisdiction because the appellants were seeking a review of predicate fact issues (no evidence that the officers participated in the beating of the plaintiff). *Id*. at 308. This Court affirmed the Seventh Circuit's decision by holding the following:

> We now consider the appealability of a portion of a district court's summary judgment order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency," *i.e.,* which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. That is, the District Court's determination that the

> summary judgment record in this case raised a genuine issue of fact concerning petitioners' involvement in the alleged beating of respondent was not a "final decision" within the meaning of the relevant statute.

Johnson, 515 U.S. at 313.

Consistent with the *Mitchell* decision, the *Johnson* Court held appellate courts can only review legal issues involving the denial of summary judgment based on qualified immunity and not the predicate facts determined by the district court. *Id.*

One year later in *Behrens v. Pelletier*, 516 U.S. 299 (1996), this Court clarified the *Johnson* decision:

> … respondent asserts that appeal of denial of the summary-judgment motion is not available because the denial rested on the ground that "[m]aterial issues of fact remain." This, he contends, renders the denial unappealable under last Term's decision in *Johnson v. Jones*, 515 U.S., at 313–318, 115 S.Ct., at 2156–2158. That is a misreading of the case. Denial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is

> at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*. See 515 U.S., at 313–318, 115 S.Ct., at 2156–2158. *Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity, *id.*, at 317, 115 S.Ct., at 2158—typically, the issue whether the federal right allegedly infringed was "clearly established," see, *e.g., Mitchell, supra*, at 530–535, 105 S.Ct., at 2817–2820; *Davis v. Scherer*, 468 U.S. 183, 190–193, 104 S.Ct. 3012, 3017–3019, 82 L.Ed.2d 139 (1984).

Behrens, 516 U.S. at 312–313.

Finally, in *Scott v. Harris*, 550 U.S. 372 (2007), which involved an interlocutory appeal of a denial of summary judgment based on qualified immunity, this Court held:

> The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light

> most favorable to the party opposing the [summary judgment] motion." *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (*per curiam*); *Saucier, supra*, at 201, 121 S.Ct. 2151. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.
>
> * * *
>
> …When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Scott, 550 U.S. at 378 – 381 (footnote omitted).

Building upon the *Mitchell*, *Johnson* and *Behrens* decisions, the *Scott* Court reiterated that an appellate court must accept the Plaintiff's version of facts when determining the legal issues of qualified immunity with one exception - when Plaintiff's version of facts is blatantly contradicted by the record. *Id.*

Therefore, on at least four separate occasions this Court has decided the issue presented for review by Kong - whether on interlocutory appeal an appellate court may review and reject a district court's findings of fact. *Mitchell*, 472 U.S. at 527–30; *Johnson*, 515 U.S. at 313; *Behrens*, 516 U.S. at 312–313; *Scott*, 550 U.S. at 378 - 381. The answer to this question is "no," unless the factual findings are blatantly contradicted by the record. *Id.*

As we will discuss next, the Eighth Circuit did not reject the District Court's findings of fact. Instead, the Eighth Circuit accepted the District Court's findings and correctly conducted a *de novo* review of questions of law including whether clearly established law prohibited the use of deadly force under these circumstances.

III. The Eighth Circuit's Decision was Based on the Second Prong of the Qualified Immunity Analysis.

It is well established there are two prongs to the qualified immunity analysis. A government official is entitled to qualified immunity unless (1) the evidence establishes a violation of a constitutional right, and (2) "the unlawfulness of their conduct was 'clearly established at the time.'" *D.C. v. Wesby*, 138 S.Ct. 577, 589 (2018) (*quoting Reichle v. Howards*, 566 U.S. 658, 664 (2012)). The qualified immunity analysis, including reasonableness of force (first prong of qualified immunity analysis), are questions of law for a court and not predicate facts to be determined by a jury. *Mitchell*, 472 U.S. at 527–530; *Hunter v. Bryant*, 502 U.S. 224, 227-228 (1991); *Plumhoff*, 572 U.S. at 773; *McKenney v. Harrison*, 635 F.3d 354, 359 (8th Cir. 2011); *Pace*, 201 F.3d at 1056; *Nelson v. County of Wright*, 162 F.3d 986, 989 (8th Cir. 1998); *Kelsay v. Ernst,* 933 F.3d 975, 981 (8th Cir. 2019). The Eighth Circuit has defined "Predicate Facts" as follows:

> "Predicate facts" include only the relevant circumstances and the acts of the parties themselves, and not the conclusions of others about the reasonableness of those actions. When there is no dispute among the parties as to the relevant facts … a court should

> always be able to determine as a matter of law whether or not an officer is eligible for qualified immunity—that is, whether or not the officer acted reasonably under settled law given the particular set of facts.

