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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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

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

ELIZABETH A. BIXBY*
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
lisa.bixby@macarthurjustice.org

Counsel for Petitioner

* Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.

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REPLY BRIEF FOR PETITIONER

Respondents offer no colorable basis for denying review. The backbone of Respondents' brief is the mistaken assertion that whether a suspect poses an immediate and significant threat of serious injury or death to the surrounding public is a question of law, not fact. BIO 7, 24-25. This Court and every federal appellate court disagree. And Respondents do not contest that the Eighth Circuit's failure to apply the blatant contradiction standard was outcome-determinative here. Instead, Respondents rely heavily on the denial of certiorari in *Hinson v. Bias*, 141 S. Ct. 233 (2020). But that argument belies *Hinson*'s vehicle flaws and ignores that the question's recurrence only underscores the need for the Court's intervention. This case presents an ideal vehicle for the Court to clarify the appropriate limits of interlocutory appellate jurisdiction and put an end to its troubling expansion.

1. Although Respondents attempt to muddy the distinction between questions of law and fact, this Court has made clear that whether a fleeing suspect poses a substantial, imminent threat to others is a "factual issue." *Scott v. Harris*, 550 U.S. 372, 380-81, 383-84 (2007). Federal appellate courts reiterate this settled point.[1] The Eighth Circuit itself has done so

[1] *Begin v. Drouin*, 908 F.3d 829, 834 (1st Cir. 2018) ("Whether an immediate threat exists is a question of fact for the jury as long as the evidence is sufficient to support such a finding."); *Baker v. City of Trenton*, 936 F.3d 523, 533 (6th Cir. 2019) ("The key *factual* question [i]s whether [the suspect] posed a serious and immediate threat of harm." (emphasis added) (cleaned up)); *Strand v. Minchuk*, 910 F.3d 909, 917 (7th Cir. 2018) (whether the suspect "continued to pose a threat when [the officer] fired" was an

many times.[2] In this case specifically, the Eighth Circuit nowhere suggested that it had recast the factual question of immediate threat as a legal one. And the cases cited by Respondents, some of which arise in

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"unresolved material question of *fact*" (emphasis added)); *Lee v. Town of Seaboard*, 863 F.3d 323, 328-30 (4th Cir. 2017) (describing whether officer "reasonably believed [the suspect's] car posed an imminent danger to bystanders" or to officers as "disputes of material fact"); *City of Harris v. U.S. Dep't of Veterans Affairs*, 776 F.3d 907, 914 (D.C. Cir. 2015) ("Whether the police officers' use of force . . . was reasonable turns on contested questions of *fact*—including . . . whether he posed an immediate threat to the safety of officers or others" (emphasis added) (cleaned up)); *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) (whether fleeing motorist posed an immediate "threat to the officers is a disputed fact"); *Lytle v. Bexar Cty.*, 560 F.3d 404, 415-17 (5th Cir. 2009) (no jurisdiction for interlocutory appeal, since whether "fleeing suspect posed such a threat that the use of deadly force was justifiable" was fact issue); *Carswell v. Borough of Homestead*, 381 F.3d 235, 240 (3d Cir. 2004) ("The *facts* to be examined include . . . whether the suspect poses an immediate threat to the safety of the officer or others." (emphasis added)); *Vaughan v. Cox*, 343 F.3d 1323, 1330 (11th Cir. 2003) ("Genuine issues of material fact remain as to whether [the suspects'] flight presented an immediate threat of serious harm to [the officer] or others at the time [the officer] fired the shot."); *Green v. Montgomery*, 219 F.3d 52, 59 (2d Cir. 2000) (describing whether the plaintiff "posed an immediate threat to the lives of the officers or others" as an "issue of fact"); *Chew v. Gates*, 27 F.3d 1432, 1442 (9th Cir. 1994) ("The existence of a *factual* question as to whether [the suspect] posed a safety threat" precludes summary judgment (emphasis added)).

[2] *See, e.g.*, *Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) (describing whether plaintiff posed a danger as among the "facts [plaintiff] could prove at trial"); *Wallace v. City of Alexander*, 843 F.3d 763, 769 (8th Cir. 2016) ("[A] fact finder could reasonably conclude that [the suspect] no longer posed a significant threat after he had discarded the gun and begun to flee.").

wholly unrelated contexts,[3] do not support their attempt to transform immediate threat into a legal question.[4]

This attempted repackaging of the imminent threat question as a legal issue also underlies one of Respondents' key arguments: that all of this is much ado about nothing because the Eighth Circuit rested its decision on prong two, not prong one, of the qualified immunity analysis. *See* BIO 20-26.