Pace, 201 F.3d at 1056.

Kong's Petition for Writ of Certiorari is premised on a claim that "the Eighth Circuit rejected a district court's determination of genuine issues of material fact *without* considering whether the record blatantly contradicted that determination." (Pet. i). This entire argument fails to recognize that the Eighth Circuit accepted all of the predicate facts found by the District Court and the alleged "genuine issues of material fact" set forth by the District Court are questions of law and related solely to the first prong of the qualified immunity analysis.

A. District Court.

The first prong of the qualified immunity analysis (reasonableness of force) turns on the totality of the circumstances, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officer or others, and [3] whether the suspect is actively fleeing or resisting arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989). These are questions of law and not predicate facts. *Mitchell*, 472 U.S. at 527–530; *Hunter*, 502 U.S. at 227-228; *Plumhoff*, 572 U.S. at 773; *McKenney*, 635 F.3d at 359; *Pace*, 201 F.3d at 1056; *Nelson*, 162 F.3d at 989; *Kelsay*, 933 F.3d at 981.

In its opinion, the District Court stated "This is the rare officer-involved shooting case in which the entire

incident is captured on the four present officers' body cameras. As such, in describing the shooting, the court relies principally on video evidence." (Pet'r's App. 33a–34a).

In denying qualified immunity, the District Court found two alleged issues of disputed facts that prevented it from finding that the use of deadly force was objectively reasonable:

> First, there is a material dispute as to whether Mr. Kong has committed a violent felony before the officers shot him (i.e., by "assaulting" the officers), such that the officers reasonably would have thought him likely to hurt others. Second, there is a material dispute 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.

(Pet'r's App. 56a).

This is a clear error of law, because whether a reasonable officer could believe Kong committed a felony or was an immediate threat of serious injury or death are questions of law. *Mitchell,* 472 U.S. at 527–530; *Hunter*, 502 U.S. at 227-228; *Plumhoff,* 572 U.S. at 773; *McKenney*, 635 F.3d at 359; *Pace*, 201 F.3d at 1056; *Nelson*, 162 F.3d at 989; *Kelsay*, 933 F.3d at 981.

Regardless of this error, the District Court only found alleged issues of fact concerning the first prong of qualified immunity analysis and did not set forth any alleged issue of fact relating to the second prong.

(Pet'r's App. 56a, 70a–71a). This was confirmed later in its opinion when the District Court rightfully acknowledged:

> Of course, even if material disputes of fact preclude the Court from deeming Defendants' use of deadly force objectively reasonable as a matter of law, the Court must still find in Defendants favor if the constitutional right defendants allegedly violated was not 'clearly established' as of March 17, 2016.

(Pet'r's App. 70a–71a).

In other words, despite these alleged issues of fact relating to reasonableness of force (first prong), the Officers are entitled to qualified immunity if their actions were not forbidden by clearly established law (second prong). This is precisely what the Eighth Circuit found as a matter of law.

B. The Eighth Circuit.

The Eighth Circuit agreed with the District Court that "[a]lmost all of the facts here come from the body cameras of four officers." (Pet'r's App. 6a); (Pet'r's App. 33a–34a). And contrary to Kong's claim that "The Eighth Circuit rejected the District Court's factual analysis" (Pet. 10), the Eighth Circuit in its statement of facts cites only to the District Court's factual findings. (Pet'r's App. 6a–9a). Therefore, the Eighth Circuit did not reject the District Court's factual findings, nor did it need to make a finding that the District Court's factual findings were blatantly contradicted by the evidence, because the Eighth Circuit adopted the District Court's factual findings

that were based on the Officers' body camera videos. *Id.*

Further, the Eighth Circuit correctly stated, it "cannot find facts, [but] it may determine whether the undisputed facts support the district court's legal conclusions". (Pet'r's App. 9a). And, as previously mentioned, both prongs of the qualified immunity analysis are questions of law. *Mitchell*, 472 U.S. at 527–530; *Hunter*, 502 U.S. at 227-228; *Plumhoff*, 572 U.S. at 773; *McKenney*, 635 F.3d at 359; *Pace*, 201 F.3d at 1056; *Nelson*, 162 F.3d at 989; *Kelsay*, 933 F.3d at 981.

When undertaking the review of these legal questions, the Eighth Circuit has the discretion to decide which of the two prongs of the qualified immunity analysis to analyze first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Here, the Eighth Circuit only addressed the second prong of the qualified immunity analysis, and correctly stated, "Even if the facts show that the officers had violated Kong's Fourth Amendment right, the law at the time of the shooting – March 17, 2016 – did not clearly establish the right." (Pet'r's App. 11a).

Specifically, based on the undisputed facts found by the District Court, the Eighth Circuit made the legal determination that Kong did not commit a violent felony. (Pet App. 17a). Despite this legal finding, the Eighth Circuit made the further legal determination that Kong still "posed a threat to citizens" (Pet'r's App. 14a), and therefore:

> …a reasonable officer would have believed the law permitted shooting Kong even without a violent felony.

> Existing precedent of the Supreme Court and this circuit did not provide fair warning to the Burnsville officers that shooting Kong under these circumstances was unreasonable. The district erred in denying the officers qualified immunity.

(Pet'r's App. 18a).

Therefore, the Eighth Circuit made it clear that whether Kong had committed a violent felony was immaterial to the legal question of whether clearly established law prohibited the use of deadly force under these circumstances. (Pet'r's App. 17a–18a); *see Thompson v. Murray*, 800 F.3d 979, 983 (8th Cir. 2015) (appellate court may review the legal question of whether a factual dispute is material); *Malone v. Hinman,* 847 F.3d 949, 953-954 (8th Cir. 2017) (a nonmaterial issue of fact does not prevent review by an appellate court).

Furthermore, all the facts relating to whether Kong was a threat are undisputed, because all of the predicate facts were captured on the Officers' body camera videos. (Pet'r's App. 6a–9a). And despite Kong's arguments to the contrary and Judge Grasz's dissenting opinion, the District Court's claimed fact dispute as to whether Kong was a threat to bystanders is not a predicate fact but rather is a legal conclusion which is subject to *de novo* review by an appellate court. *Mitchell*, 472 U.S. at 527–530; *Hunter*, 502 U.S. at 227-228; *Plumhoff*, 572 U.S. at 773; *McKenney*, 635 F.3d at 359; *Pace*, 201 F.3d at 1056; *Nelson*, 162 F.3d at 989; *Kelsay*, 933 F.3d at 981; *Mitchell*, 472 U.S. at 530 (1985); *Felder v. King*, 599 F.3d 846, 848 (8th Cir. 2010).

Therefore, the Eighth Circuit did not conduct a *de novo* review of the District Court's findings of fact when it made the legal determination that Kong did pose a threat to citizens and that clearly established precedent did not forbid the use of deadly force under these circumstances.

Finally, and more importantly, the Eighth Circuit was absolutely justified in granting qualified immunity, because there is no clearly established precedent that forbid the Officers from using deadly force under these circumstances. (Pet'r's App. 11a–18a). In his dissenting opinion, Judge Grasz did not point to a case that should have put the Officers on notice that deadly force was forbidden. (Pet'r's App. 1a–4a). In his Petition, Kong ignores this issue because the Eighth Circuit's decision was correct.

IV. The Eighth Circuit is Not Split from Other Circuits.

Kong asserts review by this Court is needed because the Eighth Circuit's practice of maintaining jurisdiction over denials of summary judgment involving qualified immunity allegedly deviates from its sister circuits. Kong's entire argument is based on the false narrative that on interlocutory appeal of a denial of qualified immunity the Eighth Circuit conducts a *de novo* review of fact issues found by a district court. Nothing could be further from the truth, and Kong fails to address an Eighth Circuit opinion directly on point.

A. Eighth Circuit.

The Eighth Circuit is not the rogue circuit that Kong portrays in his Petition. It is quite the opposite. Even the Petitioner in *Hinson* recognized that the Eighth

Circuit was an example of a circuit that was correctly following the law established by this Court. (Hinson Pet. 18).