This contention falls flat. The Court has explained that "under either prong" of the qualified immunity analysis, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). As the petition explains, the dispositive factual question here was whether Kong posed an immediate threat of serious injury or death to the surrounding public. Pet. 7, 20-21. Both prong one and prong two of the qualified immunity analysis thus turned entirely on the Eighth Circuit's answer—derived from its *de novo* review of

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[3] *See Mitchell v. Forsyth*, 472 U.S. 511 (1985) (wiretapping); *Hunter v. Bryant*, 502 U.S. 224 (1991) (probable cause); *Pace v. City of Des Moines*, 201 F.3d 1050 (8th Cir. 2000) (malicious prosecution, search, and probable cause).

[4] *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014), did not address this question. In *McKenney v. Harrison*, 635 F.3d 354, 359-60 (8th Cir. 2011), whether the arrestee posed a threat was not at issue in the case. *Nelson v. Cty. of Wright*, 162 F.3d 986, 990-91 & n.5 (8th Cir. 1998), did not discuss the issue, although it did note that under the plaintiff's version of the facts, no rational jury could find an objectively unreasonable use of force. And *Felder v. King*, 599 F.3d 846, 848-49 (8th Cir. 2010), flat-out undermines Respondents' position, holding that whether a suspect "posed a threat of death or serious injury" was a fact question unable to be reviewed on interlocutory appeal.

the record—to that factual question. Pet. 7, 20-21. That is, the court of appeals could only conclude that the officers had not violated clearly established law *because* it found that Kong "posed a threat to citizens." App. 14a; *see also* App. 2a (Grasz, J., dissenting from denial of en banc review). After all, it has long been clearly established that "[t]he use of deadly force against a fleeing suspect who does not pose a significant and immediate threat of serious injury or death to an officer or others is not permitted." *Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015); Pet. 21-22.

In sum, immediate threat is a question of fact. The district court found, after a detailed and comprehensive review of the facts, a genuine issue as to that factual question, and the court of appeals rejected that finding without suggesting any blatant contradiction. Then, in turn, this *de novo* finding of an immediate threat controlled the outcome of the qualified immunity analysis.

2. In rejecting the district court's determination of a genuine issue of material fact without finding any blatant contradiction, the court of appeals took a position on a circuit split.

Both sides in this case agree that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits apply the blatant contradiction rule. *See* Pet. 11-14.; BIO 28-36. The Eleventh Circuit decidedly rejects the rule. Respondents attempt to minimize the split by arguing that the Eleventh Circuit also adheres to the blatant contradiction rule. *See* BIO 36. In truth, the Eleventh Circuit has for decades stuck to its rule that it may review *de novo* a district court's "evidentiary sufficiency determinations" when those determinations are "part and parcel of the core

qualified immunity issues," and that it may accept or reject the district court's factual findings at its discretion. *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996). It has done so despite confessing "some doubt about the correctness of that approach" after *Johnson v. Jones*, 515 U.S. 304 (1995). *Id.* And it has applied this approach as recently as 2019. *See Butler v. Norman*, 766 F. App'x 924, 926-28 (11th Cir. 2019) (reviewing record *de novo* on interlocutory appeal).

Hall v. Flournoy does not diminish the split or change the Eleventh Circuit's position. *See* 975 F.3d 1269 (11th Cir. 2020), *cited in* BIO 36. *Hall* merely reaffirmed the Eleventh Circuit's rule that interlocutory review is unavailable when the one and only issue on appeal is factual and the defendant does not even attempt to tether that factual dispute to a qualified immunity question. *Hall*, 975 F.3d at 1276-77. But—and this is where the Eleventh Circuit departs from the majority rule—when factual questions are "part and parcel" of qualified immunity issues, the Eleventh Circuit undertakes a *de novo* review of the record and exercises discretion whether to accept or reject particular findings by the district court. *Cottrell*, 85 F.3d at 1486. So, for example, when a district court found a genuine issue of fact as to whether a suspect was armed, this anomaly of a rule allowed the Eleventh Circuit to swoop in, reject the district court's findings, and undertake its "own review of the record." *Taffe v. Wengert*, 775 F. App'x 459, 460, 466 (11th Cir. 2019). Likewise, when a district court determined that the record revealed a genuine issue as to whether the plaintiff had helped other prisoners with litigation (a protected activity), that rule empowered the Eleventh Circuit to conduct a "*de novo* review of the record" and

usurp the district court's findings. *Butler*, 766 F. App'x at 926-29.