Specifically, in *Thompson*[1] the Eighth Circuit correctly stated that it has limited jurisdiction over denials of summary judgment based on qualified immunity to conduct a *de novo* review of "purely legal issues of whether the alleged facts support a claim of violation of clearly established law." *Thompson,* 930 F.3d at 1012; *see also Raines v. Counseling Assocs. Inc.,* 883 F.3d 1071, 1074 (8th Cir. 2018). Further, the Eighth Circuit recognized that it cannot conduct a *de novo* review of the facts found by the District Court unless "the record plainly forecloses the district court's finding of a material factual dispute." *Thompson,* 930 F.3d at 1012. These standards are consistent with this Court's decisions in *Mitchell, Johnson, Behrens* and *Scott, supra.*

Based on these standards, the *Thompson* Court rightfully held that it did not have jurisdiction to hear the appeal because there was a material issue of fact (whether Thompson reached for his waist), which was beyond its limited jurisdiction. *Id.* at 1014.

Unlike *Thompson,* in the present case there was no material issue of fact involving the second prong of the qualified immunity analysis, which, therefore, allowed

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[1] Judge Grasz, who authored the dissenting opinion of the Order denying Kong's request for rehearing en banc, authored the *Thompson* opinion. (Pet'r's App. 1a–4a). Also, Judge Kelly, who authored the dissenting opinion for the Eighth Circuit's decision to reverse the denial of qualified immunity, was on the *Thompson* panel. (Pet'r's App. 23a–30a). Again, Judge Grasz and Judge Kelly never questioned the Eighth Circuit's jurisdiction over the appeal in *Kong* (Pet'r's App. 1a–4a, 23a–30a).

the Eighth Circuit limited jurisdiction to determine the "purely legal issues of whether the alleged facts support a claim of violation of clearly established law." *Thompson,* 930 F.3d at 1012. The Eighth Circuit in *Kong* rightfully exercised their limited jurisdiction and correctly found that the Officers were entitled to qualified immunity because there was no clearly established law that forbid the use of deadly force under these circumstances. (Pet'r's App. 11a–18a).

Clearly, the *Thompson* decision directly refutes Kong's argument, and Kong's failure to address *Thompson* in his Petition is alarming.

Finally, the Eighth Circuit's jurisdictional jurisprudence on denials of qualified immunity is not split from its sister circuits.

B. First Circuit.

Like the Eighth Circuit, the First Circuit has limited jurisdiction to review the denial of qualified immunity:

> … we have held that, notwithstanding the absence of a final judgment, we have jurisdiction to review interlocutory rulings implicating qualified immunity as long as those rulings are purely legal in nature (say, a ruling that a given body of facts will support a claimed violation of clearly established law). *See Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995) (citing *Johnson*, 515 U.S. at 316-17, 115 S.Ct. 2151). But we may not review, on interlocutory appeal, an order denying qualified immunity "to the extent that [the order] turns on either an issue of fact or an issue perceived by the trial court to

> be an issue of fact." Id. By virtue of this prohibition, we lack jurisdiction to consider a defendant's argument "that the facts asserted by the plaintiffs are untrue, unproven, warrant a different spin, tell only a small part of the story, and are presented out of context." *Díaz v. Martínez*, 112 F.3d 1, 5 (1st Cir. 1997)

McKenney v. Mangino, 873 F.3d 75, 80-81 (1st Cir. 2017)

C. Second Circuit.

In *Martinez v. Simonetti,* 202 F.3d 625 (2nd Cir. 2000), the Second Circuit articulated that a denial of qualified immunity is an appealable final decision within the meaning of 28 U.S.C. § 1291, "to the extent that it turns on an issue of law." *Id.* at 631-632 (*citing Mitchell,* 472 U.S. at 530). Similar to the Eighth Circuit, the *Martinez* court stated:

> In the qualified immunity context, purely legal questions may include, *inter alia,* whether plaintiffs have asserted a violation of a federally protected right in the first instance, *see X–Men Security, Inc. v. Pataki,* 196 F.3d 56, 66 (2d Cir.1999), whether that right was clearly established at the time of the challenged conduct, *see id.,* and whether the facts as alleged demonstrate the objective reasonableness of the public official's conduct, *see Tierney,* 133 F.3d at 194 (issue of whether defendants acted reasonably should be determined by the court). *See also Lennon v. Miller,* 66 F.3d 416, 422 (2d Cir.1995) (whether

> objectively reasonable for officers to believe they did not violate plaintiff's rights is purely legal question for the court).
>
> By contrast, we have recently said that "[d]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable ... if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred...." *Smith v. Edwards,* 175 F.3d 99, 104 (2d Cir.1999) (internal quotation omitted).

Martinez, 202 F.3d at 632; *see also Lynch v. Ackley,* 811 F.3d 569, 576 (2nd Cir. 2016).

D. Third Circuit.

On interlocutory appeal, the Third Circuit does not have jurisdiction to review questions of "evidence sufficiency." *Blaylock v. City of Philadelphia,* 504 F.3d 405, 409 (3rd Cir. 2007) (citing *Johnson,* 515 U.S. at 313). However, like the Eighth Circuit:

> Once [the Third Circuit] accept[s] the set of facts that the District Court found to be sufficiently supported, however, we may review the District Court's conclusion that the defendants would not be immune from liability if those facts were proved at trial. *See Behrens v. Pelletier,* 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) ("*Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported

> for purposes of summary judgment met the [qualified immunity] standard of 'objective reasonableness.'"); *Rivas v. City of Passaic,* 365 F.3d 181, 192 (3rd Cir. 2004) ("[I]f a defendant in a constitutional tort case moves for summary judgment based on qualified immunity and the district court denies the motion, we lack jurisdiction to consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove; but we possess jurisdiction to review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right.") (quoting *Ziccardi v. City of Philadelphia,* 288 F.3d 57, 61 (3rd Cir. 2002)).

Blaylock, 504 F.3d at 409.

E. Fourth Circuit

"[A] district court's denial of a claim of qualified immunity, *to the extent that it turns on an issue of law,* is an appealable 'final decision' …" *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011) (quoting *Mitchell,* 472 U.S. at 526) (emphasis added). However, like the Eighth Circuit, the Fourth Circuit does not have jurisdiction to "reweigh the record evidence 'to determine whether material factual disputes preclude summary disposition.'" *Witt,* 633 F.3d at 275 (quoting *Iko v. Shreve,* 535 F.3d 225, 234 (4th Cir. 2008)). As stated by the Fourth Circuit in *Culosi v. Bullock,* 596 F.3d 195 (4th Cir. 2010):

> Whether we agree or disagree with the district court's assessment of the record

> evidence on that issue, however, is of no moment in the context of this interlocutory appeal. This conclusion is required because the Supreme Court and this court have made clear "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." *Johnson,* 515 U.S. at 319–20, 115 S.Ct. 2151. "In other words, we possess no jurisdiction over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the facts actually occurred, but we have jurisdiction over a claim that there was no violation of clearly established law accepting the facts as the district court viewed them." *Winfield v. Bass,* 106 F.3d 525, 530 (4th Cir.1997) (en banc).

Id. at 201.

F. Fifth Circuit

The Fifth Circuit, like the Eighth Circuit, does not have jurisdiction to conduct *de novo* review of predicate facts – only questions of law:

> Whenever the district court denies an official's motion for summary judgment predicated upon qualified immunity, the district court can be thought of as making two distinct determinations, even if only implicitly. First, the district court decides that a certain course of conduct would, as a matter of law, be objectively unreasonable in

light of clearly established law. Second, the court decides that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct. According to the Supreme Court, as well as our own precedents, we lack jurisdiction to review conclusions of the *second* type on interlocutory appeal. *See Johnson v. Jones,* 515 U.S. 304, 313, 319–20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *Lemoine v. New Horizons Ranch & Ctr., Inc.,* 174 F.3d 629, 634 (5th Cir.1999). Stated differently, in an interlocutory appeal we cannot challenge the district court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true.

We do, however, have jurisdiction to the review the *first* type of determination, the purely legal question whether a given course of conduct would be objectively unreasonable in light of clearly established law. *See Behrens v. Pelletier,* 516 U.S. 299, 312–13, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) (stating that *Johnson* permits a defendant official "to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness'"). That is, we have jurisdiction only to decide whether the district court erred in concluding as a matter of law that officials are not entitled to qualified immunity on a given set of facts…

Kinney v. Weaver, 367 F.3d 337, 346–47 (5th Cir. 2004).