Respondents' other attempt to make the split vanish consists of pointing to the Eighth Circuit's prior enunciation of the correct rule in *Thompson v. Dill*, 930 F.3d 1008, 1012 (8th Cir. 2019). *See* BIO 27. But *Thompson* does not negate the split, because the decision below saw fit to discard that rule anyway. It never pointed to anything in the record that would incontrovertibly reveal Kong to be an immediate threat in rejecting the district court's determination of a genuine issue of material fact (nor could it have). Pet. 11. In departing from the majority rule and applying a *de novo* review of the record here, then, the Eighth Circuit followed the Eleventh.

3. The denial of certiorari in *Hinson v. Bias*, 141 S. Ct. 233 (2020), does not counsel against denying the petition here. For one, this Court commonly denies one or more petitions presenting a particular question before a subsequent grant, sometimes just a few months later.[5] In fact, the question's recurrence only confirms the need for this Court's intervention. Without it, defendants and the two minority-rule circuits will continue to flout the limits made clear by *Jones* and *Scott*. *See* Amicus Br. of Prof. Lammon 8-15; Amicus Br. of Nat'l Police Accountability Project 10-12. As it happens, after the filing of the petition in this case, another jurist lamented the growing tendency of appellate courts to review facts *de novo* on interlocutory

[5] *Compare, e.g.*, *Ramos v. Louisiana*, 139 S. Ct. 1318 (2019) (grant), *with Sims v. Louisiana*, 138 S. Ct. 1592 (2018) (denial of same question presented during previous term); *Gamble v. United States*, 138 S. Ct. 2707 (2018) (grant), *with Walker v. Texas*, 137 S. Ct. 1813 (2017) (denial of identical question).

review. *See Tucker v. City of Shreveport*, __ F.3d __, No. 19-30247, 2021 WL 1973562, at *14 (5th Cir. May 18, 2021) (Higginson, J, dissenting) ("[I]t is not our role to second guess a district court's assessment of factual disputes, here pretermitting resolution of uncertainties about excessive force.").

In any event, this case does not share *Hinson*'s fatal vehicle problem: that the Eleventh Circuit would have arrived at the same outcome *even if* the blatantly contradicted standard had been properly applied. After all, in *Hinson*, the officers' version of events was confirmed by video and was "uncontradicted in any material way by any admissible evidence." 927 F.3d 1103, 1108, 1119 (11th Cir. 2019). Here, however, the Eighth Circuit's deviation from the blatantly contradicted standard was the whole ballgame. Pet. 20-21. Not even Respondents contend that the record blatantly contradicts the district court's factual findings.

4. The Court should also consider summary reversal. The decision below unquestionably runs afoul of *Jones* and *Scott* in entertaining an interlocutory appeal centered on a dispositive factual question with no blatantly contradictory evidence to be found anywhere in the record. The standard applied was outcome-determinative here. *Id.* Again, Respondents do not even attempt to dispute that the Eighth Circuit would have had to affirm the district court's denial of summary judgment under the blatant contradiction standard.

If left untouched, the Eighth Circuit's venture here will likely embolden other courts of appeal to likewise assume the role of district judge *and* jury whenever they feel so inclined, despite the strict limits on their interlocutory jurisdiction. *Jones* presciently warned

against a maximalist approach to interlocutory appellate jurisdiction, *see Jones*, 515 U.S. at 309, 316, but the Eighth and Eleventh Circuits have disregarded such concerns. These holdings will further incentivize litigants to press such jurisdiction to the hilt by filing burdensome and unnecessary interlocutory appeals. The Court should take this opportunity to rein in this abuse of the interlocutory appellate process and resolve the split of authority on the appropriate limits of appellate courts' interlocutory jurisdiction.

CONCLUSION

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

Respectfully submitted,

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

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

ELIZABETH A. BIXBY*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
lisa.bixby@macarthurjustice.org

Counsel for Petitioner

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* Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.