G. Sixth Circuit.

Like the Eighth Circuit, the Sixth Circuit has jurisdiction to review a denial of summary judgment based on qualified immunity to the extent the appeal raises a question of law. *Stoudemire v. Michigan Dep't of Corr.,* 705 F.3d 560, 564 (6th Cir. 2013). Specifically, "a defendant denied qualified immunity may appeal … [only] if the issue on appeal is whether the plaintiff's facts, taken at their best, show that the defendant violated clearly established law." *Kent v. Oakland County,* 810 F.3d 384, 389-390 (6th Cir. 2016) (quoting *Quigley v. Tuong Vinh Thai,* 707 F.3d 675, 680 (6th Cir. 2013). And like the Eighth Circuit, the Sixth Circuit does not have jurisdiction to "review a district court's determination that the record sets forth genuine issues of material fact for trial." *Kent,* 810 F.3d at 390 (citing *Austin v. Redford Twp. Police Dep't,* 690 F.3d 490, 495 (6th Cir. 2012)).

H. Seventh Circuit.

The Seventh Circuit reviews the denial of qualified immunity *de novo*, "asking whether viewing the facts in the light most favorable to the plaintiff, the defendants were nonetheless entitled to qualified immunity as a matter of law." *Est. of Escobedo v. Bender*, 600 F.3d 770, 778 (7th Cir. 2010). Like the Eighth Circuit, the Seventh Circuit has jurisdiction to review questions of law, but not predicate facts:

> …when the outcome of a question of law—for instance, whether a particular action violates the Constitution—does not depend on the

> outcome of a disputed factual question, we may review whether the district court correctly determined the question of law that it considered. *See Mitchell,* 472 U.S. at 528, 105 S.Ct. 2806. These are the "more abstract issues of law" to which an appeal of the denial of qualified immunity properly is limited. *Johnson,* 515 U.S. at 317, 115 S.Ct. 2151. When conducting such a review, we "simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id.* at 319, 115 S.Ct. 2151.

Leaf v. Shelnutt, 400 F.3d 1070, 1078 (7th Cir. 2005).

I. Ninth Circuit.

In line with the Eighth Circuit, the Ninth Circuit's interlocutory jurisdiction to review a denial of qualified immunity is limited to questions of law, which is reviewed *de novo*. *Eng v. Cooley*, 552 F.3d 1062, 1067 (9th Cir. 2009) (citing *Lee v. Gregory,* 363 F.3d 931, 932 (9th Cir. 2004)). Specifically, the application of the "clearly established" prong of the qualified immunity analysis is considered a question of law that is immediately appealable. *Est. of Anderson v. Marsh,* 985 F.3d 726, 731 (9th Cir. 2021) (citing *Johnson,* 515 U.S. at 313). And in line with the Eighth Circuit, the Ninth Circuit's review is limited to whether the defendants would be entitled to qualified immunity when assuming all factual disputes in favor of the plaintiff. *Eng*, 552 F.3d at 1067.

J. Tenth Circuit.

Similar to the Eighth Circuit, the Tenth Circuit has limited interlocutory jurisdiction to review the purely legal issues of: 1) "whether the facts that the district court rules a reasonable jury could find would suffice to show a legal violation;" and 2) "whether that law was clearly established at the time of the alleged violation." *Sawyers v. Norton,* 962 F.3d 1270, 1282 (10th Cir. 2020) (quoting *Al-Turki v. Robinson,* 762 F.3d 118, 1192 (10th Cir. 2014)). In other words, both prongs of the qualified immunity analysis are questions of law and not predicate facts. *Id.*

K. Eleventh Circuit.

And in line with the Eighth Circuit, the Eleventh Circuit's jurisdictional limits on reviewing denials of qualified immunity are as follows:

> The long and the short of our case law is clear: if there is no legal question to review -- like whether the officer's conduct violated a plaintiff's constitutional rights or whether those constitutional rights were clearly established by the Supreme Court, this Court or the highest court of the state in which the cause arose -- we cannot review a trial court's determination of the facts alone at the interlocutory stage.

Hall v. Flournoy, 975 F.3d 1269, 1277 (11th Cir. 2020).

Clearly, the Eighth Circuit is not split from its sister circuits and Kong's arguments to the contrary are hollow. Simply put, the Eighth Circuit followed the law set out by this Court, and its own Circuit, when it

maintained jurisdiction of the present interlocutory appeal, conducted a *de novo* review of the legal issues and correctly reversed the District Court's denial of qualified immunity.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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